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UNDER SEAL

STATE OF WISCONSIN v. STEVEN AVERY
Case No. 05-CF-381

Defendant's Memorandum on Evidence of Wrongful Conviction and Accusations of Prisoners

07-13-06 Ordered Unsealed by the Court

SEALED

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S MEMORANDUM ON EVIDENCE OF WRONGFUL CONVICTION AND ACCUSATIONS OF PRISONERS

I.

INTRODUCTION

The state offers three sharply inconsistent motions. On the one hand, it wishes to exclude entirely any evidence of Steven Avery's wrongful conviction in 1985 and his ensuing mistaken imprisonment. On the other hand, it wants permission to offer evidence from three men who now make claims about what Avery told them *in prison* and it also wants to call Brendan Dassey, who on a 16-year old's hunch ascribes to Avery a novel motive to kill Teresa Halbach: to return to prison, which Dassey lately contends Avery wanted to do.

The state cannot have it both ways. If it wants evidence that Avery was in prison, that he spoke there with three prisoners, and that he wanted to go back, the jury must know that Avery ought not have been in prison in the first place and, far from enjoying that ill turn of fate, fought for 18 years to regain his freedom.

Indeed, even if the Court excludes evidence from the three inmates and Dassey's musings about Avery's motive, this jury should understand the reasons for bias of the Manitowoc County Sheriff's Department against Avery. Jurors otherwise cannot fairly weigh the testimony of Manitowoc County Sheriff's Department personnel. Manitowoc County deputies have prominent roles at every critical juncture of the investigation into Teresa Halbach's disappearance and death and at every critical point in the searches of the Avery property. Their bias against Avery is central to his defense.

II.

FACTS

In 1985, a judge sentenced Steven Avery to 30 years in prison for a rape and brutal attack that he did not commit. Avery served 18 of those years before DNA established that another man, Gregory Allen, was the solo rapist the victim described, not Avery. For most of those 18 years, Avery pursued post-conviction

remedies intended to restore his freedom.[1] The state resisted those efforts successfully until 2003. A second round of DNA testing, as technology improved, established that Avery was not the rapist and also identified who was. An intelligent, articulate victim (who knew neither man) had said from the beginning that only one man was involved in the attack, so Avery was innocent. The state relented and Avery walked out of Stanley Correctional Institution on September 11, 2003.

Thirteen months later, on October 12, 2004, Avery filed a civil rights action against Manitowoc County in federal court. The suit alleged that the Manitowoc County Sheriff's Department had violated Avery's civil rights. He sought up to $36 million in damages. In general, the suit arose from decisions of the Manitowoc County Sheriff's Department and the Manitowoc County District Attorney to ignore information from the City of Manitowoc Police Department suggesting that Gregory Allen, not Avery, had committed the rape. The sheriff's department brushed off the city police department's information and pursued Avery with myopic zeal. So the federal complaint alleged. Complaint ¶¶ 8-37, *Avery v. Manitowoc County*, No. 04-C-986 (E.D. Wis.). Time proved the Manitowoc Police Department right: Allen had committed the rape and assault, not Avery.

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[1] The decision in *State v. Avery*, 213 Wis. 2d 228, 570 N.W.2d 573 (Ct. App. 1997), sets forth some of that procedural history.

In the course of his lawsuit, Avery's lawyers deposed Kenneth Petersen on October 13, 2005. Petersen by then had become the Manitowoc County Sheriff. He also is the last sworn officer still employed by the Manitowoc County Sheriff's Department who was involved personally in the arrest and prosecution of Avery for the 1985 rape. His deposition occurred 18 days before Teresa Halbach disappeared.

While Petersen is the last officer in the department who played a role in 1985, he is not the last officer in the department linked to Avery's continued wrongful imprisonment. Both Lt. James Lenk and Sgt. Andrew Colborn may have played a role in 1994 or 1995, with Colborn acknowledging that he received a telephone call from a detective in another law enforcement agency relaying information that a person in custody had confessed to a Manitowoc County assault for which someone else was in jail. The Manitowoc County Sheriff's Department took no action on this information, and Avery spent another eight or nine years in prison.

According to another witness, Lenk may have known of that conversation well before Avery's release. Avery's lawyers deposed Lenk and Colborn in October 2005.

