

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

STEVEN A. AVERY,

Defendant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

JUL 14 2006

CLERK OF CIRCUIT COURT

Case No. 2005-CF-381

**DEFENDANT'S MEMORANDUM ON
EXAMPLES OF PREJUDICIAL PRETRIAL PUBLICITY**

I.

INTRODUCTION

Steven Avery has assembled a sample of the massive pretrial publicity in this case, and submitted that to the Court (without objection from the state) in the form of 24 DVD's of television coverage of the investigation into Teresa Halbach's disappearance and this prosecution, and two banker's boxes of photocopies of newspaper articles, teleprompter scripts, radio broadcasts, and comment on the case from websites. This case has received saturation coverage. In part because of his change of counsel, from the Wisconsin Public Defender's office to retained counsel, and in part because the task would have been impossible, Mr. Avery made no effort

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(1)

to collect all media coverage of this case. The earlier Affidavit of Dean A. Strang outlines in overview the contents of the sample materials he did gather.

Because even that mass of information remains daunting (the television coverage alone apparently runs to more than 20 hours of back-to-back clips relating to this case), Avery now offers a sample of his samples. The discussion that follows is illustrative, not exhaustive, and Mr. Avery stands in the end on all of the evidence of pretrial publicity in the record.

II.

EXAMPLES

A. *Recurring Themes.*

The defense has submitted 24 DVD's of nothing but Avery clips, with at least one of the DVD's more than 2 hours long. Even that sample of television coverage stops in late April 2006 (when expense became prohibitive and the cumulative effect of the publicity clear). And there is a gap between mid-November 2005 and March 2, 2006, except for a very few Milwaukee clips in January.

1. Another feature to publicity since March 1, 2006, when Avery's case overlaps with Brendan Dassey's is the latter's lawyers blaming Avery. Understandably, but unfairly all the same, Mr. Dassey's lawyers (Ralph Sczygelski

and then Len Kachinsky) both have heaped blame on Mr. Avery when arguing on behalf of Mr. Dassey in court and in making extrajudicial comments to the media. The unfair prejudice to Mr. Avery has been exacerbated by repeated reports of Mr. Kachinsky claiming that Mr. Avery is trying to influence Mr. Dassey to fire Mr. Kachinsky or not to accept a plea agreement.

2. Next, the state conducted eight televised news conferences, at least. All eight named Avery, commented on inflammatory inadmissible information, and commented as well on evidence and evidentiary detail. Four came after the state charged Mr. Avery. This matters. "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). 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.

Again, Mr. Avery was identified by name from the beginning of the eight press conferences, including as a "person of interest." Details of the state's evidence also have become increasingly specific during the course of those news conferences, culminating in the gruesome, step-by-step recounting of the state's factual theory of torture and killing on March 2. Potential jurors likely will recall that version,

even though the state's theory now is shifting as forensic evidence debunks Mr. Dassey's March 1 version of events and as Mr. Dassey has changed his statement substantially on May 13.

3. The wrongful death action that the Halbach family filed has been covered extensively. Likely, that case is inadmissible in its entirety. Yet information about it has included:

- a. the fact that it was filed.
 - b. the Halbach family's claim of *fraudulent* transfer by Avery of settlement proceeds (denial of that motion received almost no attention).
 - c. the Halbach's lawyer, Patrick Coffey, was quoted saying of Avery that he got "caught with his hand in the cookie jar." In essence, Judge Deets found otherwise.
 - d. the amount of the § 1983 settlement was linked to Avery's attorney fee here.
4. The § 1983 case itself has been the subject of extensive coverage.
- a. the amount of settlement, which will seem like a lot of money to many people. It creates the false impression that Avery, or his lawyers, became wealthy because of his wrongful conviction, at the expense of Manitowoc County citizens.

- b. the fight between lawyers over share of settlement proceeds has been subject to considerable comment.
5. Many images have appeared on TV and the internet of Avery in a cartoonish jail uniform, sometimes in slow motion.
- a. he also has been displayed in visible shackles.
 - b. the court itself already has recognized the prejudice of those images. That is the reason the court ordered that Mr. Avery be permitted to appear in civilian clothing even at pretrial proceedings.
 - c. to counsel's observation, the depiction of Avery in shackles continued during and after the July 5, 2006 hearing, including with zoom shots on leg restraints and the process of handcuffing on at least one television station. *See, e.g.,* wfrv.com/video, "Avery's Attorney Says His Client Has Become a Poster Child For the Death Penalty" and "Avery's Attorneys Argue to Reduce Bail," both 7/5/06.
6. This case has become tied to the advisory death penalty referendum in the media.
- a. For example, a 3/9/06 editorial in the APPLETON POST-CRESCENT tied the two together.

