

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

---

STATE OF WISCONSIN,

*Plaintiff,*

*v.*

STEVEN A. AVERY,

*Defendant.*

MANITOWOC COUNTY  
STATE OF WISCONSIN  
**FILED**

APR 25 2006

Case No. 2005-CF-381

**CLERK OF CIRCUIT COURT**

---

**DEFENDANT'S MOTION TO EXTEND  
MOTIONS DEADLINE  
AND TO ADJOURN TRIAL**

---

Steven A. Avery, by counsel, now moves the Court for an order modifying the schedule in this case to adjourn the trial until 2007 and to permit both parties to file pretrial motions (other than motions in limine) on or before June 16, 2006. One lawyer for Mr. Avery, Dean Strang, spoke at length to special prosecutor Kenneth R. Kratz about the scheduling relief requested here, although not about all of the reasons or details. As grounds for this motion, Mr. Avery shows the following:

1. The volume of discovery in this case is extraordinary. At present count, the defense has received more than 5,000 pages of discovery materials from the state. That does not include thousands of photographs and approximately two dozen CD-ROMs and DVDs. Counsel confidently believe that those digital media record over one hundred hours of telephone calls and interviews.

38

2. The most recently disclosed discovery materials came Friday, April 14, to counsel's office. That box consisted of 589 pages, almost all of it documents from the Wisconsin State Crime Laboratory.

3. Most of the discovery materials produced to date must be read closely. That is, in large measure the materials are police reports, witness interviews, and other materials bearing factually on the case. There is very little in the way of materials that may be skimmed or reviewed in a cursory fashion, such as telephone bills and call records.

4. At this point, no Crime Lab reports from testing on materials seized on or after March 1, 2006, have been disclosed to the defense (and undersigned counsel believe that the prosecution has not yet received such results, either). The results of those tests likely will be quite significant to both parties and will affect both pretrial motions and other case decisions.

5. Results of Crime Lab testing will greatly influence decisions on pretrial defense motions. For example, the defense now has learned that Teresa Halbach is **excluded** as a donor of DNA that was found on handcuffs and leg irons seized from Mr. Avery's trailer in November 2005, which directly calls into question Brendan Dassey's police-induced statement of March 1, 2006. Given that information, defense counsel will not move to suppress those items, even if they believe the seizure (or search leading to the seizure) was unlawful. With no suppression motion

on that subject, the state will not have to respond to such a motion and the Court will be spared ruling. The same defense reaction likely will obtain as to other items that yield test results supporting an inference of innocence.

6. On the other hand, without lab results, the defense will have to assert preemptively all Fourth Amendment rights. That may lead to inefficient use of the prosecution's time, defense counsel's time, and the Court's time if in fact later test results prove seized materials exculpatory.

7. With much discovery material still to be produced, presumably soon before or after the current May 1 deadline for motions, necessarily neither the state nor the defense can anticipate what further motions may be necessary or advisable. The only option presently is to file such motions later, after receipt of additional discovery materials. That necessity in turn would mean piecemeal consideration of motions, again with attending inefficiency in allocation of the Court's resources and counsel's.

8. The emergence of Brendan Dassey on March 2 as a defendant charged separately with crimes relating to the death of Teresa Halbach changed expectations of the defense (and perhaps of the prosecution) after the Court set the current motions schedule. To the extent that Mr. Dassey's posture may or may not change over time, the parties necessarily will have to react to developments in his case. Further motions are likely. For example, a motion under *State v. Samuels*, 252

Wis. 2d 26, 643 N.W.2d 423 (2002), may become necessary at some juncture. But counsel cannot anticipate that now. Given the schedule in Mr. Dassey's separate case, a June 16 motions deadline in this case well may allow counsel for both parties to react appropriately to any developments in the Dassey prosecution, again without piecemeal litigation.

