

UNDER SEAL

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June 1, 2006

Honorable Patrick L. Willis
Branch 1
Manitowoc County Circuit Court
Post Office Box 2000
Manitowoc, WI 54221-2000

BY OVERNIGHT COURIER

Re: *State of Wisconsin v. Steven A. Avery*
Case No. 2005-CF-381

Dear Judge Willis:

I enclose for filing **under seal** the Defendant's Motion to Exclude Manitowoc County Sheriff's Department, with Exhibit A, a DVD. If the Court would acknowledge filing by stamping the extra copy of the motion and returning that to me in the self-addressed, stamped envelope provided, I would be appreciative. Under cover of this letter, I am serving counsel for the State by overnight courier and, in Mr. Fallon's case, hand delivery. I appreciate the Court's help.

Although I submit the motion under seal, I do so only in deference to the State's request. The motion does not disclose matter in discovery materials, Crime Lab results, or other information that is not already public. Indeed, the information that the motion addresses already was disseminated publicly on television by the Manitowoc County Sheriff.

Sincerely,

HURLEY, BURISH & STANTON, S.C.

Dean A. Strang

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Enclosures

RECEIVED

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2005-CF-381

STEVEN A. AVERY,

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

JUN 14 2006

Defendant.

CLERK OF CIRCUIT COURT

**DEFENDANT'S MOTION TO EXCLUDE
MANITOWOC COUNTY SHERIFF'S DEPARTMENT**

Steven A. Avery, by counsel, now moves the Court for an order excluding all members of the Manitowoc County Sheriff's Department from any role superintending the jury in this case or testifying in the state's case-in-chief. The principal bases of this motion are the public statements of the Manitowoc County Sheriff, Kenneth Peterson, broadcast on May 10-11, 2006, and the circumstances under which Sheriff Peterson knowingly and deliberately made those statements. If the state opposes this motion or challenges any of the factual assertions on which Mr. Avery relies, Mr. Avery requests an evidentiary hearing at which he will prove those assertions.

A strong sanction is necessary to provide a remedy for the Manitowoc County Sheriff's calculated effort to defeat or interfere with Mr. Avery's constitutional rights to a fair trial and to a trial in the proper venue. *See* WIS. CONST. art. I, §§ 7, 8; U.S. CONST. amends. VI, XIV. A strong sanction also is necessary to deter such misconduct by the Manitowoc County Sheriff's Department, or by other law enforcement agencies, in the future. The relief Mr. Avery seeks is two-fold:

(a) The Court should exclude all employees or agents of the Manitowoc County Sheriff's Department from testifying in the state's case-in-chief. Mr. Avery does not seek to preclude the defense from calling witnesses employed by or agents of the Manitowoc County Sheriff's Department or to preclude the state from calling such witnesses in the course of proper rebuttal; and

(b) The Court should bar all employees or agents of the Manitowoc County Sheriff's Department from having any contact with prospective jurors, actual jurors, or Mr. Avery during the course of jury selection, the trial, and jury deliberations in this case.

In support of this motion, Mr. Avery shows the following:

1. At least since present defense counsel entered their appearances, Mr. Avery repeatedly has stated on the record, through counsel, his preference for a Manitowoc County jury. He also stated that preference in writing, by counsel's April 12, 2006, letter to the Court.

2. The state has been aware of Mr. Avery's preference for a Manitowoc County jury since shortly after Dean Strang entered his appearance.

3. Mr. Avery has a constitutional right to a jury from Manitowoc County, where the crimes with which he is charged allegedly occurred. *State v. Mendoza*, 80 Wis. 2d 122, 258 N.W.2d 260 (1977); WIS. CONST. art. I, § 7.

4. On or about March 9, 2006, counsel for Mr. Avery filed a motion for an order limiting public disclosure. That motion applied not just to statements by lawyers in this case, but to statements by "those working as supervisors or under supervision of the lawyers (including law enforcement agents, investigators, and paralegals), by agents of lawyers (including the Calumet County Sheriff and his employees), and by court personnel." Defendant's Motion for Order Limiting Public Disclosure at 1 (March 8, 2006). The Manitowoc County Sheriff and his employees fell within the compass of that motion and the order it sought.

