STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

No. 06-XXXX

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

STEVEN A. AVERY,
Defendant-Appellant.

DEFENDANT'S PETITION FOR LEAVE TO PURSUE PERMISSIVE APPEAL

Permissive Appeal from Manitowoc County Circuit Court,
Hon. Patrick L. Willis, Presiding
Manitowoc County Case No. 05-CF-381

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TABLE OF CONTENTS

ISSUES 1

FACTS 2

STATEMENT OF REASONS FOR PERMISSIVE APPEAL 4

I. Three New Counts in the Amended Complaint Rest Entirely on "Unreliable" Hearsay, so they Establish No Probable Cause and Afford No Personal Jurisdiction. 4

A. Overview 4

B. The Amended Complaint Contains Only Unreliable Hearsay 6

C. *Ruff* Does Not Trump Recent Supreme Court Teaching 9

D. Addressing this Issue Now Will Promote Judicial Efficiency and Clarify an Important Problem 12

II. After an Amended Complaint, Section 970.02(5) Requires a Preliminary Examination on New Counts Unless Waived. . 14

A. Overview 14

B. Section 970.02(5) 16

C. Avery Has a Statutory Right to a Preliminary Examination. 17

D. Addressing this Issue Now Will Promote Judicial Efficiency and Clarify an Important Problem 19

III. Where New Counts in an Amended Information are Unfounded in the Evidence at the Preliminary Examination, a Court May Not Allow Them on Speculation That They Would Be Transactionally Related if They Occurred 21

A. Overview 21

B. The Statute Seemed Clear 22

C. Reconciling *Burke* With the § 971.01(1) Requirement that an Information be "According to the Evidence" at the Preliminary Examination 23

1. *Bailey* and its Dicta 24
2. *Burke* Misread *Bailey* 27
3. Later Cases Rely on *Burke* 33
4. Bringing Clarity to Transactional Relationship . 36

D. Clarification Now is Important Generally and Will Avoid Irreparable Harm to Avery 42

CONCLUSION 45

CERTIFICATION 46

APPENDIX ..... Attached

A. April 19, 2006 Order
B. April 13, 2006 Transcript

Petitioner Steven A. Avery, by counsel, seeks leave to appeal a non-final order of the Manitowoc County Circuit Court pursuant to WIS. STAT. §§ 808.03(2), 809.50.

In 1985, Steven Avery went to prison for a rape he did not commit when the victim herself, innocently but mistakenly, identified Avery as the rapist. Eighteen years passed before DNA cleared Avery. Today, the state seeks to try him on a new rape charge, this time without an eyewitness identification or any evidence other than the uncorroborated hearsay accusation of a purported accomplice, his nephew. The irony is stark. Avery asks this Court to intervene to correct a process more unreliable already than the process that led to a wrongful rape conviction before.

ISSUES

1. Do the accusatory parts of an alleged accomplice's statement suffice, standing alone, to establish reliability (and thus

probable cause) for charges in a criminal complaint? The circuit court answered yes.

2. When the state files an amended complaint, do WIS. STAT. §§ 970.02(5) and 971.02(1) require a preliminary examination on new counts before the state may file an amended Information? The circuit court answered no, although neither party cited § 971.02(1).

3. Did WIS. STAT. §§ 971.01(1) permit the state to add to an amended Information three crimes that had no support in the preliminary examination evidence and only an accomplice's statement to suggest they occurred at all, but that would be transactionally related to the evidence if hypothetically they occurred? The circuit court answered yes.

FACTS

On November 15, 2005, the state charged Steven Avery with the murder of Teresa Halbach and mutilation of her corpse. The state also charged Avery as a felon in possession of a firearm (R1). For purposes

of this petition, Avery concedes that the preliminary examination warranted a bindover on all three charges.

After Avery's 16-year old nephew, Brendan Dassey, gave a statement to the police, the state sought leave to amend the complaint against Avery by adding three new charges: first degree sexual assault, kidnaping, and false imprisonment (R21, R22). Avery objected, arguing that Dassey's statements were unreliable as a matter of law to the extent that they accused Avery, and therefore established no probable cause (R28, R31). The proposed amended complaint offered nothing but Dassey's statement to support the three new charges (R22). The circuit court allowed the state leave to file the amended complaint, and then considered the new charges and Dassey's allegations in increasing Avery's bail (R30, R37, R40:Tr. 59-60 (March 17, 2006)).

The state sought leave to file and amended Information with the same three new charges, but without a preliminary examination (R21, R26, R33). Again Avery opposed leave and moved to dismiss the

amended complaint for want of probable cause; alternatively, he requested a preliminary examination on the new counts (R28, R31, R35). The circuit court refused a preliminary examination, upheld the amended complaint, and allowed the state to file its amended Information (R36, R37). This petition for a permissive appeal follows. The argument in support of a permissive appeal adds necessary factual details.

STATEMENT OF REASONS FOR PERMISSIVE APPEAL

I. Three New Counts in the Amended Complaint Rest Entirely on "Unreliable" Hearsay, so they Establish No Probable Cause and Afford No Personal Jurisdiction.

A. *Overview.*

When the state sought leave to file an amended complaint against Avery, (R21), it added three new charges: first degree sexual assault, kidnaping and false imprisonment. Those new counts rested on nothing but a hearsay statement by Avery's nephew that inculpated himself, but also blamed Avery. Repeatedly, the United

States Supreme Court has warned that statements against penal interest are "inherently unreliable" when they inculpate another person. *Lilly v. Virginia*, 527 U.S. 116, 131 (1999) (plurality); *see also Lee v. Illinois*, 476 U.S. 530, 541 (1986) (Supreme Court has "spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants"); *Bruton v. United States*, 391 U.S. 123, 136 (1968) ("inevitably suspect"); *Williamson v. United States*, 512 U.S. 594, 600-01 (1994) ("One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature").

Still, the circuit court rejected Avery's motion to dismiss those counts, citing *Ruff v. State*, 65 Wis. 2d 713, 223 N.W.2d 446 (1974), and holding the nephew's hearsay statement reliable. The dispute is whether the amended complaint's factual allegations were reliable, and therefore established probable cause. Because a complaint that lays no probable cause establishes no personal jurisdiction, *State v. White*, 97 Wis. 2d 193, 197, 295 N.W.2d 346, 347 (1980), deciding this issue now will avoid the risk of a wasted five-week trial with a

sequestered jury: Avery probably could appeal the lack of jurisdiction later. This Court also can make clear that *Ruff* cannot in 2006 permit a complaint founded only on hearsay now understood as unreliable. The sufficiency of a criminal complaint receives *de novo* consideration in this Court. *State v. Jensen*, 272 Wis. 2d 707, 756, 681 N.W.2d 230, 253 (Ct. App. 2004), *aff'd*, 279 Wis. 2d 220, 694 N.W.2d 56 (2005).

B. ***Amended Complaint: Unreliable Hearsay Only.***

"The complaint in a criminal case must meet probable cause requirements to confer personal jurisdiction on the circuit court," the Wisconsin Supreme Court has explained. *White*, 97 Wis. 2d at 197, 295 N.W.2d at 347. When the complaint draws from information other than the eyewitness observations of the complainant himself, "the reliability of the 'information' on which he bases his 'belief' must be established. A complaint may be based on hearsay, but the reliability of the hearsay information must be established." *State v. Knudson*, 51 Wis. 2d 270, 274, 187 N.W.2d 321, 324 (1971), citing *State ex rel. Cullen v. Ceci*, 45 Wis. 2d 432, 173 N.W.2d 175 (1970). Wisconsin courts do not presume reliability, even when a police officer is the witness upon

whose claims a complaint rests. *See White*, 97 Wis. 2d at 206, 295 N.W.2d at 351-52.

The amended complaint added rape, kidnaping, and false imprisonment counts to the murder of Teresa Halbach and mutilation of her corpse that the original complaint charged.[1] Those new charges rested entirely on a statement that Avery's nephew, Brendan Dassey, made to police officers during interrogation. Considering the four corners of the amended complaint (R22), the factual bases for the three new counts were:

- Brendan Dassey's March 1 statement to law enforcement officers, under their questioning, that he heard female screams of "help me" coming from Avery's trailer as he approached it and then knocked on the door.