- b. a 12/1/05 WISCONSIN STATE JOURNAL editorial did the same.
- c. a 5/5/06 MILWAUKEE JOURNAL SENTINEL article provided "news analysis" tying the two together.
- d. contrary to the state's argument on July 5, it is not defense counsel who has linked the death penalty referendum to the Avery prosecution. The television coverage shows repeatedly that politicians and the media themselves made that link long before counsel called it to the Court's attention on July 5. Avery agrees with the special prosecutor's observation on July 5 that the death penalty referendum has no place in the courtroom in this case. But politicians and the media have put it there, not the defense.

7. The Green Bay and Milwaukee television stations have given extensive coverage of suppression motions in both the Dassey and Avery cases. Through that coverage, the public has learned about potentially inadmissible material and defense efforts to exclude it. The Dassey case in particular involved not just an attempt to suppress evidence, but an attempt to suppress evidence that the public does not understand is inadmissible in Avery's case in any event, unless Dassey testifies. The Dassey suppression hearing was webcast live on WFRV-TV.

8. Some of the television coverage in 2005 reported on Mr. Avery's Department of Corrections prison files. These included letters to Mr. Avery's wife

at the time, Judge Hazelwood's comments in a hearing on child visitation rights, and comments of inmates. Much or all of this may prove inadmissible at trial.

B. *Specific Examples.*

1. 11/11/05 press conference: the special prosecutor makes claims of superior knowledge; and in Mr. Kratz's mind there is "no question" about who was responsible for Teresa Halbach's death. He also opined that her car key was "hidden" to avoid detection.

2. Mr. Kratz forecast a murder charge on 11/11/05 at a news conference. He did not note that any charge would require a judge's probable cause assessment.

3. 11/14/05: APPLETON POST-CRESCENT editorial, "Halbach Family Faces Tragedy with Strength." This is editorial comment on the case, lionizing the family of the victim and appealing to potential jurors' sympathy and consideration of other irrelevant facts.

4. 11/19/05: Teresa Halbach funeral broadcast live. This was heart-rending material obviously inappropriate for consideration by the jury venire. The Court presumably would not seat a juror who knew Ms. Halbach or her family well enough to attend her funeral. By television, though, now thousands had the experience of attending the funeral.

5. 3/1 and 3/2/06: On successive days in lengthy, gripping news conferences, the special prosecutor repeatedly informed the public of inadmissible statements by Brendan Dassey.

6. 3/2/06: news conference included warning of graphic content and almost 25 minutes of lurid allegations that were and are inadmissible against Steven Avery unless Brendan Dassey testifies.

7. 3/2/06: the news conference included another claim of superior knowledge, with Mr. Kratz telling the public that law enforcement now "knows" what happened at the Avery property.

8. 5/10-11/06: these are the dates of Sheriff Kenneth Petersen's appearance on the Fox 11 special series that has been discussed in depth. That two-part series also included:

- a. the criminal record of all Avery siblings
- b. long distant criminal record of Steven Avery, much of it not admissible (particularly a prejudicial description of "the burning cat," to use Sheriff Petersen's term).
- c. the May 10 segment included an "Attempted Murder" headline from Mr. Avery's 1985 case. This is especially prejudicial because the public in general thinks of the 1985 case as a rape case, and may conclude erroneously in this murder prosecution

- that Mr. Avery was charged with an earlier attempted murder case unrelated to the case on which he was convicted wrongly.
- d. claims that Mike Halbach thinks Mr. Avery is guilty (5/10 and 5/11) and thinks Mr. Avery is not going to heaven (5/10).
 - e. a misstatement of the burden of proof in criminal case by Sheriff Petersen who, commenting on a possible frame-up, said that the "fact is, they have to prove it" (5/10).
 - f. Sheriff Petersen asserted that it's Avery's personality to kill again (5/10).
 - g. the reporter explained that Mr. Avery's personality is "like a psychopath" (5/10). That unsupported opinion on character or mental disorder, using a colloquial term widely used (and misused) by the public, was obviously and highly prejudicial. The prejudice was compounded by the comments of Prof. Gerald Metalsky, whom the public could have taken as an expert on mental disorders.
 - h. three times, at least, Sheriff Petersen said that it would be easier just to kill Mr. Avery than to frame him (5/10 and 5/11).
 - i. Prof. Gerald Metalsky said that Mr. Avery is a psychopath, street smart, "knows how to work people," and will kill again

if acquitted (5/11). A prediction of future dangerousness, coming from someone presented as a responsible expert psychologist, is highly prejudicial and invites a jury to convict Mr. Avery not on the evidence in this case, but on fear of his future conduct. Prof. Metalsky further tied his opinion directly to the state's preferred outcome in this case, by referring to the possibility of an acquittal.

