STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S MEMORANDUM SUPPORTING MOTION TO DISMISS

I.

INTRODUCTION

From November 5, 2005, through March 2, 2006, representatives of the state appeared in no fewer than eight televised news conferences concerning the investigation into Teresa Halbach's disappearance and the prosecution of Steven Avery (and, later, Brendan Dassey). Four of those news conferences came after Avery's arrest. This count does not include other comments that representatives of the state have made to television reporters for use on air. Of those, a two-part segment on Fox 11 news in Green Bay in which the Manitowoc County Sheriff offered inflammatory comments about Avery stands out.

61
(1)

Because of this deliberate publicity, and because of some comments that state actors intentionally have made during these news conferences, Avery cannot have a fair trial in Manitowoc County. But this is the county in which he has a constitutional right to be tried.

Avery accordingly moves to dismiss the counts relating to Teresa Halbach. No other remedy suffices.

II.

FACTS

Avery expects to show the following at an evidentiary hearing, if the state disputes the facts he proffers here.

Between November 5, 2005, and March 2, 2006, on eight separate occasions state actors involved in this prosecution appeared in televised news conferences. Calumet County Sheriff Jerry Pagel appeared and spoke in seven of those. Special prosecutor Kenneth Kratz appeared and spoke in six.[1] Of these news conferences, four occurred after Steven Avery's arrest and charging. Earlier news conferences referred many times to Avery, his family, and his family business. In those, Avery

[1] Others who appeared at various times include Mark Rohrer, Manitowoc County District Attorney; Manitowoc County Sheriff's Department investigators; Det. Mark Wiegert of the Calumet County Sheriff's Department; and Special Agent Thomas Fassbender of the state Division of Criminal Investigation. Not all spoke at the news conferences. Avery believes that Wiegert and Fassbender never spoke.

was described at least once before he was charged as a "person of interest" and state representatives discussed search warrants that were obtained for and executed at the Avery family's property.

On November 11, 2005, the special prosecutor announced prospective plans to charge Avery with first degree intentional homicide within the next four days. Presumably any charge and arrest warrant then still would have required a judge's probable cause finding. That same news conference featured comments about specific evidence and the prosecutor's opinion that Teresa Halbach's car key was "hidden" in Avery's bedroom to avoid detection and prosecution. The prosecutor also opined that, in his view, there no longer was a question about who was responsible for the death of Teresa Halbach.[2]

On March 1, 2006, a lengthy news conference discussed the arrest and statements of a then-unnamed relative of Steven Avery. At that time, the statements were inadmissible at trial against Avery, as the prosecutor presumably knew. The special prosecutor and the Calumet County Sheriff assured the public that, based on information now known to them, Avery was very much involved in the crimes they would charge.

---

[2] As it turned out, a witness claimed at the preliminary hearing that the car key was in plain view, Prelim. Tr. 77, 78-79 (December 6, 2005), contrary to the special prosecutor's claim on November 11 at the news conference. Further, the prosecution later amended its view of responsibility to add a second person, Brendan Dassey, to the murder theory.

The next day, March 2, the special prosecutor warned children and relatives and friends of Teresa Halbach not to watch the news conference then beginning, given its graphic content. He did not warn the citizens of Manitowoc County, as prospective jurors, not to watch. He then devoted a few seconds to a standard reminder that criminal defendants are presumed innocent until proven guilty. The remainder of the news conference, which ran to 25 minutes and 46 seconds, he devoted mostly to a dramatic recounting of the lurid allegations included in Dassey's criminal complaint.[3] Much of this the prosecutor presented in narrative fashion, as if an opening statement or closing argument in court. The special prosecutor also assured the public that law enforcement, based in part on undisclosed information in its possession, now "knows" what happened at the Avery property to Teresa Halbach.

Finally, on May 10-11, 2006, a Green Bay television station, WLUK Fox 11, aired statements of Manitowoc County Sheriff Kenneth Petersen in a two-part series. The sheriff commented on Avery's prior record, and specifically on a gruesome conviction ("the burning cat," as Petersen put it) that is 24 years old. He went on to say that, "If we wanted him out of the picture, like in prison, or if we wanted him

---

[3] On May 13, 2006, Dassey recanted key allegations included in that criminal complaint and repeated at the news conference. State Crime Laboratory testing since March 2 also has called sharply into question, if not altogether repudiated, other of those allegations. Dassey now has changed completely such basic claims as where the murder of Teresa Halbach occurred, how it occurred, who did what, and how she was restrained, just for example.

killed, it would have been much easier just to kill him, than it is to try and frame somebody." Then Sheriff Peterson opined that Mr. Avery will kill again because, "I think that's his personality."