Roughly three weeks after their depositions in the federal civil suit, Lenk and Colborn both played significant roles in searches of Avery's property. Indeed, they were paired together during those searches. Lenk, for example, is the officer who

claims first to have seen the Toyota key lying in plain view on the floor of Avery's small bedroom, after earlier searches of the room had not disclosed such a key.

Although the state wishes to exclude information about why Avery was in prison, it does want the jury to know that he was there. Most directly, it wants that news to come from three men who met Avery in prison. According to the state's motion *in limine* (series 1, ¶ 6), it wishes to call Jessey Werlein, Anthony G. Myers, and Daniel Luedke. Myers and Luedke may be current state prison inmates. Werlein is not. All propose to testify to statements Avery made in prison, and two propose to supplement that testimony with claims that Avery drew diagrams for them. Dates of these supposed conversations are unclear, but at least in Werlein's case, they must have occurred before February 16, 1995.[2]

Finally, the state has announced its intention to call Brendan Dassey at Avery's trial. State's Motion *in Limine* (Series 1, ¶ 5). Dassey has spoken to the police several times. His most recent statement – to counsel's knowledge – was on May 13, 2006. During that statement to Investigator Mark Wiegert and Special Agent Thomas Fassbender, Dassey made a claim that Avery's reason for wanting to kill Halbach was to go back to prison. Dassey's theory was that Avery could not

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[2] CCAP shows that Werlein committed a disorderly conduct offense in Dane County on that date, as a habitual criminal. He received an eight month jail sentence, but does not appear to have served time in a state prison since then.

adjust to the outside world and wanted to return to prison's confines. This testimony necessarily would inform the jury of Avery's prior prison experience.

III.

ARGUMENT

For three reasons, the Court should allow evidence of Avery's wrongful conviction, his subsequent imprisonment for 18 years, and his federal lawsuit against Manitowoc County stemming from that wrongful conviction and imprisonment. Avery addresses those reasons in order of narrowest to broadest.

A. *Context.*

1. If the state has its way, a jury may hear that Avery made statements in prison and that he longed to return to prison. A jury will need a fair context in which to weigh those claims. As to any statements Avery made in prison after 1989, a jury necessarily would assume that Avery had done something wrong and would think less of his character and truthfulness. *Compare* WIS. STAT. § 906.09 (allowing impeachment by prior convictions). But after 1989,[3] that would be an incorrect and

[3] Until 1989, Avery also was serving a concurrent six-year sentence for endangering safety by use of a dangerous weapon, as counsel understands his criminal history. Avery would have reached his mandatory release date on that sentence in four years, or in about 1989. After the mandatory release date on the endangering safety conviction, Avery's time in prison was attributable only to the rape case on which he was innocent.

unfairly prejudicial inference. Avery was in prison, yes, but he was innocent; he had not committed the crime for which he was serving a 30 year sentence. In assessing Avery, and for that matter in assessing his supposed statements in prison, the jury would need that information. It would remove the unwarranted cloud from Avery's character and his credibility, if he testifies, and also would make more understandable why he may have made statements in anger, frustration or bitterness while in prison.

The Court should not admit any of this testimony from fellow inmates, who have come forward only years after the supposed statements, after information became public that allowed them to contrive their versions, and under circumstances in which at least two (those still in prison) may seek a benefit from the state. Two of the witnesses claim that Avery spoke of torturing women and raping them, and those two both claim he drew diagrams. This is other misconduct evidence, years old, and not similar to the charged crimes other than at the general level of a forcible sexual assault. There certainly is no evidence here that Avery had a "torture chamber" or bound Halbach in the manner the prisoners allege.

Further, the prisoners' testimony is cumulative and so suspicious in its timing that its probative value is slight. The third man claims that Avery spoke of burning a body as the best way to get rid of it. That statement is devoid of context, and is quite unfairly prejudicial. For that matter, if Avery made these statements or drew

these diagrams at all, he necessarily did so some years before the crimes alleged here. These witnesses should be excluded altogether under WIS. STAT. § 904.04.

2. As to Dassey's hypothesis of Avery's motive, the jury also needs information about the wrongful conviction to weigh this evidence. If he repeats his May 13 statement on this point, Dassey would have the jury believe that Avery so missed prison that he was willing to kill a near-stranger just to get back to a life of incarceration. The fact that Avery should not have been in prison on the rape conviction in the first place, and that he consumed much of his 18 years in prison trying to win his freedom, is necessary context that rightly may undermine the weight the jury decides to give Dassey's claim.