- j. Sheriff Petersen was described as agreeing with Prof. Metalsky's opinion that Mr. Avery would kill again if acquitted (5/11).
- k. Sheriff Petersen added that Mr. Avery "could be a con man" (5/11). Of course, fraud, deceit, or misrepresentation have nothing to do with this case. In context, that comment was an improper comment on Mr. Avery's credibility, long before he has to decide whether to testify at trial and outside the state's right to cross-examine Mr. Avery or to offer admissible evidence (if it has any) of Mr. Avery's character for truthfulness, even assuming that Mr. Avery puts that character trait in dispute.
- l. the court should note that defense counsel and all Avery family members other than one cousin, David Cherney, declined comment on the Fox 11 two-part series. Defense counsel

declined even after Dean Strang was told about some of Sheriff Petersen's comments.

9. 3/2/06: WTMJ-4 of Milwaukee spoke of "gruesome details" and an "eerie photo;" it also provided a caption that read "Pictures Tell the Story." This is just one example of several television and newspaper stories that examined a photograph of Brendan Dassey sitting across a kitchen table from Steven Avery in Crivitz, Wisconsin, the weekend of November 5-6, 2005. The tenor of these stories is that the viewer can determine by examining the eyes and facial expressions of Mr. Avery and young Mr. Dassey that they shared a terrible secret, and therefore could infer their guilt. The unfair prejudice of this superstition is obvious.

10. 2/27 – 3/5/06 (probably Sunday, March 5): WTMJ-TV of Milwaukee, the Charlie Sykes show, included a discussion of whether Mr. Avery should have been kept in prison even though innocent; Charlie Sykes speculated on how many women are alive today because Mr. Avery was in prison for 18 years. Now Mr. Sykes thinks "it was a good thing" that Mr. Avery was behind bars for a crime he did not commit. The implication of course, wholly unsupported by any evidence, is that Mr. Avery would have committed other rapes and murders in addition to the one here charged. This is flagrantly unfair speculation on Mr. Avery's character for violence or criminal conduct.

11. 3/6/06: Fox 6 in Milwaukee ran Mr. Avery's Calumet Co Jail mugshot, full screen. That mugshot has appeared repeatedly in television reports in both Green Bay and Milwaukee, on all or nearly all of the television stations in those two cities. The mugshot suggests guilt and is obviously unfairly prejudicial.

12. 3/6 – 3/12/06: at some point during this week, WISN-TV 12 in Milwaukee ran a report on "the Avery family criminal history," and more specifically "the history of sexual convictions in the Avery family" (part of that station's effort to explain "such violent, deviant behavior" as the police allege).

13. 11/7 – 11/13/05: during this week, NBC 26 in Green Bay displayed Mr. Avery's mugshot from jail, explained that Mr. Avery is in jail, repeated a discussion of the Toyota key in Steven Avery's bedroom, and made the editorial (as well as inaccurate) claim of "a large amount of blood" in Teresa Halbach's car.

14. 11/7 – 11/13/05: WLUK-TV, Fox 11 reported on DNA evidence, including who gave it, blood, and the Toyota key allegedly in Mr. Avery's bedroom. This channel also displayed the mugshot repeatedly, conducted an "in depth look at Steven Avery's history with the court system" with a graphic of his criminal history back to 1979, and reported details of search warrants and returns (much of which will not be trial evidence). Another story linked the Avery case to an "ongoing push to reinstate the death penalty here in Wisconsin" and the November death penalty referendum. The station discussed Mr. Avery's \$36

million lawsuit. Finally, it offered footage of people opining on camera that “he did this” or not.

15. 3/2/06: Action 2 News in Green Bay, after Mr. Kratz’s March 1 press conference, reported that authorities now have “a definitive set of answers” about what happened to Teresa Halbach. Mr. Avery was depicted in jail garb with shackles. The channel also reported Brendan Dassey’s claims about Avery, Brad Dassey blaming Steven, and minute details of Dassey’s story. Mr. Avery bears in mind the truth that Mr. Dassey’s statements are not admissible against Mr. Avery at trial unless Mr. Dassey testifies.

16. 3/2/06 and at many times after that date, to the present: NBC 26 (just for one example) and other television stations have reported repeatedly Brendan Dassey, his lawyer, and his family blaming Mr. Avery for the crimes and for Mr. Dassey’s predicament. NBC 26 stories included images of Mr. Avery in jail garb, details of search warrants and returns, details of the amended criminal complaint, removal of Avery’s photo from Wisconsin Innocence Project website, and the mugshot.

17. 3/2/06 and after: Action 2 News (again, just for one example) offered a detailed comparison of Brendan Dassey’s statements with the evidence allegedly gathered at the scene. The same channel quoted Sheriff Pagel, in a claim of undisclosed superior knowledge, saying that “we now know that the garage was

part of the crime scene.” That is a form of vouching that would be forbidden at trial, and that is unfairly prejudicial when jurors acquire it outside trial. This channel, too, ran footage of Mr. Avery in jail garb.