The reporter described Sheriff Peterson as agreeing with Lawrence University Professor Gerald Metalsky's opinion that Mr. Avery will kill again if acquitted of the current charges.[4] Expanding on his views of Mr. Avery's character flaws, Sheriff Peterson finally opined that Mr. Avery "could be a con man, who knows."

According to www.wfrv.com, the eight news conferences, which were broadcast in the Green Bay media market (including Manitowoc County) in their entirety, ran to the following lengths:

November 5 – 10 minutes, 30 seconds

November 6 – 42 minutes

November 7 – 17 minutes, 32 seconds

November 8 – 7 minutes, 35 seconds

November 9 – 14 minutes, 6 seconds

November 11 – 26 minutes, 30 seconds

March 1 – untimed, but over 30 minutes

March 2 – 25 minutes, 46 seconds

---

[4] The report acknowledged that Metalsky never has met Avery or reviewed any records relating to Avery.

These news conferences also were excerpted repeatedly on newscasts by Green Bay and Milwaukee television stations.

III.

ARGUMENT

The Wisconsin Constitution includes two specific guaranties important here. First, a criminal defendant will be tried "by an impartial jury of the county or district wherein the offense shall have been committed." WIS. CONST. Art. I, § 7. Second, the defendant may not be "held to answer for a criminal offense without due process of law." WIS. CONST. Art. I, § 8. Further, in combination, the right to due process and the specific rights enshrined in Article I, §§ 7 and 8 mean a right to a fair trial. *See State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325, 330 (1990); *State v. Vanmanivong*, 261 Wis. 2d 202, 216, 661 N.W.2d 76, 83 (2003). Ordinarily, the state cannot put the accused to a choice between constitutional rights, in which he must sacrifice one to secure the other. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (defendant "was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another").

The Fourteenth Amendment to the United States Constitution also requires the states to afford a criminal defendant due process of law. Wisconsin's due process clause is broader in some respects than its federal analog, *see, e.g., State v. Knapp*, 285 Wis. 2d 86, 115-30, 700 N.W.2d 899, 914-21 (2005), so Avery relies independently on both the state and federal due process guaranties.

A Wisconsin defendant's right to a fair trial with a jury from the vicinage is absolute, in the sense that the state has no right to move for change of venue and a trial court cannot order venue changed over the defendant's objection. *State v. Mendoza*, 80 Wis. 2d 122, 139-45, 258 N.W.2d 260, 267-69 (1977). The *Mendoza* court wrote very clearly that the accused has a right to both a fair trial *and* a trial with a jury from the correct venue; the accused's right is not just to one or the other:

> It is the state's position that the right to be tried where the crime is committed is predicated on the right to an impartial jury. If an impartial jury is unobtainable, the state reasons, then the place of trial guarantee is unavailable.
>
> But because the venue right is grounded on policy considerations of its own, we think it unwise, particularly in light of the aforementioned precedent, to construe one right as contingent upon another. Both rights seek to insure the ultimate right to a fair trial. And in most cases, the rights are not mutually exclusive. The right to an impartial jury may be vindicated in ways other than the compelled relinquishment of the right to venue where the crime was committed.

Mendoza, 80 Wis. 2d at 143, 258 N.W.2d at 268-69.

Presumably, the Court needs little citation to authority for the proposition that procedural due process contemplates accusation in court, not on television, and a trial process in the circuit court, not in the broader court of public opinion. State officials, including a district attorney and sworn law enforcement officers, take oaths of office requiring them to uphold the federal and state constitutions. WIS. CONST. Art. IV, § 28; WIS. STAT. §§ 19.10 (district attorneys), 59.21(1) (sheriffs). That pledge perforce embraces a criminal defendant's rights to an impartial jury from the vicinage of the crime, due process, and a fair trial. When state actors take deliberate actions that foreseeably impair a defendant's right to a fair trial, or his right to an impartial jury, or his right to an impartial jury from the proper venue, then, they deny the defendant due process. For all of those rights are central to the process that the Wisconsin Constitution (and, in part, the United States Constitution) promise the accused. Actions inconsistent with those rights infringe directly upon the process that is due the defendant.