- Dassey's March 1 statement that Avery took time to answer his door on October 31, admitted having sexual intercourse with Teresa Halbach, and was covered in sweat.

- Dassey's March 1 statement that he saw Teresa Halbach naked and physically restrained on Avery's bed, begging for help and for Avery to stop.

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[1] The original complaint also charged Avery as a felon in possession of a firearm.

- Dassey's March 1 statement that Avery encouraged Dassey to have sexual intercourse with Halbach and to assault her sexually, and that Halbach was asking him not to do it, asking him to tell Avery to knock it off, asking him to uncuff her, and crying.

- Dassey's March 1 statement that he had sexual intercourse with Halbach for about five minutes at Avery's invitation and that Avery complimented him on doing so and said that he, Avery, was proud of Dassey.

That is the only evidence the proposed amended complaint offered of the three new charges (*see* R22). As to the new counts, the proposed complaint offered no physical evidence. It referred to no other witness. It offered no corroboration. It included no admission by Avery. As to Dassey's reliability, the amended complaint alleged that Dassey's statements are "presumed truthful and reliable" because against his penal interests.

But as to someone like Avery, whom a supposed accomplice accuses, Wisconsin courts call such statements "presumptively *unreliable*," not presumptively reliable. *State v. Myren*, 133 Wis. 2d 430, 434, 395 N.W.2d 818, 821 (Ct. App. 1986) (italics added).

C. Ruff *Does Not Trump Recent Supreme Court Teaching.*

Since 1974, the United States Supreme Court has explained that blame-shifting or finger-pointing portions of an accomplice's narrative fall outside the scope of the hearsay exception for statements against interest. Such statements are "inherently unreliable." *Lilly v. Virginia*, 527 U.S. at 131 (plurality); *see also Williamson*, 512 U.S. at 599-600. In a similar vein, "a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Lee*, 476 U.S. at 541.

The Seventh Circuit also understands this unreliability. Affirming a habeas decision setting aside a Wisconsin murder conviction because this Court issued a decision clearly contrary to *Lilly*, the United States Court of Appeals for the Seventh Circuit wrote, "A statement, made during interrogation and blaming someone else, is too unreliable to supply the 'particularized guarantees of trustworthiness' that until *Crawford* [*v. Washington*, 541 U.S. 36 (2004)] could have supported admissibility." *Murillo v. Frank*, 402 F.3d 786, 792 (7th Cir. 2005).

Since at least 1986, this Court has understood the problem, too. "The confession of an accomplice inculpating the accused is presumptively unreliable as to the parts detailing the accused's conduct or culpability, since the accomplice may desire to shift the blame, curry favor with the authorities, or divert attention to another." *Myren*, 133 Wis. 2d at 434, 395 N.W.2d at 821.

Rejecting that history of the last twenty years, the circuit court relied instead on a state supreme court decision now 32 years old, *Ruff*. The circuit court read *Ruff* correctly. *Ruff* held in relevant part that a complaint founded on two accomplices' statements, implicating the defendant, established probable cause. *Ruff*, 65 Wis. 2d at 719-20, 223 N.W.2d at 449-50. Citing an earlier case, the *Ruff* court concluded that "when a participant in a crime admits his own participation and implicates another, an inference may be reasonably drawn that he is telling the truth." *Id.* at 720, 223 N.W.2d at 449-50, citing *State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 228, 161 N.W.2d 369, 371 (1968). "[S]uch admissions against one's interest," the court elaborated, "are not inherently untrustworthy." *Id.* at 720, 223 N.W.2d at 450.

The flaw in *Ruff's* reasoning is obvious today. That court never distinguished the reliability of self-inculpatory parts of the declarants' statements[2] from the unreliability of parts that shifted blame to others. *Ruff* in that sense has aged poorly. Courts now well understand the need to look carefully at the components of such a statement, for "One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Williamson*, 512 U.S. at 599-600. As this Court also now appreciates, when considering a purported statement against penal interest, "a court must break it down and determine the separate admissibility of each 'single declaration or remark.'" *State v. Joyner*, 258 Wis. 2d 249, 262, 653 N.W.2d 290, 296 (Ct. App. 2002), quoting *United States v. Canan*, 48 F.3d 954, 959 (6th Cir. 1995).

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Two separate declarants accused the defendant in *Ruff*. Assuming that each spoke to the police in isolation from the other and that their statements as to Ruff were consistent, that fact alone might distinguish the reliability of the complaint in *Ruff* from the reliability of the amended complaint here. This amended complaint rested wholly on Dassey's statement, and as to the new charges of rape, kidnaping, and false imprisonment, included none of the physical corroboration that the *Ruff* complaint probably did include (assuming that the *Ruff* court's statement of facts covered some of the same ground that the complaint did).

Whatever the continuing vitality of *Ruff* on its narrow facts – with two accusatory statements by accomplices in the complaint, and ample physical evidence of the crimes apparent from the court's recital of the facts – that case offers no help here. It does not make the uncorroborated finger-pointing of one purported accomplice a reliable basis for finding probable cause on sexual assault, kidnaping, and false imprisonment charges against Avery.

D. *Addressing this Issue Now Will Promote Judicial Efficiency and Clarify an Important Problem.*

Because the amended complaint may not have established personal jurisdiction on the three new counts it added, an appeal now will avoid a jurisdictional issue on appeal after a full trial. Errors in a preliminary hearing are harmless after a fair trial, *State v. Webb*, 160 Wis. 2d 622, 467 N.W.2d 108 (1991), but a party may challenge personal jurisdiction later if he raised it in the circuit court, as Avery did. *Compare State v. Jennings*, 259 Wis. 2d 523, 527-29, 657 N.W.2d 393, 394-95 (2003) (appeal challenging personal jurisdiction after waiver of preliminary hearing and no contest plea; state supreme court refers to

reserving the right to challenge personal jurisdiction); *State v. Dietzen*, 164 Wis. 2d 205, 210, 474 N.W.2d 753, 755 (Ct. App. 1991) (jurisdictional defects, including personal jurisdiction, not waived by voluntary plea of guilty or no contest; but objection not made before entering plea was waived). This Court can conserve judicial resources and avoid a potentially wasted trial by deciding now whether this amended complaint demonstrated probable cause and therefore conferred personal jurisdiction. *White*, 97 Wis. 2d at 197, 295 N.W.2d at 347. In doing so, the Court will "[m]aterially advance the termination of the litigation or clarify further proceedings in the litigation." WIS. STAT. § 808.03(2)(a).

A permissive appeal also will "[c]larify an issue of general importance in the administration of justice." WIS. STAT. § 808.03(2)(c). Avery's amended complaint cannot be the first or last to rest on the unaided accusation of one who claims an accomplice's role. Although *Bruton* reflects awareness of the danger of such hearsay statements as early as 1968, the Supreme Court has devoted much more attention to

those statements since *Lee v. Illinois* in 1986. That concern peaked most recently in 2004, with *Crawford v. Washington*, 541 U.S. 36 (2004), which held that the Sixth Amendment's confrontation guaranty bars statements against penal interest at another's trial unless the declarant either testifies, or the defendant had adequate opportunity to cross-examine the declarant before trial. If such statements have no place at trial, even when the prosecution offers other incriminating evidence, then arguably they ought not serve as the sole basis for a criminal charge, either. Their reliability is no greater in a complaint than at trial, especially alone.

II. After an Amended Complaint, Section 970.02(5) Requires a Preliminary Examination on New Counts Unless Waived.

A. *Overview.*

Initially, the state pursued its three new charges by asking leave to file an amended complaint (R21). It tendered a proposed amended complaint (R22), which the circuit court permitted over defense objection (R28, R30, R37). Citing the amended complaint and its new

charges, the circuit court then increased bail on an earlier state motion (R23, R30). The state simultaneously had sought leave to file an amended Information and added a supporting memorandum (R21, R33). Avery responded with a motion to dismiss the new counts or, alternatively, to require a preliminary examination before the state filed an amended Information (R31, R32, R35).

