STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

STATE'S RESPONSE TO MOTION TO SUPPRESS STATEMENTS TO NEWS REPORTERS ON SIXTH AMENDMENT GROUNDS

INTRODUCTION

The defendant seeks to suppress statements he made to members of the electronic media during in-person interviews conducted at the Calumet County jail after criminal charges were filed and while being detained on bail. The state is aware of three such interviews.[1] The defendant does not contest the voluntariness of his statements to the reporters, he contends that admission of these post-charging statements violate his Sixth Amendment right to counsel. In addition, the defendant does not challenge statements he made in telephone calls that he placed to the media while in custody at the Calumet County Jail. Moreover, it does not appear that the defendant is challenging any telephone calls initiated by the defendant from the jail to any other person. Because the state did not deliberately, directly, or indirectly elicit defendant's statements

[1] Upon information and belief, the defendant was twice interviewed by Jennifer Kolbusz of WFRV-TV Channel 5 in Green Bay about thirty days apart; and once by Emily Metesic WBAY-TV Action News 2, Green Bay on about November 14, 2005.

to the reporters, no Sixth Amendment violation occurred and the court should find these statements admissible.

SUMMARY OF ANTICIPATED FACTS

The state expects the evidence to show that although the Calumet County Sheriff's Department permitted the defendant to be interviewed on these occasions, the reporters did not act as agents of the state. The evidence will show the reporters were not asked by the sheriff's department to interview the defendant. The reporters simply asked to see and speak with the defendant. Once the defendant agreed to be interviewed and informed the sheriff's department that he was willing to be interviewed, the sheriff's department did not seek to control or effect the intended questioning of the defendant by the reporters. The reporters were not told what they could or could not ask about. The interview content was not directed or controlled in any manner. The fact that the sheriff's department permitted the interview and permitted it to be recorded is irrelevant to the analysis of whether the defendant's Sixth Amendment right to counsel was violated.

ARGUMENT

"Thus, the Sixth Amendment is not violated whenever -- by luck or happenstance -- the State obtains incriminating statements from the accused after the right to counsel has attached." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). Avery asserts that the statement he voluntarily made to a reporter violated his Sixth Amendment right to counsel. Specifically, he suggests that the state's acquiescence in allowing him to be interviewed constitutes the state's deliberate

elicitation of these statements and therefore they should be suppressed. The state disagrees.[2] While Avery's Sixth Amendment right to counsel had attached, and while members of the media deliberately elicited incriminating statements from him, none of the media acted as an agent of the state, a necessary prerequisite to finding a Sixth Amendment violation. Therefore, the court must deny the motion to suppress.

I. THE COURT SHOULD NOT SUPPRESS AVERY'S POST-CHARGING STATEMENT TO REPORTERS WHO DELIBERATELY ELICITED STATEMENTS IN THEIR CAPACITY AS PRIVATE PERSONS.

In *State v. Dagnall*, 2000 WI 82, 236 Wis. 2d 339, 612 N.W.2d 680, the Wisconsin Supreme Court summarized Sixth Amendment jurisprudence.

> ¶ 28. . . . The Sixth Amendment to the United States Constitution, in pertinent part, provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The Supreme Court has applied the Sixth Amendment right to counsel to the states through the Due Process Clause of the Fourteenth Amendment.
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> ¶ 29. The Sixth Amendment right to counsel offers constitutional safeguards to the accused once the State initiates adversarial proceedings. The right protects the unaided layperson at critical confrontations with his expert adversary, the government, after the adverse positions of government and defendant have solidified with respect to a particular crime. The Sixth Amendment right fulfills this objective in two ways. First, it redresses the imbalance between the State, a powerful, sophisticated, and determined adversary, and the accused, allowing the accused to rely upon the services of an attorney as a medium during critical stages