5. On May 3, 2006, this Court denied Mr. Avery's motion for an order limiting public disclosure. In that same hearing, through counsel Mr. Avery reiterated again his preference for a Manitowoc County jury. The Court allowed the defense until June 16 to make a final decision on whether to withdraw or pursue prior defense counsel's motion for a change of venue. Docket No. 43.

6. On May 10 and 11, 2006, Fox 11 News in Green Bay, WLUK, broadcast a two-part special report. Sheriff Kenneth Peterson appeared on camera, spoke on camera, and had other statements attributed to him by the reporter.

7. As to Sheriff Peterson, the special report included the following:

a. The sheriff commenting on Mr. Avery's prior record, specifically on a gruesome conviction now 24 years old ("The first time I ran into him was with the burning cat"). The reporter, Lauren Cook, also attributed to Sheriff Peterson a comment that Mr. Avery has a "colorful past."

b. The sheriff commenting that it would have been "a whole lot easier to eliminate Steve than it would to frame Steve. Hell." Asked to explain, Sheriff Peterson said, "If we wanted him out of the picture, like in prison, or if we wanted him killed, it would have been much easier just to kill him, than it is to try and frame somebody." Those comments are bizarre and inappropriate at a bare minimum, especially coming from a county's top law enforcement official. They suggest social acceptability of discussing publicly or contemplating a police murder of a presumptively innocent man charged with a crime. Further, one implication of the sheriff's statements is that because Steven Avery is alive, he is guilty: since it purportedly would have been too much trouble to frame Mr. Avery and the sheriff's department did not kill him, it must be that he is guilty of the charges and reliably

will be “out of the picture” or “in prison” without the need of some more drastic step by the sheriff’s department.

c. Sheriff Peterson opining that Mr. Avery will kill again because, “I think that’s his personality.” The Fox 11 segment omitted Sheriff Peterson’s qualifications to assess personality disorders or to predict future dangerousness, and also omitted the bases of his opinion.

d. The second evening of the series, the Fox 11 report repeated Sheriff Peterson’s comments about “eliminat[ing]” Mr. Avery and the comparative ease of just killing him.

e. Also on the second evening of the series, Sheriff Peterson provided some details of his opinion that Mr. Avery will kill again. “Of course, I’m not a mental health professional,” Sheriff Peterson conceded, “but you know, experience tells us that it could be.”

f. The reporter described Sheriff Peterson as agreeing with Professor Gerald Metalsky’s opinion that Mr. Avery will kill again if acquitted of the current charges.

g. Expanding on his views of Mr. Avery’s characterological flaws or personality disorders, Sheriff Peterson finally opined that Mr. Avery “could be a con man, who knows.”

h. In sum, Sheriff Peterson's televised comments included deliberate comment on topics, like distant prior record, that a seasoned law enforcement officer would know to be inadmissible at trial; unsupported and outrageous opinions about Mr. Avery's propensity to kill human beings in the future; an unsupported opinion that Mr. Avery may be a "con man;" and a bizarre implication that Mr. Avery is guilty because he still is alive. Even discounting that implication, Sheriff Peterson's comments necessarily reflected a view that it is within the pale of polite public discourse here to suggest publicly the option of an extrajudicial killing of Mr. Avery by people sworn to uphold the law.

8. These statements, which the Court may view for itself on the DVD submitted as Exhibit A with this motion, have to be understood in the context of twenty years of history between Mr. Avery and the Manitowoc County Sheriff's Department.

a. The Manitowoc County Sheriff's Department was the lead investigative agency in the 1985 rape case that resulted in Steven Avery's conviction. Sheriff Peterson personally was involved in that investigation and the arrest of Mr. Avery. According to the Fox 11 reporter, he described himself as the only officer left on the Manitowoc County Sheriff's Department who worked on the 1985 rape case.

b. It now is undisputed that Mr. Avery was innocent of that 1985 crime.

c. At the time, the Manitowoc County Sheriff's Department persistently ignored information from the City of Manitowoc Police Department that Gregory Allen committed the rape. In fact, DNA later proved that Gregory Allen did commit the rape.