The Court ought exclude Dassey's speculation in any event. It is exactly that: speculation about another person's motives. Dassey does not ascribe to Avery any statement expressing this motive. The motive theory is outside Dassey's personal knowledge, then, and he is not competent to testify to it. WIS. STAT. § 906.02.

B. ***Bias as Impeachment.***

Wisconsin courts appreciate fully that "bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely." *State v. Missouri*, 2006 WI App. 74, ¶ 22, 714 N.W.2d 595, 601 (Ct. App. 2006) (reversed conviction because circuit court excluded other bad

acts showing police officer's bias); *State v. Williamson*, 84 Wis. 2d 370, 383, 267 N.W.2d 337, 343 (1978), *overruled on other grounds, Manson v. State*, 101 Wis. 2d 413, 304 N.W.2d 729 (1981). As the Wisconsin Court of Appeals explained succinctly just over four months ago, "Inquiry into a witness's bias is always material and relevant." *State v. Yang*, 2006 WI App. 48, ¶ 11, 712 N.W.2d 400, 405 (Ct. App. 2006). Indeed, the *Yang* court held that the trial court's refusal to allow the defendant to explore a witness's bias on cross-examination denied his constitutional right to confront the witness. *Yang* reversed the conviction and remanded for a new trial. *See also State v. Seymer*, 281 Wis. 2d 739, 747-53, 699 N.W.2d 628, 631-34 (Ct. App. 2005) (reversing a conviction for denial of confrontation where the trial court limited cross-examination on bias; the "right of confrontation includes the right to cross-examine adverse witnesses to expose the witness's motivation in testifying and any potential bias").

The United States Supreme Court interprets the Sixth Amendment right of confrontation the same way. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986); *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974) ("We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination"). In *Davis*, for instance, the trial judge precluded the defense from exploring the bias of a witness, Green; in part, the judge blocked the defense from showing that Green was on probation for

juvenile delinquency and had reason to please the prosecutor. The Supreme Court reversed the conviction. "The claim of bias that the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer." *Davis*, 415 U.S. at 317-18.

Here, Avery's wrongful conviction embarrassed the Manitowoc County Sheriff's Department and diminished its reputation — or so reasonable jurors could conclude. When he then filed a federal lawsuit, Avery put the actions of that department under a spotlight, and revealed the bias that led that department to ignore the true culprit, Gregory Allen, in favor of a single-minded pursuit of Avery. This further embarrassed and caused resentment within the department, jurors could find. It also raised the realistic specter of a huge judgment against the county. The prospect of being the cause of such a judgment reasonably could have affected the morale and attitude of all members of the sheriff's department and would have focused antipathy on Avery, jurors once again reasonably could conclude. Sheriff Petersen had a personal stake in this, in part because he is the current sheriff and in part because he was involved in the 1985 arrest and prosecution of Avery. As its top official, his attitudes and directives may affect the entire department. Indeed, they are supposed to do exactly that.

Lenk and Colborn also had a personal stake in Avery's lawsuit, although not dating to 1985. In 1994 or 1995, at least Colborn and perhaps Lenk had information

again pointing to Allen, and suggesting that the wrong man was in prison. Yet the Manitowoc County Sheriff's Department still took no action. Avery spent another eight or nine years in prison for a crime he did not commit. Shortly before Teresa Halbach disappeared, Petersen, Lenk, and Colborn all had been drawn into Avery's lawsuit for depositions. Their actions were in issue and they knew it.

A jury must have this information when it has to consider the import and weight of Lenk and Colborn, in particular, appearing at critical junctures in the current investigation and prosecution of Steven Avery. Although nominally the Calumet County Sheriff's Department was in charge of this investigation and had help from many other agencies, Lenk, Colborn, and other members of the Manitowoc County Sheriff's Department in fact played crucial roles. Despite more than one previous search of the small bedroom, for example, members of the Calumet County Sheriff's Department, the State Crime Lab, the Two Rivers Police Department, or other agencies did not find the Toyota key that the state contends bore Avery's DNA and was lying in plain view: Lenk did.

Without evidence of Avery's prior wrongful conviction, the role of the Manitowoc County Sheriff's Department in causing that injustice, and the basic facts of Avery's federal lawsuit, a jury could view Lenk and other members of the Manitowoc County Sheriff's Department simply as two-dimensional law enforcement officers doing a job. With this information, a very different, three-

dimensional view of them and their reasons for bias against Avery – even intense resentment of him – emerges for jurors' proper consideration.