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[2] In his motion, Avery also relies on Wis. Const. art. I, § 7 as a separate ground for bringing this motion. However, in his brief he does not argue that the analysis is different or that the Wisconsin's Constitutional right to counsel provides greater protection than the Sixth Amendment of the United States Constitution. The Wisconsin Supreme Court has held that the Wisconsin Constitution's right to counsel does not afford greater protection than the Sixth Amendment right to counsel under the United States Constitution. *See State v. Sanchez*, 201 Wis. 2d 219, 548 N.W.2d 69 (1996) (court rejects argument that court should provide greater rights under Wis. Const. art. I, § 7, than federal courts have recognized under the Sixth Amendment right to effective assistance of counsel); *see also State v. White*, 2004 WI App 78, 271 Wis. 2d 742, 750, 680 N.W.2d 362 (finding right under Wis. Const. art. I, § 7, coterminous with Sixth Amendment right for purposes of effective assistance of counsel claims). In the absence of any case law suggesting a different result, the state believes the court's analysis is the same under either the state or federal constitutional provision.

> of a criminal proceeding. Second, it ensures fairness in criminal proceedings by recognizing "the obvious truth that the average defendant does not have the professional legal skill" to confront that expert adversary single-handedly during critical confrontations.
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> ¶ 30. The right to counsel under the Sixth Amendment arises after adversary judicial proceedings have been initiated--in Wisconsin, by the filing of a criminal complaint or the issuance of an arrest warrant. The right extends to pretrial interrogations. The Sixth Amendment right thus protects a defendant during the early stages of a prosecution "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." Police and prosecutors are under an affirmative obligation not to circumvent or exploit the protections guaranteed by the right.
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> . . . .
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> ¶ 54. The Sixth Amendment right to counsel is not violated when "by luck or happenstance--the State obtains incriminating statements from the accused after the right to counsel has attached." The defendant's unguarded outburst in Patterson appears to fall within this category. Moreover, an accused person may initiate contact with authorities without consulting his or her attorney. Chief Justice Burger noted in Jackson that behavioral and theological specialists have long recognized "a natural human urge of people to confess wrongdoing." Incriminating statements made by a defendant after the defendant has contacted authorities are not per se inadmissible; but after an attorney has been retained or appointed, an accused's unsolicited contact with the police must be viewed with skepticism and will require authorities to show that incriminating statements were in fact voluntarily given. The authorities themselves may not initiate contact for questioning about the charges.

Citations and quotations omitted.

In *Massiah v. United States,* 377 U.S. 201 (1964), the Supreme Court recognized that the Sixth Amendment "forbids the use of incriminating statements 'deliberately elicited by law enforcement authorities' subsequent to a defendant's initial appearance and request for counsel." *State v. Estrada*, 63 Wis. 2d 476, 493, 217 N.W.2d 359 (1974). Said another way, a defendant's post-charging statement is inadmissible if it is 1) deliberately elicited; and 2) by a government agent. Subsequent Supreme Court decisions have explored *Massiah*'s parameters in the context of police informant contacts with charged, represented defendants.

In *United States v. Henry*, 447 U.S. 264 (1980), police placed a paid informant into a jail cell for the purpose of listening, but not initiating or questioning, with Henry regarding his charged offense. Because the state had intentionally created a situation likely to induce him to make an incriminating statement, the Court found a Sixth Amendment violation. In *Henry*, the Court noted that Henry was unaware that his cellmate was acting for the government and, therefore, he could not have waived his assistance of counsel.

In *Maine v. Moulton*, 474 U. S. 159, 176 (1985), Moulton's codefendant entered into a cooperation agreement with authorities. Moulton met with the codefendant to discuss trial strategy for the charged case. The codefendant did not disclose his relationship with Moulton. Authorities surreptitiously recorded Moulton's contacts with the codefendant with the codefendant's consent. Officers directed the codefendant not to question Moulton, but Moulton made incriminating statements in response to the codefendant's statements. The Supreme Court found a Sixth Amendment violation as the conduct of the state's agent, the codefendant, was likely to result in incriminating statements without counsel.

The Court's subsequent decision in *Kuhlman v. Wilson*, 477 U.S. 436 (1986), limits *Henry* and *Moulton*'s scope. In *Kuhlman*, investigators placed an informant near Wilson for the purpose of "listening" to his conversations. He made no effort to stimulate conversation. The court found no Sixth Amendment violation occurred. The Court held:

> [A] defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Id. at 437.