d. Steven Avery filed suit in federal court on October 12, 2004, over his wrongful conviction and imprisonment. Manitowoc County was the lead defendant, and Thomas H. Kocourek, in his individual capacity and as Sheriff of Manitowoc County, was the second defendant. Sheriff Kocourek was Sheriff Peterson's immediate predecessor. The actions of the Manitowoc County Sheriff's Department were central to the causes of action, as the federal complaint reveals. *Avery v. Manitowoc County*, No. 04-CV-983 (E.D. Wis.), Complaint. That civil action sought up to \$36 million in damages.

e. Kenneth Peterson was among those deposed in the civil action. He was deposed on October 13, 2005, eighteen days before Teresa Halbach disappeared.

f. The civil case was pending and Sheriff Peterson was aware of the potential liability in the tens of millions of dollars that his department created at the time the state arrested and charged Steven Avery with the current offenses. His deposition would have been fresh in mind.

g. After Mr. Avery's arrest and the filing of charges here, Manitowoc County was able to settle Mr. Avery's federal lawsuit for just \$400,000. In that way, the Manitowoc County Sheriff's Department avoided both enormous liability and accountability for its role in the arrest and conviction of Mr. Avery in 1985 for a crime he did not commit.

9. By his own account, Sheriff Peterson's personal experience with Steven Avery goes back 24 years, and includes personal participation in the 1985 rape investigation and Mr. Avery's wrongful arrest then.

10. The combination of the motive of Sheriff Peterson and the Manitowoc County Sheriff's Department to deny Mr. Avery a fair trial, and thus to help assure his conviction and imprisonment, and Sheriff Peterson's demonstrated efforts to prejudice the jury pool against Mr. Avery and to deny him a fair trial requires that the Court fashion a remedy. The fact that Sheriff Peterson made the public comments he did one week after Mr. Avery's most recent assertion of his preference for a Manitowoc County jury, and one week after this Court denied Mr. Avery's motion for limits on public disclosure that would have applied to Sheriff Peterson, requires that the Court fashion a strong remedy. The remedy should cure the harm to Mr. Avery, to the extent possible, and also deter further intentional misconduct and efforts to deny Mr. Avery his constitutional rights to a fair trial and to have that fair trial with a jury from the proper venue.

11. The Court's power to exclude sheriff's department employees as witnesses in the state's case-in-chief and as superintendents of the jury is beyond question. As a matter of discretion, a Wisconsin court may exclude witnesses as a sanction for misconduct by a litigant or party – even misconduct as comparatively minor as failing to disclose a witness list on time, violating a witness sequestration order, or disclosing witness statements tardily. *State v. Hahn*, 221 Wis. 2d 670, 687-90, 586 N.W.2d 5, 14-15 (Ct. App. 1998); *State v. Wright*, 196 Wis. 2d 149, 158-60, 537 N.W.2d 134, 138-39 (Ct. App. 1995); *Nyberg v. State*, 75 Wis. 2d 400, 408-10, 249 N.W.2d 524, 528-29 (1977), *overruled on other grounds*, *State v. Ferron*, 219 Wis. 2d 481, 579 N.W.2d 654 (1998); *Loose v. State*, 120 Wis. 115, 97 N.W. 526, 528 (1903); *see also State v. DeLao*, 252 Wis. 2d 289, 313-16, 643 N.W.2d 480, 491-93 (2002); WIS. STAT. § 906.11. The misconduct here goes directly to fundamental constitutional rights, and clearly was deliberate and flagrant.

12. Similarly, the exclusionary rule causes the state to forfeit its right to offer physical evidence or statements that it obtains in violation of the Fourth and Fourteenth Amendments, or even in violation of a prophylactic rule like that announced in *Miranda v. Arizona*, 384 U.S. 436 (1966). By analogy, the Manitowoc County Sheriff's efforts to violate Mr. Avery's right to a fair trial and to a jury drawn from the vicinage, WIS. CONST. art. I, §§ 7, 8; U.S. CONST. amends. VI, XIV, should

cause the state to forfeit its opportunity to call the Manitowoc County Sheriff or his subordinates and agents as witnesses in the state's case-in-chief.