At a hearing on the competing motions, the circuit court entertained and denied Avery's renewed motion to dismiss the amended complaint (R31, R32, R36, R37, R40:Tr. 14-16 (April 13, 2006)). Moving to the question of a preliminary examination, defense counsel argued orally that a statute, WIS. STAT. § 970.02(5), required a preliminary examination on the new counts (R36, R40:Tr. 4-7 (April 13, 2006)). The circuit court disagreed (R36, R37). It held that Avery had no right to a preliminary examination on the new counts in the amended complaint (R37, R40:Tr. 16-27 (April 13, 2006)). The court granted leave to file the amended Information (R36, R37).

Procedurally, perhaps the state could have sought leave only to file an amended Information, skipping an amended complaint (although the relevant statute, WIS. STAT. § 971.29, is ambiguous on this point). In any event, that is not what the state chose to do. It filed an amended complaint, with leave of court.[3] The court considered and ruled upon a defense challenge to probable cause in that amended complaint. The court further cited the new charges in the amended complaint as reason to increase Avery's bail. In that posture, Avery had a statutory right to a preliminary examination. This Court will decide *de novo* the meaning of § 970.02(5), like any statute. *See generally Suchomel v. University of Wisconsin Hospital*, 2005 WI App. 234, ¶ 22, 708 N.W.2d 13, 19 (Ct. App. 2005).

B. *Section 970.02(5).*

Section 970.02, WIS. STAT., concerns a judge's duties at an initial appearance. Subsection (5) is straightforward:

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3 The state later called the amended complaint "jurisdictionally unnecessary" (R40:Tr. 8 (April 13, 2006)).

> If the defendant does not waive preliminary examination, the judge shall forthwith set the action for preliminary examination under s. 970.03.

WIS. STAT. § 970.02(5).

Although no party cited WIS. STAT. § 971.02(1), it also is relevant:

> If the defendant is charged with a felony in *any* complaint, including a complaint issued under s. 968.26, or when the defendant has been returned to this state for prosecution through extradition proceedings under ch. 976, or any indictment, no information or indictment shall be filed until the defendant has had a preliminary examination, unless the defendant waives such examination in writing or in open court or unless the defendant is a corporation or limited liability company. The omission of the preliminary examination shall not invalidate any information unless the defendant moves to dismiss prior to the entry of a plea.

WIS. STAT. § 971.02(1) (italics added).

C. *Avery Has a Statutory Right to a Preliminary Examination.*

Three points are indisputable. First, for its own reasons the state proceeded on an amended complaint. Second, the circuit court considered and ruled upon a probable cause challenge to the amended complaint, and cited the amended complaint's new allegations in

increasing bail (R30, R31, R32, R36, R37, R40:Tr. 20-23, 59-60, 62 (March 17, 2006); Tr. 14-16 (April 13, 2006)). Third, Avery asserted his claim to a preliminary examination on the three new charges (R31, R32, R35), and never waived a preliminary examination.

Under Wisconsin criminal procedure, a complaint and an Information are jurisdictional documents that do not co-exist; in felony cases, they come sequentially. WIS. STAT. §§ 968.01, 968.02(2), 971.01, 971.05(3); *compare State v. Copening*, 103 Wis. 2d 564, 576-77, 309 N.W.2d 850, 856 (Ct. App. 1981) (complaint initiates prosecution, but Information also establishes subject matter jurisdiction; this Court did not make the point, but there would be no need to establish subject matter jurisdiction if the complaint remained operative after the state files an Information). When it chose to file an amended complaint, the state implicitly renounced its original Information. At a minimum, for its own reasons, it started the charging process anew as to the new charges and triggered the procedural incidents of a complaint.

The circuit court followed suit. That court ruled on a probable cause challenge to the amended complaint before addressing the state's request to file an amended Information. *Compare* WIS. STAT. § 971.31(5)(c). The circuit court also cited the new charges and factual allegations in the amended complaint as reasons to increase bail. *Compare* WIS. STAT. § 970.02(2) (duty to admit defendant to bail in accordance with ch. 969 at initial appearance); (R40:Tr. 59-60 (March 17, 2006)). The amended complaint was "any complaint," and Avery had a further right to a preliminary examination before the state could file an amended Information in this procedural posture. WIS. STAT. § 971.02(1); *see also* WIS. STAT. § 970.02(5).

D. *Addressing this Issue Now Will Promote Judicial Efficiency and Clarify an Important Problem.*

If Avery should have had a preliminary examination, the amended Information is not properly filed and affords no personal jurisdiction. *Logan v. State*, 43 Wis. 2d 128, 138, 168 N.W.2d 171, 176 (1969) ("We conclude that though a magistrate fails to act within the ten days required by statute [for a preliminary examination], he does

not lose subject matter jurisdiction. It merely means that the state had no jurisdiction over the person of the defendant at the particular time and place unless the objection to such jurisdiction was waived"). That means an appeal could follow a trial, and render trial wasted.

Moreover, if the state cannot obtain a bindover on any of the three new charges, Avery will not stand trial on them. A trial without improper charges would be more efficient, to say nothing of more fair. This appeal will avoid the irreparable harm to Avery of trial on three unsupported counts.

Finally, this problem may recur in other cases. In theory, it may arise in any felony prosecution in which the district attorney seeks leave to file an amended complaint after arraignment on an Information, at least if the amended complaint adds a new felony charge. The state on occasion does seek leave to file a new or amended complaint after arraignment on an Information. *See, e.g., State v. Martin*, 162 Wis. 2d 883, 903 n.15, 470 N.W.2d 900, 908 n.15 (1991) (after arraignment, state can add repeater enhancement only by

dismissing and then filing a new or amended complaint (unless defendant consents to amendment of the Information. *State v. Peterson*, 247 Wis. 2d 871, 884-88, 634 N.W.2d 893, 899-901 (Ct. App. 2001)). Both the state and future defendants have a strong interest in knowing whether a defendant may insist upon a new preliminary examination as to any new felony charges in an amended complaint filed after arraignment.

III. Where New Counts in an Amended Information are Unfounded in the Evidence at the Preliminary Examination, a Court May Not Allow Them on Speculation That They Would Be Transactionally Related if They Occurred.

A. *Overview.*

In spite of a statute that requires charges in an Information "according to the evidence on such [preliminary] examination," the state filed new charges here with no roots in the preliminary examination evidence and no admissible or reliable basis in the complaint. Rather, the state posited that the new charges are transactionally related to events that the preliminary examination

proved. The question is the necessary linkage to the preliminary examination; what does transactionally related mean in this context? If it is enough that a hypothetical new event would be related to the transactions proven at the preliminary, assuming the hypothetical new event occurred at all, then the amended Information here may stand. If, by contrast, the evidence itself must establish a relationship between at least some elements of the crime that the new event presents and the transaction proven at the preliminary examination, then the amended Information here cannot stand. This Court will decide *de novo* whether § 971.01(1) permitted the three new charges in the amended Information. *See State v. Richer*, 174 Wis. 2d 231, 238-39, 496 N.W.2d 66, 68 (1993).

B. *The Statute Seemed Clear.*

The statute at issue is WIS. STAT. § 971.01(1). That statute is not complex on its face:

> 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.

WIS. STAT. § 971.01(1). Section 970.03(10) has no application here.

C. *Reconciling* Burke *With the § 971.01(1) Requirement that an Information be "According to the Evidence" at the Preliminary Examination.*

Just exactly what the legislature meant when it prescribed an Information "according to the evidence on such examination," WIS. STAT. § 971.01(1), has been the crux of the problem for courts. The amalgam of cases that have addressed that problem leave confusion.

On its face, the statute appears not to invite the 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 terms of that statute alone.

1. Bailey *and its Dicta.* Avery turns first to *Bailey v. State*, 65 Wis. 2d 331, 222 N.W.2d 871 (1974). The one-count 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. *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. *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). 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.