For two reasons, Avery's situation is fundamentally different from the situations presented in *Henry*, *Moulton* and *Kuhlman*. First, in each of the above cases, the person contacting the charged defendant was a state agent, taking direction from law enforcement and gathering information on behalf of law enforcement. Neither Kolbusz nor Metesic has any relationship with the Calumet County authorities. They were given no instructions by the authorities whatsoever regarding the direction or content of their interviews. The statements/interviews are the product of private party journalism, not police-initiated efforts to prod Avery into making additional incriminating statements.

Second, the state agents in *Henry*, *Moulton,* and *Kuhlman* were "spies" who had concealed their roles as police informants, and, unbeknownst to the targets, reported contacts to authorities. In contrast, no one deceived Avery as to the identity of these reporters. Avery knew who the reporters were and why they were there; they wanted to get "his side" of the story out. Avery had counsel and clearly must be aware of his right to consult with counsel given his extensive experience with the criminal justice system. Nothing prevented him from contacting his attorneys to consult with them before deciding to speak with the reporters. Finally, Avery knew virtually everything he stated to the reporters would become a matter of public record. The interviews were "on camera" and thus recorded with his permission. Otherwise, what would be the point of the interviews if they were not to be recorded and aired for public consumption. The deception in those other cases that triggered Sixth Amendment concerns is not present in Avery's case.

II. A SIXTH AMENDMENT VIOLATION OCCURS ONLY IF A PRIVATE PERSON BECOMES A STATE AGENT.

State v. Lee, 122 Wis. 2d 266, 362 N.W.2d 149 (1985), is the controlling precedent. In *Lee*, the Wisconsin Supreme Court observed:

> An inculpatory statement will be suppressed if the police intentionally create a situation, by directing, controlling or involving themselves in the questioning of a person in custody by use of a private citizen, which is likely to induce an accused to make incriminating statements without the assistance of counsel. *United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Conversely, a confession to the police will not be suppressed when prompted by the advice of a third party in the absence of influence by the authorities on these communications or if the influence is only incidental. *See e.g., Cunningham v. State,* 248 Ga. 835, 286 S.E.2d 427 (1982); *State v. Rebstock,* 418 So.2d 1306 (La.1982), *cert. dismissed,* 459 U.S. 1190, 103 S.Ct. 841, 74 L.Ed.2d 1032 (1983); *State v. Scott,* 626 S.W.2d 25 (Tenn.Cr.App.1981); *Caffo v. State,* 247 Ga. 751, 279 S.E.2d 678 (1981); *Com. v. Johnson,* 273 Pa.Super. 14, 416 A.2d 1065 (1979); *State v. Snethen,* 245 N.W.2d 308 (Iowa 1976).

Lee at 275-76.

> If police involvement is sufficiently extensive, the actions of the citizen will be treated as the effective equivalent of actions by the police. The question to be addressed in each case is whether the citizen was acting on behalf of the police. This is a question of law which must be reviewed independently by this court.

Lee at 276.

> Among those factors to be considered are the following: **1)** whether it was the citizen or the police who initiated the first contact with the police, e.g., *Thomas* at 135; *Surridge* at 252; *State v. Schad,* 129 Ariz. 557, 633 P.2d 366, 374 (1981); **2)** whether it was the citizen or the police who suggested the course of action that was to be taken, *cf., Thomas* at 135; *Surridge* at 252; *Schad,* 633 P.2d at 374-75; **3)** whether it was the citizen or the police who suggested what was to be said to the suspect; in other words, was the citizen, in essence, a message carrier for the police, *cf., Henry,* at 271; *Thomas* at 135; *Surridge* at 252; *Schad,* 633 P.2d at 374-75; *Bottoson v. State,* 443 So.2d 962 (Fla.1983); **4)** whether it was the citizen or the police who controlled the circumstances under which the citizen and the suspect met; whether the control was extensive or incidental, *e.g., Henry,* at 270; *Surridge* at 252; *Thomas* at 135.

