HURLEY, BURISH & STANTON, S.C.
ATTORNEYS AT LAW

PO BOX 1528
MADISON, WI 53701-1528

UNDER SEAL

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

Defendant's Memorandum Opposing Admission of Prisoners' Claims

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 OPPOSING ADMISSION OF PRISONERS' CLAIMS

I.

INTRODUCTION

Three current or former prison inmates spoke up after learning that the state had charged Steven Avery with Teresa Halbach's murder. Although details vary, two claim that Avery, at some earlier unspecified time, made statements about torturing or binding women and drew diagrams. The third claims that Avery said that the way to get rid of a body is to burn it. Setting aside the fact that he denies making them, Avery thinks the statements properly excluded under WIS. STAT. § 904.03.

II.

FACTS

In short, the inmate statements the state seeks to offer are as follows.

A. *Jesse Werlein.* While at Green Bay Correctional Institution, Avery described plans to abduct, rape, torture and kill women. Avery drew a diagram of a torture chamber.

B. *Anthony Myers.* While at Green Bay Correctional Institution, Avery spoke of bondage and tying women to a wall. Avery drew a diagram of an uncomfortable position in which to bind women. Avery spoke of dominance or anger toward women.

C. *Daniel Luedke.* While at Fox Lake Correctional Institution, Avery had conversations in which he said that the best way to get rid of a body was to burn it.

None of the inmates offer corroboration of their statements. Werlein and Myers evidently have not produced the alleged diagrams. None of the inmates reported these claims until after massive publicity about the state's murder charge against Avery. Given the prisons in which they claim Avery made his statements, if Avery made the statements, they were many years ago. Luedke and Myers evidently remain prison inmates. Werlein has been out of prison since before 1995.

III.

ARGUMENT

Wisconsin courts generally exclude proof of other bad acts. *State v. Edmunds*, 229 Wis. 2d 67, 79, 598 N.W.2d 290, 296 (Ct. App. 1999) ("As a general rule, evidence of prior bad acts is not admissible because of the risk that the jury will find the defendant had bad character in general and then convict him/her of the specific crime being tried, as a punishment for being a 'bad person'"); WIS. STAT. § 904.04(1). At most, only one of the six charges against Avery loosens the general rule excluding uncharged acts under this state's "greater latitude" rule: the first degree sexual assault count. Even that one is debatable. While the Wisconsin Supreme Court wrote in *State v. Davidson*, 236 Wis. 2d 537, 555, 613 N.W.2d 606, 615 (2000), of a greater latitude rule in "sexual assault cases," the *Davidson* court hastened to add a qualification. It appended to the phrase "sexual assault cases" the explanatory clause "particularly cases that involve sexual assault of a child." *Davidson*, 236 Wis. 2d at 555, 613 N.W.2d at 615; *see also id.* at 559, 613 N.W.2d at 617 ("especially those [sexual assault cases] involving crimes against children"). And every case that *Davidson* discussed in support of the greater latitude rule from its beginning concerned a sexual assault of a child. *Id.* at 555-60, 613 N.W.2d at 615-17. Teresa Halbach, of course, was an adult in her mid-20's. This case does not square with the

facts of most cases that apply the greater latitude rule, or with the likely reasons for the rule.

The proponent of other acts evidence bears the burden of proving its admissibility under Wisconsin's three-step test. *State v. Sullivan*, 217 Wis. 2d 768, 774, 576 N.W.2d 30, 33 (1998). Later, an appellate court decides whether the circuit court exercised appropriate discretion. That means the circuit court must examine the relevant facts, apply a proper standard of law, and use a demonstrably rational process to reach a conclusion that a reasonable judge could reach. *Sullivan*, 217 Wis. 2d at 780-81, 576 N.W.2d at 36.

The three steps that *Sullivan* requires are: first, "determine whether the other acts evidence is offered for a permissible purpose" under § 904.04(2), which provides an illustrative (not an exhaustive) list. *Sullivan*, 217 Wis. 2d at 783, 576 N.W.2d at 37. Second, decide whether the other acts evidence is relevant. *Id.* at 785, 576 N.W.2d at 38. And third, decide whether the danger of unfair prejudice substantially outweighs probative value. *Id.* at 789, 576 N.W.2d at 39-40; WIS. STAT. § 904.03.

The second step, relevance, itself has two components. A circuit court must (a) decide "whether the evidence relates to a fact or proposition that is of consequence to the determination of the action; and (b) assess probative value, "that is, whether the evidence has a tendency to make a consequential fact more probable

or less probable than it would be without the evidence." *Sullivan*, 217 Wis. 2d at 785-86, 576 N.W.2d at 38. Although Wisconsin has no general rule on the required degree of similarity between the other acts and the charged offense, *id.* at 787, 576 N.W.2d at 39, "[t]he probative value of the other acts evidence . . . depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." *Id.* at 786, 576 N.W.2d at 38. "The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence." *Id.* at 786-87, 576 N.W.2d at 38.

Within that framework, Avery now undertakes to "clearly articulate" his reasons for excluding the state's proffered evidence by applying "the facts of the case to the analytical framework," as the *Sullivan* court bid him to do. *Id.* at 774, 576 N.W.2d at 33. He treats the Werlein and Myers statements together, and addresses the Luedke statement separately.

A. *Werlein and Myers.*

1. The state seeks to offer these statements to prove plan, intent, and motive. Those are permissible purposes. WIS. STAT. § 904.04(2). They satisfy the first step of *Sullivan*.