Applying that unchanged rule to the facts in *Bailey*, 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. *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.

2. Burke *Misread* Bailey. The next major decision to follow in this sequence is *State v. Burke*, 153 Wis. 2d 445, 451 N.W2d 739 (1990). 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 had 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 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 of *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 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, when a court poses an assumption for the sake of argument ("even assuming . . .") as the Wisconsin Supreme Court did in *Bailey*, 65 Wis. 2d at 341, 222 N.W.2d at 876-77, 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.[4] *Burke* read it wrongly.

4

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.

Burke then appeared to adopt an alternate test by which to assess the propriety of new charges in an Information. This is a transactional relationship test, and includes seven factors to which courts might look in assessing whether new charges are appropriate in the Information. *Burke* explained:

> . . . a prosecutor may bring additional charges in the information so long as the charges are not wholly unrelated to the transactions or facts considered or testified to at the preliminary examination, irrespective of whether direct evidence concerning the charges had been produced at the preliminary examination. The charges must be "related in terms of parties involved, witnesses involved, geographical proximity, time, physical evidence, motive and intent."

Burke, 153 Wis. 2d at 457, 451 N.W.2d at 744, quoting *Bailey*, 65 Wis. 2d at 341, 222 N.W.2d at 877.

If this seven-factor transactional relationship test now is an alternate, independent gauge of an Information with new charges that allows a transactional relationship only between the new event the state wishes to charge and the general events or transactions that

the preliminary examination evidence disclosed, the state has dangerous room for creativity in that abstraction. If it permitted an argument that the new event would be related to the "transaction" proven at the preliminary examination *if* the new event happened at all, rather than required that one or more elements of a new crime appear in the evidence as the link to the new charge, the transactional relationship test would pay 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.[5]

Avery's case is a good concrete example. *If* he raped Teresa Halbach, then it occurred during the course of the "transaction"

5

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.

that included her murder and the mutilation of her corpse. But there is no reliable suggestion that he did rape her. The evidence at the preliminary examination included not the slightest hint of that crime, and the seven factors of the transactional relationship test all would rest on the speculative assumption that the new event ever occurred.

On the state's argument in the circuit court below, no court could 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 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. The state's reading of *Burke* and later cases leaves no real judicial power to bar such a new count.

3. *Later Cases Rely on* Burke. In deciding whether *Burke* expanded 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. Some of those decisions continue to suggest a concrete linkage between the new crime and the evidence, rather than adopting the broader aspects of *Burke* that suggested an abstract link between a new event and the transaction proven at the preliminary. Some do not.

Chief among the cases that continue to tie counts in an Information to the evidence adduced at the preliminary hearing is *State v. Richer*, 174 Wis. 2d 231, 496 N.W.2d 66 (1993). There, the state supreme 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 only LSD delivery proved at the preliminary hearing. It could not. "[N]o 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. The court went on to write, "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 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.

But other cases pick up *Burke's* looser implications. The loosest of the Wisconsin Supreme Court's transactional relationship cases has been *State v. Williams*, 198 Wis. 2d 516, 544 N.W.2d 406 (1996). The *Williams* 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 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 sum, the line of Wisconsin cases examining the linkage between evidence at a preliminary hearing and charges in an Information had required a tie between the preliminary hearing evidence and the counts in the Information until *Burke*. Even *Burke* did not say that it altered that longstanding rule; taken at its word, *Burke* only reaffirmed the rule. Later cases seem equivocal: they all cite *Burke*, but Avery is unsure whether the Wisconsin Supreme Court meant to expand *Bailey*, or whether it has retained the connection between evidence and elements of counts in the Information, not just a connection between a new event and a "transaction" proven at the preliminary examination.

4. *Bringing Clarity to Transactional Relationship*. Everyone agrees that one way to assess the propriety of additional charges in the Information is to ask whether the evidence at the preliminary

examination supported them. As a class, defendants would stop there and, at least superficially, they have the terms of § 971.01(1) to commend their view. However, *Burke* and cases since say that transactional relationship, apart from the evidence, also can play a role in the analysis. The state's preferred reading of *Burke* and cases following is that the transactional relationship test is a true alternative gauge of the propriety of new charges. Evidence aside, the state contends, if the event that the new charge concerns is related to a transaction that the preliminary examination suggested, then the prosecutor is free to add the new charge in the Information.

That is a plausible (although not necessary) reading of *Burke*. But it is not a plausible reading of § 971.01(1). The statute does not suggest an alternate route by which a prosecutor can avoid the obligation to file an Information "according to the evidence." WIS. STAT. § 971.01(1). The supreme court presumably did not set out in *Burke* to rewrite the statute. The challenge, then, is to read *Burke* in a

way that is true to that case and to those that follow it, and also true to the statute.

That task is not difficult. Courts try crimes, not transactions. So an Information charges crimes, not transactions. Crimes in turn are compositions of essential elements. Considered in full, though, evidence demonstrates the nuances of human life – its events, or "transactions" as lawyers like to call them. Yet a court cannot lose sight of the crimes at issue.

The way to understand *Burke* and the transactional relationship test, then, is to ask whether the evidence at a preliminary examination suggested, in the transaction it established, at least some elements of a new crime or crimes that a district attorney proposes to add to an Information. If the transaction that the evidence proved contained within it one or more elements of the new charge, and that charge itself fits with most of the seven factors that identify it to the transaction proven, then the new charge is proper. On the other hand, if the evidence at the preliminary examination did not establish one or

more elements of the proposed new charge – if one or more elements did not appear as aspects of the transaction that the evidence portrayed – then the new charge is not proper. A prosecutor may not simply append to an Information a charge that emerges from some new event that *would* fit within the transaction at issue, *if* the event occurred at all. The transactional relationship must be with one or more elements of a crime that the evidence demonstrated, not with a mere event that the evidence did not demonstrate at all, but that would fit within the transaction if hypothetically the event occurred. Only when at least some elements of the new crimes emerged from the evidence are those "charges in addition to those advanced at the preliminary hearing '. . . not wholly unrelated to the transactions or facts considered or testified to at the preliminary.'" *Bailey*, 65 Wis. 2d at 341, 222 N.W.2d at 876, quoting *Fish*, 20 Wis. 2d at 438, 122 N.W.2d at 385.

This does not mean that the preliminary examination must establish probable cause for every charge in the Information. It

does mean the preliminary must offer some showing of one or more elements of every charge in the Information, lest a charge be "wholly unrelated" to the evidence.

Bailey, Burke, Williams, Richer, and other decisions addressing new charges in an Information all fit comfortably with this reading of the transactional relationship test. The evidence at the preliminary examinations in *Bailey* and *Burke* plainly suggested some elements of the new charges that the Informations added in those cases. In *Bailey,* the preliminary examination evidence suggested elements of the indecent liberties, attempted child enticement and child enticement charges the prosecution added (for example, physical evidence consistent with sexual assault, blood of the child's type on a mattress in a secluded chicken coop, the child's boot in the defendant's car). *See Bailey,* 65 Wis. 2d at 337-38, 342-43, 222 N.W.2d at 874-75, 877. *Burke* was an easier case still: the preliminary hearing evidence showed at least the child's age, a sexual encounter between the defendant and the child, and the defendant's intended sexual

gratification as to the new charges in the Information. *Burke*, 153 Wis. 2d at 449-50, 451 N.W.2d at 741. *Williams* is the same. The preliminary examination established an aggravated battery of the victim at issue, and that attack (hitting the victim in the face with a large rock) also proved at least the recklessness and 'other human being' elements of the disputed first degree reckless injury charges, if not the great bodily harm element as well. *See Williams*, 198 Wis. 2d at 523-24, 544 N.W.2d at 409; WIS. STAT. § 940.23(1).