Lee at 276-77.

In the case at bar, the state expects the evidence will show (and defendant Avery implicitly concedes as much in his brief) that the sheriff's department did not initiate the first contact; except, of course, to simply see if the defendant was agreeable to being interviewed. All three contacts occurred at the request of the media. Second, the media suggested the course of action; *i.e.*, provide the defendant with the opportunity to get his side of the story out. Third, clearly it was the media who controlled the interview. They were in the driver's seat and did not take their cues from the sheriff's department. They decided what questions to ask and in what order to ask them. Lastly, while it was clear that the sheriff controlled the circumstances of where the interview was to occur, they did not control anything with respect to the interview itself. The sheriff's department did not participate in the interviews. The fact that the sheriff controlled the "place" where the interview occurred does not outweigh the other factors and tip the scale in favor of finding that the media acted as agents of the sheriff. Unlike Mrs. Lee, the media did not become agents of the sheriff.

III. THE SIXTH AMENDMENT DOES NOT BAR THE ADMISSIBILITY OF INMATE DEFENDANT'S POST-CHARGE STATEMENTS TO AN INDEPENDENT REPORTER.

Courts in other jurisdictions have uniformly rejected Sixth Amendment challenges to statements made to third parties such as reporters, often in situations where authorities provide access similar to that of the Calumet County Sheriff's Department.

Texas appellate courts have repeatedly denied challenges similar to Avery's claim. In *State v. Hernandez*, 842 S.W.2d 306 (Tex. Ct. App. 1992), the court rejected a Sixth Amendment challenge to the admissibility of an inmate's post-charging statement to a reporter. The *Hernandez* court emphasized that *Massiah* is predicated on state action and has never extended "to situations where an individual, acting on his own initiative, deliberately elicits incriminating

information from an accused and he is not a government agent." *Hernandez*, 842 S.W.2d at 314. In reviewing the case law, the court made the following observations. First, the creation of an agency relationship between law enforcement and a third party

> depends upon the existence of an agreement between the government or State and the informant at the time the elicitation takes place. Where the government or State has entered into an arrangement with a jail inmate or private citizen agreeing to pay him for incriminating statements from another inmate, an agency relationship may have been established. However, an inmate or private citizen who has not entered into an agreement with the government and who reports incriminating evidence out of conscience or even an "an encouraged hope to curry favor" is not acting as a government agent. An individual's actions will not be attributed to the State if no promises are made for the individual's help and if nothing was offered to or asked of that individual.

Id. at 314-15. The *Hernandez* court found that the reporter was not a state agent as he had no relationship with the state and was not subject to the state's control. Hernandez additionally argued that while the reporter was not a state agent, authorities violated his Sixth Amendment rights by creating an environment likely to induce him to make deliberately elicited incriminating statements. Reviewing *Massiah*, *Henry*, and *Moulton*, the *Hernandez* court rejected this claim finding that these decisions are preconditioned upon the existence of a state agent. When a third party deliberately elicits statements in conformity with jail policies rather than through special favors, the Sixth Amendment is not violated.

In *Escamilla v. State*, 143 S.W.3d 814 (Tex Crim. App. 2004), officers followed their established practice in permitting a reporter to interview Escamilla in response to Escamilla's consent to a reporter's request for an interview. Prior to the interview, an investigator discussed with the reporter the possibility that the reporter might have success in getting Escamilla to confess and that he wanted the reporter to get him to confess. Despite face-to-face involvement contact and police efforts to encourage an interview, the Texas Criminal Court of Appeals found no Sixth Amendment violation. The court noted that despite the officer's expressed hope to the reporter that Escamilla would confess to the reporter, the reporter did not become a state agent.

Finally, the court relied upon the fact that the officer provided no direction to the reporter regarding interview questions. *Id.* at 823-24.