18. 3/4/06 and after: Fox 11 tied the Avery case to state legislators’ efforts to bring back the death penalty. That channel, too, depicted Mr. Avery in jail garb and shackles. It provided a detailed recounting of Brendan Dassey’s statements. Fox 11 also broadcast a story including speculation that Mr. Avery could not adjust to life after prison and got no help with parole because he was exonerated. This last information was highly speculative and suggested reasons altogether outside the evidence to assume Mr. Avery guilty.

19. 3/17/06: live coverage of court appearances in Green Bay (Fox 11 at least). Several television stations also reported this Court’s decision to increase Mr. Avery’s bail, which is a wholly inappropriate set of considerations for potential jurors.

20. 3/17/06: NBC 26 claims falsely that Avery “smiled, waved, and blows a kiss to the crowd.” That false claim intimated incorrectly and unfairly that Mr. Avery is a callous, unrepentant criminal cavorting in the limelight.

21. All eight news conferences conducted by Mr. Kratz and Sheriff Pagel aired in full on Green Bay stations, and some on Milwaukee television stations.

These news conferences were not short, purely factual, and devoid of mention of Mr. Avery's name, obviously.

22. Mr. Avery's preliminary hearing was broadcast in full, at least on one website. That included evidence and argument that may not be admissible at trial. It also concluded with a judicial finding of probable guilt, something that the Court would avoid scrupulously at trial and that well could prejudice potential jurors unfairly.

23. After March 1, 2006, Mr. Avery's sister Barb Janda appeared on several television reports (with her face pixillated or blurred) saying that Steven Avery "can rot in hell." The unfair prejudice of potential jurors learning that Mr. Avery's own relatives evidently believe him guilty is obvious and enormous.

24. In the same vein, several television reports at various junctures have included Candy Avery, Mr. Avery's sister-in-law, proclaiming him guilty. Early reports also quoted her asserting his probable innocence. These repeated exposures make it more likely that potential jurors will retain her opinions, and that they will conclude that subsequent information caused Candy Avery to change her mind about Mr. Avery's innocence.

25. Several television and newspaper reports commented upon the decision of the Wisconsin Innocence Project at the University of Wisconsin Law School to remove Mr. Avery from its website, out of respect for the Halbach family

and in deference to the current charges. The Wisconsin Innocence Project had played an important role in securing Mr. Avery's release from prison on the 1985 conviction. Potential jurors could draw an improper and unfair inference that the members of the Wisconsin Innocence Project (including lawyers and third-year law students who represented Mr. Avery) now question Mr. Avery's innocence on the current charges.

26. Both Green Bay and Milwaukee television stations have given extensive coverage to motions to dismiss and Mr. Avery's effort to pursue a permissive appeal. Counsel expect further coverage of the July 19 hearing on Mr. Avery's suppression motion. All of those motions and the attempted permissive appeal issues, delve into extraneous and inadmissible matters, and threaten unfair prejudice.

27. At Brendan Dassey's most recent bail hearing, Mr. Kratz revealed that in May Mr. Dassey alleged that he and Mr. Avery planned the charged offenses for days. This allegation again rests on Mr. Dassey's presently inadmissible statements.

Again, these are exemplary highlights of the prejudicial pretrial publicity only. Mr. Avery continues to rely on the cumulative prejudicial effect of all of the newspaper, television, radio and internet coverage of Ms. Halbach's disappearance, the prosecution of Mr. Avery, and the related prosecution of Mr. Dassey, which

regularly has spilled over with inadmissible information and inferences as to Mr. Avery. This case has received saturation coverage from the outset. That has included editorial comment, obviously, but even more commonly has linked the criminal prosecution of Mr. Avery to extraneous considerations for jurors — from Mr. Dassey’s inadmissible statement and his case, to civil actions by Mr. Avery and more recently by the Halbach family, to contests over lawyer’s fees, to actions of the Wisconsin Innocence Project, to Avery and Halbach family members’ comments on guilt, to an advisory death penalty referendum.

III.

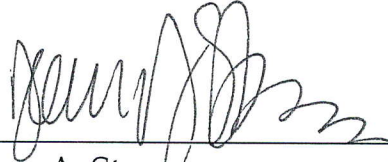
CONCLUSION

If, and only if, the Court (a) denies his motion to dismiss without prejudice the charges relating to Teresa Halbach, then (b) denies a continuance of the trial to a date in or after February 2007 with an accompanying order limiting public comment by lawyers and law enforcement agents involved in this prosecution, and finally (c) elects to proceed under WIS. STAT. § 971.22 to the exclusion of WIS. STAT. § 971.225, Steven Avery will consent to waive his state constitutional right to a trial in the correct venue, Manitowoc County. His consent to a change of venue is conditioned expressly on these three events.

Dated at Madison, Wisconsin, July 13, 2006.

Respectfully submitted,

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