C. *Bias as a Defense.*

But not just as a matter of context and confrontation does Avery have a right to present his prior wrongful conviction and his federal lawsuit to show bias of the Manitowoc County Sheriff's Department. This evidence goes to his basic right to present a defense to these charges.

Due process embraces, at its most fundamental, the right to be heard; to have one's say in response to an accusation. That is why, in a criminal case, the Fourteenth Amendment guarantees the right to present a defense. *In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence"); *Washington v. Texas*, 388 U.S. 14, 17-19 (1967); *Webb v. Texas*, 409 U.S. 95, 97-98 (1972) (per curiam). As the United States Supreme Court has explained, "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Sometimes, even generally applicable evidentiary rules must bend to accommodate that constitutional right to present a defense. *Chambers*, 410 U.S. at 295-303. That basic is the right to defend.

Avery has made no secret of his defense. From the outset, he personally has said to the media in his simple way that the Manitowoc County Sheriff's Department is picking on him, is out to get him. The idea is that he is being blamed for something he did not do. It is a simple defense. But it also is sufficient. And, at least from Avery's perspective, the very same department has done it once before. Indisputably, the Manitowoc County Sheriff's Department did pursue and arrest the wrong man in 1985.

Avery surely has the right to show a jury that it has happened again in 2005. What more likely is in dispute here is Avery's opportunity to convince a jury, if he can, that the second mistaken arrest was not random coincidence — not as improbable as a second lightning strike in the same place. Bias and reason for prejudice against Avery is what removes or undermines the hypothesis of randomness. In the world of competing metaphors about things that happen twice, this is not like a second lightning bolt. It is more like baseball: when a pitch sails up and inside the zone at a batter's head the first time, it is an accident; the second time, it is a beanball. We assume an indifferent (and therefore randomizing) Mother Nature in electrical storms; we do not assume an indifferent or randomizing human on the pitching mound. Bias or motivation of the actor is the difference. It is the link between the two occurrences, the refutation of the null hypothesis.

So bias itself may be a defense. *See Holt v. Virginia*, 381 U.S. 131, 137 (1965) (both a lawyer charged with contempt and his lawyer were held in contempt for filing a motion alleging bias of the judge; the contempt convictions denied due process, where bias was alleged in plain English, in words themselves inoffensive, as part of presenting a defense). Recently, the Wisconsin Court of Appeals reversed a conviction in *Missouri* where the entire defense appears to have been a police officer's bias against black people. As the *Missouri* court noted, "The defense is entitled to present its best defense." *Missouri*, 2006 WI App. 74, ¶ 25, 714 N.W.2d at 602.

In part, bias is Avery's defense, too. His wrongful conviction and the allegations, embarrassment, resentment, and possible liability associated with his federal lawsuit all explain why the Manitowoc County Sheriff's Department may be biased against him, or why members of that department have reason to want to believe that Avery committed the terrible crimes alleged here. Worse, members of the department may have reason to want Avery convicted even if they believe he did not commit some or all of the alleged crimes. This is payback, a reasonable jury could infer.

And at least foreseeably, this case involves no requested indulgence in bending the rules of evidence. It is an easier case than *Chambers*. Avery seeks only

to offer documents and testimony on cross-examination and direct examination that readily are admissible under the ordinary rules of evidence.

IV.

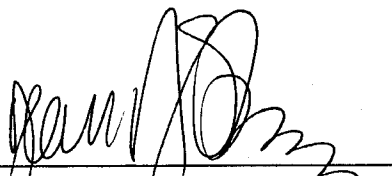
CONCLUSION

Steven Avery asks the Court to allow evidence, comment, and argument on his wrongful conviction, wrongful imprisonment, and lawsuit against Manitowoc County. These subjects bear directly and significantly on bias of members of the Manitowoc County Sheriff's Department against Avery. Members of that department are essential witnesses here; their credibility to the jury well may determine the outcome of this trial. Avery also asks the Court to exclude Brendan Dassey's speculation about his motives. Finally, he asks the Court to bar testimony from the three inmates.

Dated at Madison, Wisconsin, June 28, 2006.

Respectfully submitted,

HURLEY, BURISH & STANTON, S.C.



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