13. The sheriff's misconduct here is serious, intentional, and flagrant. He did not just violate a discovery statute by tardy disclosure, for example. He attacked directly Mr. Avery's constitutional rights to a fair and impartial jury drawn from Manitowoc County, and to a fair trial generally. He did so after repeated statements by the Avery defense team in court that they prefer not to change venue. He did so shortly after the Court denied Mr. Avery's motion for an order limiting exactly this sort of prejudicial, inflammatory public disclosure. He did so outside the courtroom, on a widely watched television station in Green Bay that is available in all corners of Manitowoc County. He did so not as an underling or a rookie; he did so as the top law enforcement official in Manitowoc County, with 31 years of experience. Sheriff Peterson is an elected official, so likely is the member of the sheriff's department with the greatest public visibility and name recognition.

14. The prejudice to Mr. Avery is obvious. With the exception of one cousin (who may have spoken weeks or months earlier; counsel was unaware of the cousin's existence, and has no idea when he was interviewed) and Mr. Avery's former lawyer, for purposes of the Fox 11 report Steven Avery and his family abided this Court's wishes that they not comment publicly on this case. In the Fox 11 report, taped statements by Mr. Avery and his family were from months ago, before

charges were filed against Mr. Avery. Defense counsel declined comment. So Sheriff Peterson's statements went unanswered. The sheriff's statements paraded before the public inadmissible and long-past details of Mr. Avery's prior criminal record. Those statements included an assertion that Mr. Avery perhaps is a "con man," obviously a loaded term and a grossly inadmissible opinion. The statements entertained in a matter-of-fact tone the hypothetical option of a law enforcement killing of Mr. Avery.

15. And, most sensationally and prejudicially, Sheriff Peterson did not just stop at asserting Mr. Avery's guilt of the crimes charged: he asserted that Mr. Avery will commit a future murder if acquitted here. In other words, Sheriff Peterson posited that Mr. Avery in the future will commit an awful crime if free to do so, leaving obvious if implicit the necessity to convict him of these crimes to prevent a future murder. Sheriff Peterson based that prediction on "experience," after explaining his 24 years of personal experience with Mr. Avery. On a claim of superior personal knowledge, then, Sheriff Peterson not just implied Mr. Avery's guilt of the current charges, but warned the jury venire that a failure to convict him would lead to another murder by Mr. Avery.

16. Excluding all Manitowoc County Sheriff's Department personnel from the state's case-in-chief will be a measured sanction proportionate to the offense here by a chief county law enforcement agent of the state, and will provide the best

available remedy to Mr. Avery without unduly impeding the search for truth. Because everyone who works for the sheriff's department is under Sheriff Peterson's control, and presumably responsive to his views and attitudes, barring the whole department is proper. Further, two other ranking employees of the Manitowoc County Sheriff's Department, both of whom in 1995 were involved in suppressing the identity of the true perpetrator of the 1985 rape (and thus contributed to an additional eight years in prison for Mr. Avery), took lead roles in this investigation. For example, those two investigators were involved directly in repeated searches of Mr. Avery's own trailer before and after his arrest, contrary to the public impression that the Manitowoc County Sheriff's Department had a limited role or no role in key investigative steps. Like Sheriff Peterson, these two ranking employees also were deposed in Mr. Avery's civil suit less than three weeks before Ms. Halbach's disappearance, yet became intimately involved in the aspects of this investigation that focused on the same Steven Avery who spent eight additional years in prison in part because of their actions. While Sheriff Peterson alone has displayed his bias on the Fox 11 report and sought on television to undermine Mr. Avery's constitutional rights, he by no means is the only member of his department with motive to do so.

17. The proposed witness exclusion applies only to the state's case-in-chief: it preserves both Mr. Avery's right to present a defense and call necessary defense

witnesses, *Webb v. Texas*, 409 U.S. 95, 97-98 (1972) (per curiam); *Washington v. Texas*, 388 U.S. 14, 19 (1967), and the state's right to respond with Manitowoc County Sheriff's Department witnesses in rebuttal if the defense opens doors in its case. In that sense, the proposed remedy is analogous to – and less restrictive than – the permissible use of an accused's statement taken improperly, but not involuntarily. Cf. *Harris v. New York*, 401 U.S. 222, 224-26 (1971) (voluntary statement taken in violation of *Miranda* may be used on cross-examination to impeach defendant); *James v. Illinois*, 493 U.S. 307, 311-19 (1990) (defendant's statement, suppressed as product of unlawful arrest, can be used to impeach him but not to impeach other defense witnesses); see generally *Walder v. United States*, 347 U.S. 62 (1954) (physical evidence inadmissible in government's case-in-chief because illegally obtained may be used for impeachment).