In *Hall v. State*, 67 S.W.3d 870 (Tex Crim. App. 2002), *cert. granted*, judgment vacated on other grounds, and case remanded for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall v. Texas*, 537 U.S. 802 (2002), codefendants consented to a reporter's request for interviews. While deputies permitted the interviews, no authority suggested that they conduct the interview, much less suggested any questions for them to ask. The Court concluded that because the reporters were not state agents, Hall's Fifth, Sixth, and Fourteenth Amendment rights were not violated through the introduction of their incriminating statements to the reporter.

In *Resnover v. State*, 460 N.E.2d 922 (Ind. 1984), *cert. denied* 469 U.S. 873 (1984), the Indiana Supreme Court found no Sixth Amendment violation occurred when an inmate made incriminating statements to a reporter who interviewed him at the inmate's request in jail. Critical to its holding was the finding that law enforcement did not direct or encourage the reporter to act as its agent and did not misrepresent the reporter's status to the defendant. In *Sears v. State*, 668 N.E.2d 662, 668 (1996), the Indiana Supreme Court extended this principle to inmate statements made to reporters, precharging. The *Sears* court concluded that *Miranda* did not apply to a custodial defendant's statements to a reporter not acting as a state agent.

The *Sears* court relied upon the rational in *People v. Massie*, 66 Cal. 2d 899, 428 P.2d 869 (1967). In *Massie*, the California Supreme Court rejected a challenge to the admissibility of a confession made to a television reporter. Critical to its holding was the finding that the reporter did not act as an agent for the police. *See also People v. Price*, 63 Cal. 2d 370, 46 Cal. Rptr. 775, 406 P.2d 55, 61 (1965) (finding granting interview request to reporter not acting in any respect on behalf of state did not interfere his right to counsel under *Massiah*).

In *Wilcher v. State*, 697 So.2d 1087 (Miss 1997), the Mississippi Supreme Court rejected a Sixth Amendment challenge to the admissibility of an inmate's statements to a reporter. While acknowledging that the interview would not have occurred without assistance of prison staff, the government did not exercise control, involvement or direction during the interview. As such, the inmate could not establish requisite proof of state action necessary to support a Sixth Amendment claim.

In *United States v. Surridge*, 687 F.2d 250 (8th Cir. 1982), a friend met with Surridge in the jail and made incriminating statements. Applying *Henry*, the Eighth Circuit denied a Sixth Amendment challenge to the statement's admissibility, finding that the friend was not acting on the government's behalf or at their direction. It rejected the argument that the Sixth Amendment creates "an affirmative duty on the part of the police to prevent a private citizen from acquiring information from a person in custody and giving it to the police." *Id.* at 255. It concluded that authorities have no duty to bar visits with individuals who may become potential informants as long as the police do nothing to direct, control, or involve themselves with the private citizen's questioning.

Taken together, these decisions uniformly require the existence of a relationship between the state and the third party that elicits the incriminating statement. Furthermore, merely providing an opportunity for private parties, including reporters, to have contact with a charged defendant does not create a relationship between the state and the private party that would trigger protections of the Sixth Amendment. Neither the defendant's motion nor will the record support the claim that law enforcement officials had an agency relationship with news reporters Metesic and Kolbusz. There is no evidence in the record that authorities compensated them for their efforts to obtain information from Avery or that they directed or suggested that they ask Avery any questions.

Taken to its extreme, Avery's interpretation of the Sixth Amendment would impose a duty on jail staff to silence him when he voluntarily chose to discuss his case with third parties, including reporters, once the state has charged him. Such a practice in certain circumstances could violate a defendant's First Amendment right to free speech.

CONCLUSION

For the above reasons, the state respectfully requests the court to find that the reporters were not state agents acting under the supervision, direction or influence of law enforcement officials when Avery made statements to them that were later published to the general public. The state did not deliberately elicit Avery's voluntary statements to the reporters. As such, this court should permit the introduction of the statements and the recordings of them in the above case.

Dated this 17th day of July, 2006.

Respectfully submitted,

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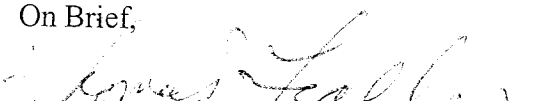
On Brief,



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