2. But the state founders on the second step. The only evidence the state may have to suggest a rape, bondage, or torture of Teresa Halbach would come from Brendan Dassey. Presently, he has a Fifth Amendment privilege to refuse to testify. He also has given a series of wildly contradictory, irreconcilable statements about the charged events. The latest, on June 29, is that Dassey knows nothing about the death of Teresa Halbach. In short, it is not clear that Dassey will be a witness in Avery's trial. His inculpatory statements against Avery are inadmissible unless he does testify. *Crawford v. Washington*, 541 U.S. 36 (2004).

Without Dassey, the state has – literally – no evidence to support the first degree sexual assault, kidnaping, and false imprisonment counts in the amended Information. With Dassey, the state would have evidence to support the kidnaping and false imprisonment counts, although sharply weakened by Dassey's various inconsistent statements. And with Dassey, the state would have evidence only to support a party to the crime theory of sexual assault: Dassey does not claim that Avery raped Halbach in any of his versions; he does in two versions claim that he, Dassey, raped her and that Avery encouraged him (with significant other inconsistencies; but in general, his claim that he raped Halbach persists in those two versions). Again, even this evidence is weakened by Dassey's several inconsistent statements.

So the question whether Werlein and Myers offer evidence that "relates to a fact or proposition that is of consequence to the determination of the action," *Sullivan*, 236 Wis. 2d at 785-86, 576 N.W.2d at 38, hinges on whether the state offers Dassey's testimony and establishes a version of his story that includes rape, torture and bondage. Without the predicate of Dassey's testimony, with a version of facts that includes rape, torture and bondage, the Werlein and Myers statements simply are excluded as not relevant. WIS. STAT. §§ 904.01, 904.02.

Even with Dassey's testimony, the "nearness in time, place and circumstances to the alleged crime" is weak. *See Sullivan*, 236 Wis. 2d at 785-86, 576 N.W.2d at 38. Dassey describes no torture chamber constructed for Halbach, no room like Werlein recounts. Dassey does not describe binding Halbach as Myers says. Dassey does not claim that Avery raped Halbach. The inmates, for their part, do not suggest that Avery's plans included watching others rape a victim. And the inmates describe statements that Avery made, if he made them at all, more than eleven years ago.

Might Avery have been angry at women then? Yes; he was serving a 32 year sentence for a rape that he did not commit, and had no way to know that the woman who testified in court that he raped her was innocently mistaken (as she was). Although he would have been wrong, Avery had every reason at the time to believe that a woman he never had met came to court and perjured herself to send him to prison for more than three decades. While in prison, his wife left him and procured

a court order limiting contact with his children. Avery very well could have been angry at women.

The relevance of that anger at the time, though, relates to the wrongful conviction, not to prospects of attacking Teresa Halbach in 2005. These statements would require detailed explanation of the circumstances of Avery's 1985 conviction, imprisonment, and limitation of child visitation for a jury to understand them in a fair context.

3. The statements are not worth the candle. They are old, fit poorly with the evidence here (even assuming the state calls Dassey), in part are cumulative, and would in fairness require so much other evidence of the wrongful conviction and child visitation orders that they present the twin risks of confusing jurors and wasting time. The Court should exclude them. WIS. STAT. § 904.03.

B. ***Luedke.***

1. If the state argues that the alleged statement to Luedke proves intent as to the mutilation of a corpse count, it has a permissible purpose under in the sense that knowledge of the advantages of burning a body could help to prove intent to destroy a body that way under § 904.04(2). Plan and motive are stretches, though: nothing in Luedke's statement suggests any context in which Avery was planning

to burn a body, intended to, or had any reason to want to burn a body. For all that appears, Avery was making a flat statement of fact, as he believed it to be.

2. Again, the state founders on the second step. Even assuming the propriety of intent as a purpose, though, the old statement to Luedke has little probative value. If Avery put Teresa Halbach's body on a bonfire and then heaped flammable materials on top of it to fuel the fire, there can be little doubt that he intended to mutilate her corpse; the unexplained statement many years ago about burning a body has very little *additional* tendency to make the existence of the fact of intent "more probable . . . than it would be without the evidence." WIS. STAT. § 904.01.

3. Against that limited probative value, the Court also must weigh the Luedke statement's considerable tendency to cause unfair speculation and prejudice. A juror's natural response to Avery's supposed statement, standing without context as it does, would be, "how would Avery know?" That natural query in turn invites speculation that Avery had burned a human body before, or seen it done. The state of course has no evidence at all that Avery had. Further, the defense would have to explore the context of the statement, and Luedke's motives and bias in coming forward only at this late date to announce Avery's long past statement. The unfair prejudice, risk of jury speculation, confusion of the issues, and waste of time far outweigh the slight probative value of the statement. WIS. STAT. § 904.03.

IV.

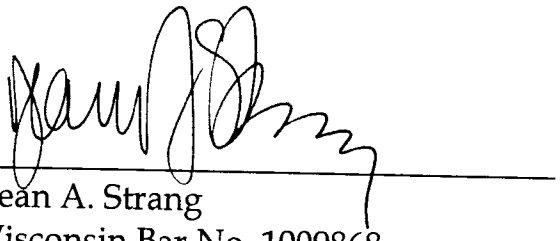
CONCLUSION

Steven Avery asks the Court to deny admission of the three inmates' claims. The alleged statements lack any real connection to evidence presently available to the state, prove nothing here but an unpleasant character, are old, and are cumulative in part. They also are inflammatory and unfairly prejudicial. The Court should exclude these statements under WIS. STAT. §§ 904.02, 904.03.

Dated at Madison, Wisconsin, August 18, 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
Jerome F. Buting
Wisconsin Bar No. 1002856
Counsel for Steven A. Avery

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