Richer fits as well with Avery's proposed reading of the transactional relationship test. There, again, the supreme court disallowed a second LSD delivery charge nine days after the one delivery charged in the complaint, where the preliminary examination suggested nothing of ongoing activity or a second delivery. Although the charged conduct was similar, and in this sense fit within the state's broader conception of *Burke* as allowing wholly new events that, if they occurred at all, would come within a "transaction" that the preliminary examination suggested, the preliminary evidence in fact

touched on none of the elements of the new crime and offered no link between the two deliveries. *Richer*, 174 Wis. 2d at 236-37, 496 N.W.2d at 67. "The fact that probable cause has been found regarding the defendant's participation in a particular charge says nothing about that same defendant's participation in any other counts that later might be included in the information." *Id.* at 242, 496 N.W.2d at 69. The *Richer* court could have written exactly those words about the three new charges that Avery faces.

D. *Clarification Now is Important Generally and Will Avoid Irreparable Harm to Avery.*

Every time a district attorney files an Information that includes a charge not in the complaint, the gloss that the Wisconsin courts have added to § 971.01(1) is a potential point of contention. Not every case actually presents the problem, of course. Sometimes a district attorney adds only charges for which the preliminary examination clearly suggested an evidentiary basis. On occasion, too, a district attorney files less serious charges after the preliminary examination than the complaint had alleged, so the defendant has no cause to balk.

But when a prosecutor relies on the seven factors that *Bailey* and *Burke* cited for the proposition that a new charge unsupported by the evidence at the preliminary examination nonetheless is related "transactionally" to charges that the evidence supported, the complexities of the case law in this area cause problems. This is an issue of general importance. If as Avery suggests it is the elements of a new crime that must be transactionally related to the crimes proven at the preliminary examination, then the transactional relationship keeps the tie between crimes in the Information and crimes that the state's evidence suggested. This reading does no violence to the statutory terms of § 971.01(1). If, however, only an assumed event represented in the new charge need be related to the transaction that the state's evidence suggested, then transactional relationship becomes much more abstract and allows fanciful connections to the original charges. It invites connections that the evidence nowhere implied. This latter possibility is the one that harkens back to the House that Jack Built, and distorts § 971.01(1).

This Court can address an issue of general importance, then, by clarifying whether transactional relationship refers to linkage between elements of new charges and the evidence, or refers only more abstractly and capaciously to linkage between new alleged events and the evidence. It also can avoid irreparable harm to Avery, by disallowing three speculative new counts wholly unrelated to the preliminary examination evidence.

CONCLUSION

For the reasons he explains above, Steven Avery asks the Court to grant leave to appeal the non-final order of the circuit court.

Dated at Madison, Wisconsin, May 2, 2006.

Respectfully submitted,

STEVEN A. AVERY, *Petitioner*

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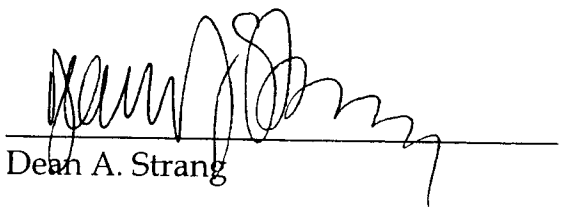
STATEMENT ON WORD COUNT

Pursuant to WIS. STAT. § 809.50(4), counsel for petitioner states that this petition is in a proportional serif font. Exclusive of the cover page, the Table of Contents, and this Statement on Word Count, the petition contains 7,914 words, as measured by the properties feature of WordPerfect 10.0.



Dean A. Strang

State of Wisconsin	Circuit Court Branch I	Manitowoc County

STATE OF WISCONSIN vs. STEVEN A. AVERY,	Plaintiff, Defendant,	ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT OR TO CONDUCT ADDITIONAL PRELIMINARY HEARING Case No. 05-CF-381

The State, having filed an original Criminal Complaint in this matter, the Court having conducted a preliminary hearing on December 6, 2005, finding probable cause and binding the defendant over for trial; the State having filed an original Information, including felony counts of first degree intentional homicide, mutilating a corpse, and felon in possession of a firearm, with arraignment having been held on January 17, 2006; the State having filed an Amended Criminal Complaint on March 7, 2006; and the State having petitioned the Court for leave to file an Amended Information in this matter, adding three felony counts to the original Information including first degree sexual assault, kidnapping and false imprisonment;

The defendant moved to dismiss the Amended Criminal Complaint and for an order requiring a second preliminary hearing, prior to the acceptance of the Amended Information;

NOW, THEREFORE, IT IS ORDERED that, over defense objection, the State's motion for leave to file the Amended Criminal Complaint is granted.

IT IS FURTHER ORDERED that for reasons articulated on the record on March 17, 2006, and reaffirmed on the record on April 13, 2006, the defendant's motion to dismiss the Amended Criminal Complaint is denied.

IT IS FURTHER ORDERED that for reasons articulated on the record on April 13, 2006, the defendant's motion to require a second preliminary hearing, prior to the acceptance of the Amended Information, is denied.

Dated this 19th day of April, 2006.

BY THE COURT:

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
APR 19 2006
CLERK OF CIRCUIT COURT

Patrick L. Willis
Circuit Court Judge, Branch I

(50)

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY
BRANCH 1

STATE OF WISCONSIN,

PLAINTIFF, MOTION HEARING

vs. Case No. 05 CF 381

STEVEN A. AVERY,

DEFENDANT.

DATE: APRIL 13, 2006

BEFORE: Hon. Patrick L. Willis
Circuit Court Judge

APPEARANCES:

KENNETH R. KRATZ & THOMAS J. FALLON
Special Prosecutors
On behalf of the State of Wisconsin.

DEAN A. STRANG & JEROME F. BUTING
ATTORNEYS AT LAW
On behalf of the Defendant.

STEVEN A. AVERY
Defendant
Appeared in person.

* * * * * * * *

TRANSCRIPT OF PROCEEDINGS

Reported by Diane Tesheneck, RPR

Official Court Reporter

(51)

THE COURT: At this time the Court calls State of Wisconsin vs. Steven Avery, Case No. 05 CF 381. This matter is scheduled this morning for a Court decision on a motion that's been filed by the defense. Will the parties state their appearances for the record, please.

ATTORNEY KRATZ: Your Honor, the State of Wisconsin appears by Calumet County District Attorney Ken Kratz, having been appointed as special prosecutor in this case. The State also appears this morning by Tom Fallon. Tom is with the Department of Justice, also having been assigned special prosecutor in this matter.

ATTORNEY STRANG: Good morning. Steven Avery, second to my right, he's in custody. Dean Strang appearing on his behalf and Jerome Buting, also as counsel for Mr. Avery.

THE COURT: All right. I will indicate for the record that the motion that's the subject of the hearing today is a motion that was filed by the defense, renewing a previous motion that the new charges in the Amended Complaint should be dismissed, or in the alternative, if the Court permits the filing of the charges, that the defendant be entitled to a preliminary examination

on the new charges.

I will also indicate for the record that I met with counsel in chambers, briefly, before we began this morning. And as I understand it, the defense would like the opportunity to supplement it's written argument, which the Court has already received and reviewed, and the prosecution would like a chance to respond. Is that correct, Mr. Strang?

ATTORNEY STRANG: It is.

THE COURT: All right. I will hear you at this time.

ATTORNEY STRANG: I will not belabor the written arguments nor repeat arguments made at the initial oral motion to dismiss the Complaint. Leaving, in summary, my argument on the motion to dismiss the Complaint, that when the United States Supreme Court, probably close to half a dozen times since 1968, has explained that statements against a declarant's interest, that then go on to inculpate another person, are unreliable, that those sorts of unreliable statements fail Wisconsin's reliability requirement for the factual assertions in a Criminal Complaint. The Court already has ruled adversely to me on that. I have renewed the motion in writing

and I will leave argument there on that point.

As to the question of a preliminary hearing, if the Amended Complaint is allowed to stand, I confess that I had been -- become occupied, if not preoccupied, with ***Burke*** and ***Bailey*** and the profusion of case law, criminally, from the Wisconsin Supreme Court that make very thick, I think, intellectually interesting, very complicated, the law in an area in which the underlying statutes, at least to my eye, look fairly straight forward, but now have been construed, or rather with such gloss that there's nothing at all straight forward about the area of the law. And I became very interested in that, and that case law, and what it all means, where it sorts out and applies here, as the focus of my briefs, I think also the focus of the State's written submissions.