9. The pace of developments in this case, the volume of dense discovery, the filing of a civil wrongful death action, the need to monitor intense media coverage for purposes of evaluating and supporting a change of venue motion, the emergence of Mr. Dassey as an accused, and Mr. Avery's custodial status after denial of bail modification all have taxed defense counsel's ability to meet the May 1 deadline for pretrial motions. While defense counsel will meet that deadline if required, they also necessarily will have to file additional motions as they receive further discovery materials and review more closely the materials they already have. Further, counsel entertain doubts about their capacity, given the factors listed above, to provide the effective assistance of counsel that Mr. Avery deserves and that the Court expects, on the current schedule.

10. As to the trial date, the frequency of prejudicial media reports, the spread of those reports across all outlets (print, internet, television, and radio), the regular inclusion of inadmissible information, the expression of opinions going to guilt or innocence by members of the Halbach and Avery families and by some

reporters, and the recency of pervasive public exposure to such media reports all make selecting a fair and impartial jury in Manitowoc County impossible or at least highly improbable in the next six months. Mr. Avery asks the Court to take several steps to ameliorate the problem:

a. Rule on, and grant, his March 8, 2006, motion for an order limiting public disclosure. To date, the Court has declined to rule on that motion. Although the prosecutors in this case have not held a press conference since March 1, they held several before. Moreover, the Brown County District Attorney recently held a press conference essentially to announce that he believes Mr. Avery committed another crime, but that he is *not* charging that crime for now. Defense counsel recall no other press conference in which a prosecutor alleged publicly that a crime was committed and blamed one specific person by name, but then declined to file a charge.

b. Enforce strictly SCR Chapter 61 as to the media.

c. Motions in limine seeking admission or exclusion of sensitive evidence should be filed under seal until a jury is empaneled, to avoid unnecessary prejudicial publicity. *Compare State v. Cummings*, 199 Wis. 2d 721, 741-42, 546 N.W.2d 406, 414 (1996) (sealing of search warrants); *see also In the Matter of Daily News L.P.*, 265 A.D.2d 129, 132-34, N.Y.S.2d 527, 530 (2000) (approving sealing of New York equivalent of other bad acts motion in limine).

d. Reconsider the Court's order denying modification of bail, to permit Mr. Avery's family to post real property exceeding \$650,000 in unencumbered fair market value to secure his release. An order allowing Mr. Avery's release on bail would be appropriate and would decrease dramatically the number of images of him in a caricatured jail suit, suggesting to the public a presumption of guilt. Were Mr. Avery able simply to appear in court in civilian street clothes, the widely broadcast images of him would not suggest that he is guilty or a danger to the public. There further is new information that warrants reconsidering the Court's order denying bail modification:

i. Teresa Halbach's DNA was not found on either the handcuffs or leg shackles seized from Mr. Avery's trailer. The DNA of two other persons was found, so the absence of her DNA is not attributable to a fastidious effort to clean or destroy evidence. One DNA donor may be Mr. Avery himself. But neither donor is Teresa Halbach. If the story attributed to Brendan Dassey on March 1 were true, it would be almost inconceivable that nowhere on the handcuffs and leg shackles is to be found the DNA (through blood, other bodily fluid, epithelial cells in sweat, or hair) of Teresa Halbach.

ii. The amended criminal complaint, in restating parts of the March 1 statement attributed to Brendan Dassey, omitted the dramatically different version of events attributed to Brendan Dassey just two days earlier, on February 27,

2006. In that February 27 version, Mr. Dassey said nothing about his own presence during or participation in a sexual assault or murder and said nothing about any events occurring in Mr. Avery's trailer. He instead attributed to Mr. Avery a supposed confession about killing Ms. Halbach in or near her car. The February 27 and March 1 versions attributed to Mr. Dassey are irreconcilable. These sharply inconsistent versions, given within approximately 48 hours to the same law enforcement interviewers under very similar interview conditions, only can diminish further the plausibility of the inadmissible statements attributed to Mr. Dassey in the amended criminal complaint.