Specific examples may help. When a prosecutor and a sheriff speak at a news conference that they have arranged, to which they have caused media representatives to be invited, and at which a cluster of microphones sits visibly before them as they stare into cameras, they reasonably must anticipate that their

words will be broadcast publicly.[5] When they then use that extrajudicial forum to predict what charges they will file in a future bounded by four days, they are not confining themselves to the process established by law for initiation of a criminal prosecution. *See* WIS. STAT. § 968.02. Or when they use language so graphic and shocking that it prompts the district attorney to try to restrict the audience (on daytime television) to persons over 15 years of age, they reasonably can anticipate that they will affect adversely the accused's right to an impartial jury and a fair trial. When a prosecutor gives the functional equivalent of an opening statement, or a closing argument, outside court and on television before a defendant even has faced arraignment on some of the charges at issue, he again adopts a process outside the process established by law for argumentation and trial of cases. *Compare* WIS. STAT. § 972.10(6) (statutory procedure for closing arguments in criminal trials).

Since retaining counsel, Avery has made clear time and again his preference for a trial with a Manitowoc County jury. If possible, he wishes to avoid a change of venue — and has said that on the record as recently as the May 3, 2006, hearing. In other words, Avery intends to exercise his constitutional right to an impartial jury from Manitowoc County and has made no secret of that intention.

---

[5] Lawyers especially are on notice of the obligation to refrain from public comment that would threaten an impartial and fair trial. *See* WIS. SCR 20:3.6(a) ("A lawyer who is participating of has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter").

State actors have interfered with that right. Fully four televised news conferences in this case occurred after Avery's arrest. Two extrajudicial news conferences predicted future charges against Avery (November 11, 2005 and March 2, 2006). The prosecutor and sheriff commented more than once on specific items of evidence. The prosecutor offered a personal opinion that a car key was "hidden," and offered his personal opinions on why. He commented on what law enforcement officers "know," suggesting superior knowledge based on undisclosed reliable information. He opined indirectly but unmistakably on Avery's guilt of murder, saying on November 11 that there no longer is a question about who is responsible for Teresa Halbach's death, in his view. Yet the determination of whether there is a reasonable question about who is responsible for Halbach's death quintessentially is a jury's role under the process that is due a criminal defendant.

The Manitowoc County Sheriff's May 10-11 comments were more colorful still. Although much briefer, they arguably were as destructive of Avery's rights to a fair trial and to an impartial Manitowoc County jury as the special prosecutor and the Calumet County Sheriff's more extensive statements between November 2005 and early March 2006.

Fox 11, WLUK in Green Bay, ran footage of Sheriff Petersen in a two-part story aired on successive nights. He raised Avery's long past criminal record, including the most gruesome old allegation against Avery. Rather than confining

himself to suggesting Avery's guilt of this murder, which would have done damage enough to Avery's rights to a fair trial with an impartial jury from the sheriff's own county, Sheriff Petersen opined that Avery will commit a future murder if left free to do so. That in itself was a powerful hint that a jury properly should decide this case not on the evidence, but on fear of what Avery might do in the future if set free. Petersen's statement only can have a rare resonance in this particular case, where Avery is accused of committing this murder after his release from prison for a rape that he did not commit. And Petersen speculated that Avery may be a "con man," which was a character attack completely extraneous to the actual charges here.

Taken together, the state's actions effectively have destroyed Avery's opportunity to obtain an impartial jury in Manitowoc County. Indeed, some of the state's public comments have been so widely disseminated, in the Milwaukee media market and elsewhere, that they threaten Avery's ability to obtain an impartial jury in any of Wisconsin's 72 counties. When the state impairs the right to an impartial jury, it necessarily also hampers the right to a fair trial. There is no fair trial or due process if the fact-finder starts with a bias against the accused, rather than a presumption of innocence.

Dismissal is the logical remedy. Avery is entitled under the constitution to the rights he has described. The state has not worked to preserve those rights. Instead, state actors have taken steps that impede the exercise of those rights directly or

indirectly. Avery now faces deprivation of those rights, in part because of the state's actions. In their extrajudicial comments, state actors at times have engaged in a process other than the statutory process that is due to Avery. That conduct *ipso facto* is a denial of due process. And it is fundamentally unfair.