And so I have written arguments that suggest to the Court why it should grant a preliminary hearing here and I think over looked a statutory command that the Court shall order a preliminary hearing in the unusual procedural posture in which we find ourselves here today.

We step back to early in mid-March. The

State's request was for leave to file an Amended Complaint and leave to file and Amended Information. We took issue with the first of those requests, to file an Amended Complaint. That was the briefing, our opposition to an Amended Complaint, or to the request that he be granted to file an Amended Complaint, was the thrust of the briefing that brought us here the last time before your Honor.

The Court overruled my position and did grant the State's request to leave to file an Amended Complaint, that occasioned by oral motion to dismiss the Complaint for want of probable cause. And we covered that ground already.

But we are not here today on a request for leave to file an Amended Information only. We're here with an Amended Complaint now having been filed on leave of the Court, no initial appearance having been made on that Amended Criminal Complaint. And I think, therefore, we're within the field covered by Wisconsin Statute Section 970.02, and for our purposes here, narrowly 970.02 (5), which governs the initial appearance and what's to happen and -- at and after the initial appearance.

And the question is, or the statutory command is, that if the defendant does not waive the preliminary examination, the Judge shall, forthwith, set the action for a preliminary examination under Section 970.03. That's the preliminary examination we seek. We're certainly not waiving it.

The question becomes somewhat circular because, if we don't have a right to preliminary examination for some reason in the first place, then there's nothing that we would be asked to waive or, properly, could resist waiving. I don't have any case law construing 970.02 (5) in this setting, or anything that I can offer today from which the Court might draw guidance, other than statutory language.

But the procedural posture, I think, is indisputable. We are here with the Court having granted leave to file an Amended Complaint, which is what the State had requested. We are here on an Amended Complaint. There has not been an initial appearance on that Amended Complaint. The Amended Complaint adds three new charges, not before seen in the course of this case to date.

We, of course, have disputed whether

those are transactionally related to and derived from the evidence at the earlier preliminary hearing. We think they aren't, the State thinks they are. But the fact is, this is a new Complaint and it is a Complaint on which the case, as to the three new charges, presently is founded.

We don't waive the preliminary hearing. We think we have a right to it. And we think the statutory command is clear, that the Court shall schedule a preliminary hearing forthwith on the three new counts.

THE COURT: All right. Mr. Kratz, or Mr. Fallon?

ATTORNEY KRATZ: Judge, Mr. Fallon wrote the brief on this issue. And with leave of the Court, I would like him to argue this today.

THE COURT: Very well. Mr. Fallon.

ATTORNEY FALLON: Yes. Thank you, Judge. Good morning. I think I feel compelled to address counsel's concern regarding the posture of the case and whether or not an additional preliminary examination is needed at this time.

We're firmly convinced that no such examination is needed for both a practical reason

and a legal reason. The legal reason being, quite frankly, is he's not entitled to one. And I say that because, interestingly enough, the defendant has received a benefit to the fact that the State sought and did, in fact, file an Amended Complaint, which was jurisdictionally unnecessary.

The defendant has been provided far more information relative to the additional charges than the law in Wisconsin normally permits. So he has received a benefit already, one to which he was not entitled, one in which, as a result of which, no preliminary examination is required under the law.

Once the original charges are filed, once a Court finds probable cause at a preliminary examination and binds the matter over for trial, the Information becomes the governing procedural document. The document upon which this Court may exercise its authority and power to determine the course of action for the parties.

In this particular case, additional information came to pass, which ethically permits the prosecutor, and also based on the transaction

related law that each side has briefed rather thoroughly, to add additional charges. Assume, for the sake of argument, this Court had granted the defense motion to dismiss the Complaint. Would the state be precluded from being in the exact posture we're in right now? Absolutely not.

As the Court is aware, and the parties are aware, the cases of ***State vs. Bailey***, ***State vs. Burke***, ***State vs. Richer***, ***State vs. Williams***, State vs. Akers (sic) ***State vs. Bury***, all occurred and were litigated in the context of post-probable cause, based upon the original Complaint and a subsequent preliminary examination and no additional or Amended Complaints after bindover.

So, in effect, the defendant has received a benefit, based on a local custom and practice, to provide additional information should, in the average felony case, the result, a change of plea. The parties would have a factual basis upon which to make a determination to accept a plea, to refer the matter for further presentence investigations, what have you. A current local custom and practice, but one which

is not jurisdictionally required and nor should it be.

So, even if the Court had granted the motion to say, no, I'm not going to let the State file an Amended Complaint with these additional counts, the State would not be precluded from seeking leave to amend the Information for the reasons stated in the State's brief, that the additional charges are transactionally related, or to borrow the phrase, not wholly unrelated to the transaction which was the subject of the preliminary examination, that is, the murder and mutilation of Teresa Halbach.

I would also note, parenthetically, that even if we were to get it wrong, so to speak, any error relative to preliminary examination is cured by a fair, impartial jury trial. And that's ***State vs. Webb***. And I see that possibility of no error because he is not entitled to a preliminary examination and, thus, looking at the law as just cited in ***Bailey***, ***Burke***, ***Richer***, ***Williams***, ***Akins***, ***Bury***, the case that followed ***Bailey***, I'm not going to reiterate the points of my brief, I think they are very clear.

The State is entitled to add the additional charges because they are transactionally related and whether we have -- there's no legal requirement, there's no jurisdictional imperative to have a preliminary examination ordered on those Complaints because those Complaints were not required by law. They were not jurisdictionally mandated. They were not necessary. They were provided as a courtesy.

And I would note that 99 percent of the defendants in Wisconsin law find themselves wondering, well, jeez, how did that prosecutor add these additional counts. None of them had the benefit of the additional information being provided in the Complaints, because they are not necessary. They are not required. They do not provide the jurisdictional predicate that the defense seems to suggest that they do.

So, he has received the benefit. He has received notice. He has received the information. He is, in effect, better off at this early stage in the proceedings than all the other defendants who may find themselves in this posture. So, that's the equitable argument. The legal argument is there's no jurisdictional

basis. They are not required and they are unnecessary.

So, we ask the Court to decide this strictly in the context of whether or not a prosecutor may seek leave and amend the Information, based on the theory that the additional counts are either: One, directly flow from evidence adduced at preliminary examination or, as we theoretically and actually posit in our brief, the additional charges are transactionally related to the information, to the subject matter which was testified to at preliminary examination. We thank the Court.

THE COURT: Thank you. Mr. Strang.

ATTORNEY STRANG: I'm very pleased to hear my colleague, a very skilled lawyer, concede here that the Complaint was unnecessary, the Amended Complaint was unnecessary. I don't know that I fully can accept his gracious concession to the extent that he qualifies it by saying jurisdictionally unnecessary, but it is gratifying to hear the concession that this Amended Complaint was unnecessary.

Only lawyers, though -- I think only lawyers could imagine that that unnecessary

Complaint conferred a benefit on Steve Avery. The benefit is then that he has been pilloried in the press on the basis of unreliable, inadmissible, hearsay accusations in the Complaint. Repeatedly pilloried in the press.

The benefit has been that this Court explicitly cited that information in the Complaint as part of the reason for raising his bail from a half million dollars to three quarter of a million dollars cash. The benefit is that we are here today fighting simply to have the State stand beside and submit to the minimal testing of a preliminary hearing, the information that it has spread before the public in this Amended Complaint and by comments to the news media that tracked some of the allegations of the Criminal Complaint. And the State resists the minimal testing that occurs at a preliminary hearing in this State where it is required only to establish probable cause.

So, I don't share the sense that any benefit has been conferred on Mr. Avery by this Amended Complaint. I do have the sense that it introduces altogether something new in this case. And I think everybody watching, or listening, or

sitting behind me today, understands that there are altogether new things that the State has been alleging since early March, against Mr. Avery. And those ought to be tested by preliminary hearing.