18. Excluding those witnesses from the state's case-in-chief at least will reduce the possibility that the Manitowoc County Sheriff's Department will succeed in 2006 at what it accomplished, inadvertently or otherwise, in 1985: the conviction of Mr. Avery for a crime he did not commit. That is exactly the cure Mr. Avery needs. The Court's firm order in this regard also will provide a powerful incentive for all law enforcement agents involved in this case to refrain from impairing or attempting to impair Mr. Avery's constitutional rights to a fair trial and to an impartial jury from Manitowoc County.

19. Further, given the demonstrated bias of the Manitowoc County Sheriff against Steven Avery, and the reasons for institutional bias against Mr. Avery throughout that sheriff's department, the department that Sheriff Peterson runs should not be entrusted with contact with, or custody of, jurors in Mr. Avery's case. Unavoidably, the bias of members of the Manitowoc County Sheriff's Department against Steven Avery may become a contested issue in this trial. At the same time, sheriff's deputies will be entrusted with the transportation, feeding, and entertainment of sequestered jurors during a five-week trial. Close relationships and personal interaction between deputies and jurors will occur. The chances for improper comments to and influence on sequestered jurors are too great, where those jurors will be considering the bias of the Manitowoc County Sheriff's Department. Sheriff Peterson did not restrain himself from making inflammatory comments about inadmissible information, and offering unsupported and highly incendiary opinions about Mr. Avery's future conduct and character flaws or personality disorders, when given a chance to speak on television to the general venire. In conducting himself that way, he spoke as the Sheriff, the principal of his department and the elected official who is the chief law enforcement officer in his county. He and his agents hardly can be expected to demonstrate greater restraint or respect for Mr. Avery's right to a fair trial if permitted direct contact with the actual jurors who will decide Mr. Avery's fate. Excluding them from that role, too,

will assure effectively Mr. Avery's right to a jury that decides his fate on the basis of evidence in court, not on the basis of subtle prodding, cajoling, or worse by bailiffs or law enforcement officers out of court.

20. While the Wisconsin Statutes provide that the county sheriff shall "attend upon" the circuit court, WIS. STAT. § 59.27(3), the statutes do not make the sheriff the exclusive keeper of juries. Indeed, a court may appoint "an officer of the court" to keep jurors together, WIS. STAT. § 972.12, and there is no statutory limitation on the officers to whom a court may turn to fulfill those duties.

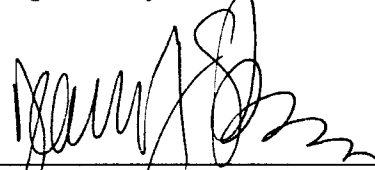
21. If for no other reason, the Court should recuse the Manitowoc County Sheriff's Department from superintending the jury or Mr. Avery to avoid an obvious appearance of impropriety, given both the twenty year history between the sheriff's department and Mr. Avery and Sheriff Peterson's recent inflammatory comments on Fox 11. All parties have not just an interest in a fair trial, but also in a trial that appears fair.

WHEREFORE, Steven Avery requests that the Court enter an order both barring the state from calling any witness employed by the Manitowoc County Sheriff's Department in its case-in-chief and excluding the employees of that department from having any contact with prospective jurors or jurors during the course of the trial, as bailiffs or otherwise. That exclusion from superintending the jury or Mr. Avery should apply irrespective of where this case is tried or from what county jurors are drawn.

These steps are necessary to vindicate Mr. Avery's rights to a fair trial and to an impartial jury drawn from Manitowoc County, the alleged venue of the charged offenses. If the state opposes this motion or disputes facts, Mr. Avery further requests an evidentiary hearing.

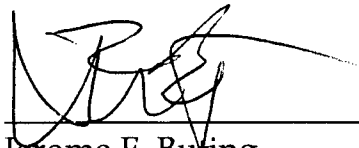
Dated at Madison, Wisconsin, June 1, 2006.

Respectfully submitted,



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