In other words, because Avery now cannot have a fair trial, cannot have an impartial jury, and cannot have an impartial jury from Manitowoc County in particular, he cannot have what the state constitution (and, partly, the federal constitution) guarantees him. State actors have placed Avery outside the constitutional framework, and have engaged in a process themselves that is partly outside that framework. But the state has no power to try a man other than within the constitutional framework, so necessarily the state here has no power to try Avery at all.

The Wisconsin Supreme Court nearly 40 years ago ruled against the relief Avery seeks here, holding that a possible conflict between the constitutional rights to a speedy trial and to a jury from the vicinage because of pretrial publicity did not warrant dismissal. *State ex rel. Schulter v. Roraff*, 39 Wis. 2d 342, 350-53, 159 N.W.2d 25, 30-31 (1968). Of course, *Schulter* concerned a conflict between the speedy trial right and the venue right, because of pretrial publicity. But the defendant sought dismissal because of pretrial publicity, so unless *Schulter* is distinguishable, Avery's

motion to dismiss probably cannot succeed unless and until the Wisconsin Supreme Court overrules *Schulter*.

As it happens, *Schulter* is distinguishable on material points. The only source of prejudicial pretrial publicity of which Schulter complained was a coroner's inquest that found him the proximate cause of the death of five people in a car accident. Schulter had supplied beer to the teenager who drove his car; four in that car and a fifth in another car died in the ensuing crash. The state later charged Schulter with two counts of contributing to the delinquency of a child.

Although the *Schulter* court noted that, "It is not the source of pretrial publicity which determines the prejudice and the remedy but the nature, amount and the effect of such pretrial publicity," *Schulter*, 39 Wis. 2d at 351, 159 N.W.2d at 30, the fact is that the publicity there arose from a statutorily-authorized official proceeding: the coroner's inquest. Declining dismissal, the court wrote that "we do not think such a drastic step is necessary or the facts here warrant the termination of all criminal proceedings against Schulter because of any outrageous deprivation of his rights resulting from the manner in which the inquest was held or the accompanying publicity." *Id.* at 351, 159 N.W.2d at 30. Further, the court explained, "We do not share Schulter's view that the publicity given the incident and the inquest was so great or so prejudicial that he cannot receive a fair trial using the available remedies to overcome any prejudice of the pretrial publicity." *Id.* at 352-53,

159 N.W.2d at 31. The remedies to which *Schulter* referred were voir dire, a change of venue, and perhaps a continuance.

This case is quite different. Notwithstanding any suggestion in *Schulter* to the contrary, the Wisconsin Supreme Court later held that, "The participation of the state in promulgating adverse publicity is relevant in determining whether the trial court abused its discretion in not granting a venue change." *Briggs v. State*, 76 Wis. 2d 313, 327, 251 N.W.2d 12, 18 (1977). So source of publicity does matter, in that respect.[6] In *Briggs*, the district attorney and sheriff conducted but one press conference. "The press conference was short and informational in nature. The identity of the defendant was not revealed, nor was the shooting incident described with specificity." *Briggs*, 76 Wis. 2d at 327, 251 N.W.2d at 18. In all, the record in *Briggs* reflected just twelve newspaper articles, seventeen transcripts of radio broadcasts, and seven tapes of television broadcasts. *Id.* at 326, 251 N.W.2d at 18.

This case hardly could be more different than *Schulter* and *Briggs*. The offense to Avery's rights to an impartial jury, specifically a jury from Manitowoc County, and to a fair trial generally here comes not from any court hearing or proceeding that statutes contemplate, as in *Schulter*. It comes from extrajudicial statements to the media. And this case features not one press conference, "short and

---

[6] Note that the defendant in *Briggs* was not seeking dismissal. He complained on appeal that the trial court should have granted a change in venue.

informational" without reference to the defendant or a specific description of the crime, as in *Briggs*. This case has seen eight news conferences, many of them lengthy, with four after the state filed charges. In those news conferences, the state discussed Avery repeatedly by name. On March 2, it presented a lengthy, lurid and detailed description of Teresa Halbach's alleged final hours. The state offered some opinions on evidence and guilt.

Then came Sheriff Petersen. That state actor went beyond opining on Avery's guilt on the present charges: he opined about the murder that Avery has yet to commit, mused that perhaps Avery is a "con man," and offered gruesome details of Avery's prior criminal record. Altogether, too, hundreds upon hundreds of television broadcasts have accumulated already. Court hearings have been webcast in full by streaming video. Newspaper articles in Manitowoc County and surrounding areas surely number in the hundreds, perhaps higher. The national media have taken notice, with the most extensive presentation coming on NBC's "Dateline" program. All of these facts separate this case meaningfully from *Schulter* and *Briggs*.