THE COURT: All right. By way of background, the Court notes first that the initial charges in the initial Complaint in this case charged the defendant with first-degree intentional homicide, mutilation of a corpse, and a felon in possession of a firearm. The State sought permission, and the Court granted permission, for the State to file an Amended Complaint adding the charges of first-degree sexual assault, kidnapping, and false imprisonment.

The defendant's motion before the Court today raises two separate issues. First, the defense renews its argument that the Amended Complaint should be dismissed on its face, or in the alternative, the defense also argues that if the Court permits the filing of an Amended Complaint, the defendant is entitled to a preliminary examination on the new charges.

The Court will first, briefly, readdress the argument regarding the sufficiency of the

Complaint. The Court has already ruled that the State is permitted to add the new charges in the Amended Complaint, and I don't believe there's a reason for the Court to reconsider that ruling at this time.

There is no claim of prejudice on the part of the defense, based on the lack of time to answer the new charges. The defense alleges that there is no reliable information in the Amended Complaint to support the new charges. However, the statements of the alleged co-defendant can, in this Court's opinion, be used to support the charges in the Amended Complaint under the law in the case of ***Ruff vs. State***, which I cited at the last hearing. And the Court still believes that case to be the law in the State.

With respect to the reliability of statements of the alleged co-defendant that form the basis of the new allegations, the Court cannot presume that that witness won't be available to testify. The development of the law in the area of confrontation certainly suggests that if he doesn't testify, the State will have a difficult time supporting the allegations, based on the statements attributable to the

co-defendant.

But the Court is not aware of any law that wouldn't find that the co-defendant's statements would not be relevant if he did testify. And I believe they still can form the basis of the charges in the Amended Complaint. Therefore, the Court does not find a basis for denying the State's request to file and Amended Complaint.

The next logical issue to take up here is the new argument raised by the defense today. And that is, whether or not the defense is entitled to a preliminary examination upon the filing of new charges in the anticipated new Information, is the defendant entitled to a preliminary examination under Section 970.02 based on the filing of an Amended Complaint.

The parties did not brief that issue in written form, but both parties have informed the Court today that they are not aware of any relevant case law. So we're left with the language of Section 970.02 itself.

Significant in the Court's mind is the title of that statute. It is the duty of the judge at the initial appearance. I don't believe

that the filing of an Amended Complaint triggers a new initial appearance in this case. It can result in the defendant responding to the charges, but I don't believe that a second initial appearance is contemplated within the meaning of the statute; 970.02 (5) says, if the defendant does not waive preliminary examination the judge shall forthwith set the action for a preliminary examination understand 970.03.

Implicit in the statute is that there's a right of a preliminary examination to waive. And I think that merely postpones the question to the one that the parties have addressed in -- at length in their written briefs, and that is, is the defendant entitled to a preliminary examination upon the filing of additional charges, after the bindover.

I agree with the -- I believe both parties today, that the case law as it is developed does not appear to require, nor does the statutes require, the State to file an Amended Complaint as a condition precedent to adding charges in the Information. The fact that the State has elected to do so and provide the -- everyone with the alleged factual basis for the

additional charges, I'm not sure how, absent some specific wording in the statutes requiring it, that that fact alone would add anything to the argument that the defendant should be entitled to a preliminary examination.

It does provide the defendant with notice of the factual basis for the State's charges. And I think that that's a benefit to the defense in the sense that it alerts the defense as to what the basis for the new charges are going to be. So, I don't find anything in Section 970.02 that would independently trigger a right to an additional preliminary examination in this case.

The Court will move on then to what both of the parties have focused on in the written briefs as the primary argument, and that is, when the State seeks to add charges in an Information, that were not the subject of the Complaint at the time of the original preliminary examination, is the defendant entitled to a second preliminary examination on the new charges.

I will first note that the factual basis for the defendant's claim of entitlement to an additional preliminary examination is largely

undisputed. The State did not produce any evidence to support the charges it seeks to add, at the time of the original preliminary examination. In fact, the State does not claim it was in possession of any such evidence to support those charges at the time of the original prelim. There is no specific evidence in the record from the original preliminary examination that would support the additional charges.

As noted by the parties in their briefs, the question of whether the State can add charges not included in the original Complaint, after a defendant has been bound over for trial following a preliminary examination, has been the subject of extensive litigation over the years.

The governing statutes themselves are not particularly clear on their face as far as providing an answer to this question. And the Supreme Court decisions dealing with the issue have not always been unanimously decided.

The starting point is Section 971.01 (1), which provides that the district attorney shall exam all the 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 Section 970.03 (10), shall file an Information according to the evidence on such examination, subscribing his or her name thereto.

The statute is somewhat ambiguous on its face and susceptible to different interpretation. One interpretation certainly might be that the district attorney is limited to pursuing only those charges supported by evidence produced at the preliminary examination. However, the Supreme Court has held many times that that is not the law in this state and the defense in this case does not argue otherwise.

The question then becomes, what is the test for determining whether the State can add additional charges. The test was stated in the case of ***State vs. Richer*** reported at 174 Wis. 2d, 231, by the Supreme Court as follows:

From our discussion in ***Leicham*** to our recent decision in ***Burke***, we have seen a broadening of prosecutorial discretion from a rule limiting charges to those supported strictly within the confines of the evidence adduced at the preliminary, to a rule granting prosecutors the discretion to charge, in the Information, any

felony that is, quote, "not wholly unrelated", end quote, to the initially charged crime.

The common denominator in all these decisions was that the charges must be related to one another, either from an evidentiary viewpoint or a transactional one. We conclude that a felony not charged in the preliminary examination can be made a count in a subsequently filed Information if there is evidence, direct or inferential, in respect to that felony, adduced at the preliminary, or if a subsequently charged felony is demonstrated by the State to be transactionally related, that is, not wholly unrelated, to one or more of the felonies for which the defendant has been bound over for trial.

This test has been adhered to in all the cases cited by each of the parties in their briefs. The parties differ concerning how they believe the standards to be applied to this case. The defense argues that the not wholly unrelated test applies to evidence introduced at the preliminary hearing itself, as opposed to the transaction, which was the subject matter of the preliminary examination.

The Court concludes that while there is such a distinction, the law is that charges can be added which do not have to be specifically related to the evidence introduced at the preliminary examination. Perhaps the closest case on the facts, to those in this case, is that of the ***State vs. Bailey*** reported at 65 Wis. 2d, 331. It's a 1974 Wisconsin Supreme Court decision.

The Complaint in that case charged Bailey with one crime, first-degree murder. The Information filed after the preliminary examination added counts of indecent behavior with a child, child enticement, and attempted child enticement. The additional charges related to the abduction of the child, who was subsequently murdered by the defendant. In upholding the prosecutor's authority to add these charges, the Court ruled as follows:

In our view of Section 970.03 (10) does not prohibit the prosecutor from including in the Information, once a defendant has been bound over, charges in addition to those advanced at the preliminary hearing, so long as they are not wholly unrelated to the transactions or facts

considered or testified to at the preliminary.

This view is consistent with the legislative statement in Section 970.03 (1), that a preliminary hearing is held, quote, "for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant", end quote. Once it is determined that the defendant should be bound over for trial on at least one count, the purpose of the preliminary has been satisfied and the prosecutor may, in his discretion, allege such other offenses as permitted by the limitations stated above.

In this case, assuming there is no evidence presented as to them at the preliminary, 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, witnesses involved, geographic proximity, time, physical evidence, motive, and intent.

There's a strong parallel between the facts recited in ***Bailey*** and those here. The child enticement counts were related to crimes that immediately preceded the murder and were

part of the motive for the murder.

Now, as the defense points out in its brief, the Court in ***Bailey*** went on to find that the facts introduced at the preliminary examination in that case would have been sufficient to bind over on the enticement counts anyway. So the language quoted could be considered dicta not necessary to the Court's decision.

And I believe that's an entirely valid distinction on the defense's part. I think the language could easily have been characterized as dicta. And, in fact, it was. It wasn't really necessary to the Court's decision because the Court found the facts introduced at the prelim by themselves would have been sufficient to support the additional counts.