e. Grant an adjournment of the trial until a date certain in 2007. That will permit time for the orderly and efficient filing and consideration of motions, for defense testing of forensic evidence if necessary, and for the abatement of prejudicial pretrial publicity. Reported cases on change of venue commonly cite a prolonged abatement of pretrial publicity, often for six months or more, as a factor weighing in favor of denying a change of venue. *See, e.g., State v. Fonte*, 281 Wis. 2d 654, 678-80, 698 N.W.2d 594, 605-07 (2005) (most inflammatory articles published seven months before trial); *State v. Messelt*, 178 Wis. 2d 320, 330, 504 N.W.2d 362, 366 (Ct. App. 1993) (noting two gaps of several months in publicity, which meant that "memories and passions of readers had time to fade"); *McKissick v. State*, 49 Wis. 2d 537, 545-46, 182 N.W.2d 282, 286 (1971) (one of several Wisconsin cases citing

“timing and specificity of the publicity” as a factor to consider in deciding whether to change venue).

f. Allow the defense until June 16 to state decisively whether it prefers a Manitowoc County jury or wishes a jury from a distant county. That would allow the Clerk of Court more than six months to make necessary arrangements – more time than between today and the tentative September 5 trial date.

g. An adjournment of the trial until 2007 also would recognize the realities of this case, and its defense. In general, the stakes are as high as they can be under Wisconsin law. In specific, this defendant is someone once imprisoned already for a crime he did not commit. The volume of police reports and forensic analysis is highly unusual. Both parties will rely extensively on experts (pathology, anthropology, odontology, DNA, and so on) – and therefore will have to exchange expert reports and curricula vitae, with the state disclosing first, the defense next disclosing its experts, and the state finally disclosing rebuttal experts. The state’s investigation continues with at least two departments, the Calumet County Sheriff’s Department and the Wisconsin Department of Justice, Division of Criminal Investigation, actively involved. The defense investigation hardly has begun, and also will be extensive. Witnesses who must be interviewed by the defense number in the dozens, probably. After all, the state speaks realistically of calling 60-150



witnesses, just in its case-in-chief, in this expected five week trial. Logistically, because Mr. Avery remains in jail unable to post bond, Mr. Strang must travel four hours, round trip, every time he wishes to see his client. For Mr. Buting, the round trip is over three hours. That of course does not include time spent with the client. And the defense necessarily must pursue a permissive interlocutory appeal, if it wishes ever to challenge three critical rulings of this Court as to the amended complaint, the amended information, and the necessity of a preliminary hearing on three new charges. All of these factors make the case very unusual, and warrant a correspondingly unusual schedule.

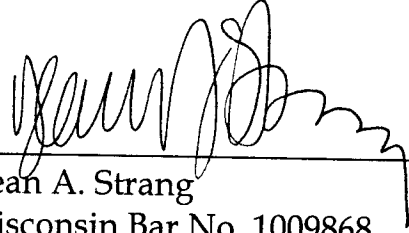
11. No party in this case has demanded a speedy trial. Indeed, the defense has raised earlier the need for an adjournment of the tentative September 5 trial date, to permit adequate time for prosecution and defense forensic testing, exchange of expert witnesses' information, and an abatement of the intensity of prejudicial pretrial publicity. An extension of the pretrial motions deadline and an adjournment of the trial is consistent with those ends.

WHEREFORE, Steven Avery requests that the Court modify the current schedule to set a jury trial at an appropriate date in 2007 and to permit pretrial motions to be filed on or before June 16, 2006. This schedule modification, if the Court grants it, will foster justice and permit the efficient allocation of judicial, prosecutorial, and defense resources.

Dated at Madison, Wisconsin, April 21, 2006.

Respectfully submitted,

HURLEY, BURISH & STANTON, S.C.



---

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

Post Office Box 1528  
Madison, Wisconsin 53701-1528  
(608) 257-0945

---

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