If the role of the state in *Schulter* did not cause "any outrageous deprivation" of rights, then, the same is not true here. The state's repeated, inflammatory extrajudicial statements, ranging from dramatic and detailed descriptions of the alleged crimes to opinions about evidence and guilt of these crimes, to his imagined

proclivity to murder in the future, to simple repetition of Avery's name and the progress of the investigation, have been a deliberate attack on Avery's rights to a fair trial and an impartial jury, including one from Manitowoc County. Possibly Sheriff Petersen best illustrates the state's attitude toward Steven Avery and his constitutional rights: Petersen surmised that Avery will kill again, and openly ruminated about the relative ease of simply killing Avery rather than framing him. Nothing about that was short, informational, or fair.

Schulter is distinguishable. Dismissal is appropriate here, although it can be limited to the counts concerning Teresa Halbach. The state's comments have been much more circumspect on the felon-in-possession charge.

If the Court declines to dismiss the five counts of the Amended Information at issue here, Avery notes that the Court's options are dwindling. The Court has refused Avery's request to continue the trial into February 2007 or later, which would allow the prejudice of pretrial publicity to dissipate. The Court has denied Avery's motion to enter an order limiting public comment by lawyers and law enforcement officers. Avery suggests one final lesser, and less favored, remedy. The Court might give the jury panel, from whichever county it comes, a very strongly worded curative instruction. For example, the Court might tell prospective jurors:

> The law of the state of Wisconsin requires preservation of a defendant's right to a fair trial before an impartial jury. Here, the state deliberately

> has tried to undermine Mr. Avery's rights to a fair trial and an impartial jury. Not only is Mr. Avery presumed innocent, then, but you should consider the state's efforts to deny him a fair trial an indication of the weakness of the state's case against Mr. Avery.[7]

Such an instruction would be a weaker remedy than Avery should have for the state's sustained disregard of his constitutional trial rights. But after declining the necessary continuance into 2007 and demurring to Avery's request for an order limiting public disclosure by lawyers and law enforcement officers, dismissal or a very strong curative instruction are all that remain.

IV.

CONCLUSION

For the reasons he explains here and in his motion to dismiss, Steven Avery asks the Court for an evidentiary hearing if the state opposes this motion. He also asks the Court to enter an order dismissing the five counts in the Amended Information concerning Teresa Halbach. The state has thwarted effectively Avery's

---

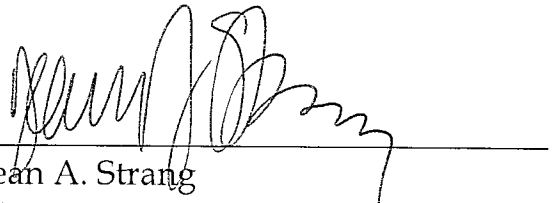
[7] In the different context of police failure to record interrogations, in spite of repeated judicial encouragement to do so, the Massachusetts Supreme Judicial Court two years ago imposed a requirement of a cautionary instruction. On defense request, a Massachusetts judge now must give a jury instruction "advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care." *Commonwealth v. DiGiambattista*, 442 Mass. 423, 447-48, 813 N.E.2d 516, 533-34 (2004). Further, if voluntariness of the statement is in dispute, "the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt." *DiGiambattista*, 442 Mass. at 448, 813 N.E.2d at 534.

right to a trial with a jury from the correct venue, Manitowoc County, and has impaired his right to a fair trial with any jury. The state's deliberate deprivation of the state constitutional right to trial with a jury from the vicinage denies fundamental fairness and due process. The fully adequate remedy is dismissal of the five charges directly affected. As a less favored alternative, Avery suggests a strongly worded curative instruction.

Dated at Madison, Wisconsin, June 15, 2006.

Respectfully submitted,

HURLEY, BURISH & STANTON, S.C.



10 East Doty Street, Suite 320
Madison, Wisconsin 53703
[608] 257-0945

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

BUTING & WILLIAMS, S.C.

400 Executive Drive, Suite 205
Brookfield, Wisconsin 53005
[262] 821-0999

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

F:\-clients\avery\mtn to suppress stmnt to sheriff.wpd