However, ***Bailey*** has been cited in a number of subsequent Supreme Court decisions and the Court has never backed away from its rationale, whether or not that rationale is characterized as dicta. In fact, the Supreme Court has accepted the dicta from ***Bailey*** as the law.

For example, in the case of ***State vs.***

Burke, the Court held as follows: ***Fish*** and ***Bailey*** hold that, in a multiple offense transaction case, once the defendant has been bound over for trial on at least one count related to the transaction, the prosecutor may, in the Information, charge additional counts not wholly unrelated. ***Bailey*** further establishes that the direct evidence related to the additional counts may not have been presented at the preliminary examination.

In the Court's opinion, we are not left to wonder how additional charges must relate to the evidence introduced at a preliminary examination in order to be includable in an Information. The test has been repeated often. To meet the test of transactionally related or not wholly unrelated, the charges must be related in terms of parties involved, witnesses involved, geographic proximity, time, physical evidence, motive and intent. That's the test that the Court is required to apply and that test can be applied in this case.

Referring specifically to the facts in this case, the Court concludes that the new charges clearly meet the test which the Supreme

Court has established:

The parties involved in the alleged crime are the same, that is, it's the same defendant and the same victim.

The witnesses, who would be the persons alleged to be present at the time of the crime, are the same in each case.

With respect to geographic proximity, everything is alleged to have happened at the same location.

With respect to time, the new charges are alleged to have immediately preceded the homicide and mutilation of a corpse charge from the original Complaint.

In addition, the physical evidence involved is likely to significantly overlap the charges in the original Complaint and the Amended Complaint.

With respect to motive and intent, the kidnapping, false imprisonment, and sexual assault charges will form an important basis on the alleged motive for the homicide and mutilation charges.

The Court concludes that it's difficult to imagine how the additional charges could be

more closely related to the original charges in this case, than they are. Thus, the Court concludes that the State is permitted to add the new charges and the defendant is not entitled to a preliminary examination on the other charges.

For those reasons, the Court is denying the motion of the defense to dismiss the -- I will reiterate the Court's denial of the motion to dismiss the Amended Complaint. And the Court also denies the motion requesting an additional preliminary examination on the additional charges.

Mr. Kratz, I will direct you to prepare the order in this case. Procedurally, at this point, I don't know if the State is prepared to proceed with an Information at this time or not. Mr. Kratz.

ATTORNEY KRATZ: I think probably, Judge, the Court should schedule an arraignment at which time the Amended Information can be filed.

THE COURT: I know, Mr. Strang, you indicated previously, in the correspondence, that the defense may seek a permissive appeal from the Court's ruling if the Court ruled as it did. I don't know if the -- if the defense is going to seek

to delay with respect to arraignment or not.

ATTORNEY STRANG: Well, that's a question, the Court is right. And I agree with Mr. Fallon's assessment of ***Webb***. I read that case the same way, in the sense that, if we think the Court erred on the sufficiency of the Complaint, or on our entitlement to a preliminary hearing, the only time we can raise that is now. Because the trial will certainly cleanse the error, or render it harmless, if in fact there was error.

So, this is not a usual case, the stakes are very high. Obviously, we understand what they are for Mr. Avery, for the Halbach family, for the State, people of the State. I think it prudent for us to ask the Wisconsin Court of Appeals for leave to file an appeal here, permissively, that the Court doesn't have to -- that is, the Court of Appeals doesn't have to grant leave. But if I don't ask, I'm giving up my only opportunity to be heard on the correctness of the Court's ruling and to have those rulings reviewed. So, I do and will do that.

I have 10 days from the entry of the written order, I think -- 14 days, I'm sorry,

from the entry of the written order memorializing the Court's rulings. It seemed, although I don't have an answer on whether an intervening arraignment would affect the posture of a request for permissive appeal, I can tell the Court this, if we're put to an arraignment before we seek leave to file from this appeal, we will stand mute and not participate in that, not wanting to waive or imperil our position on the request for this interlocutory appeal.

So, the better practice may be to schedule the arraignment after the deadline, at least, for filing a petition for leave to take permissive appeal. I think that's probably the wiser procedural course for the Court to follow. Although counsel may well view it differently, that's the view at this table.

THE COURT: I did read the ***Webb*** case and I understand that, as a result of that case, if you want to challenge the Court's ruling you -- the lesson is pretty clear, you have to do it before the trial. I didn't see anything in there to suggest that holding an arraignment would prejudice the defendant in anyway. But on the other hand, the Court didn't really address the issue in this case.

Mr. Kratz.

ATTORNEY KRATZ: On the 9th of March I did file the Amended Information already. That's why, when I was searching, I couldn't find it, it's already been filed. If the Court can just recognize today that it's been filed, however the Court wishes to address the responsive pleading, you can do that.

ATTORNEY STRANG: I did not remember the date, but I do remember seeing the proposed, at that point, Amended Information. It was, I suppose, filed conditionally on the granted leave to file, which the Court now has granted. And I certainly have a copy of the proposed Amended Information.

THE COURT: All right. Does the State have any objection to scheduling the arraignment shortly after the appeal deadline for the defense?

ATTORNEY KRATZ: No, Judge, once the Court accepts, or recognizes the filing of the Information, an arraignment can be held any time.

THE COURT: Well, let's see. All right. How about 9:00 on -- or Mr. Strang, is life easier for you -- or, actually, we have Mr. Fallon traveling as well. Does 9:30 work out better for you?

ATTORNEY STRANG: Well, I assume Mr. Fallon

is in the same position. I have to be seated in my car three hours before the Court starts. So I wouldn't be seated in my bed at 6:00 a.m., but I also wouldn't be in my car.

THE COURT: What if we do it this way, how about 10:00 on May 30th. I will tell you, here, for security purposes, the Sheriff's Department likes to have your hearing be the first thing done in the courtroom that day. So, I have pressure on both sides here.

ATTORNEY FALLON: I don't know about Dean, but it doesn't matter to me, whatever is convenient for the Court and security purposes. If you want to hold this at 7:00 a.m., I will be here.

ATTORNEY STRANG: Right.

ATTORNEY KRATZ: If all we're doing is the arraignment, I suspect Mr. Fallon is not going to be here. It should be a 30 second hearing.

ATTORNEY STRANG: I will be here any time the Court sets it. I was being a little bit flippant. Yes, it's a three hour drive, but I will be here whenever the Court sets it.

ATTORNEY KRATZ: Is there any chance of doing it just before noon on the 4th of May? The reason I say that, co-defendant, Mr. Dassey's

motions before Judge Fox are scheduled, I have to be here that morning anyway. And if we could -- if this is such a short hearing, if we could do it sometime later that morning on the 4th, that would sure help my schedule.

ATTORNEY STRANG: Both Mr. Buting and I have a Criminal Law Section Board meeting for the State Bar at 11:00 on the morning of May 4th.

THE COURT: Where is that held?

ATTORNEY STRANG: That one is in Madison.

ATTORNEY KRATZ: The 3rd is fine, Judge. That's fine.

THE COURT: All right. Let's say 10:00 on the 3rd then. All right. Is there anything else that either party wants to bring up on the record this morning?

ATTORNEY KRATZ: Not the State, your Honor.

THE COURT: Mr. Strang.

ATTORNEY STRANG: No.

THE COURT: All right. If not, we're adjourned for this morning.

(Proceedings concluded.)

STATE OF WISCONSIN)
)ss
COUNTY OF MANITOWOC)

I, Diane Tesheneck, Official Court Reporter for Circuit Court Branch 1 and the State of Wisconsin, do hereby certify that I reported the foregoing matter and that the foregoing transcript has been carefully prepared by me with my computerized stenographic notes as taken by me in machine shorthand, and by computer-assisted transcription thereafter transcribed, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge and ability.

Dated this 25th day of April, 2006.

Diane Tesheneck, RPR
Official Court Reporter

This transcript prepared exclusively for Atty. Strang.

(83)