STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

STEVEN A. AVERY,

Defendant.

Case No. 2005-CF-381

DEFENDANT'S POST-HEARING MEMORANDUM SUPPORTING SUPPRESSION OF MARINETTE COUNTY STATEMENTS

I.

INTRODUCTION

Steven Avery invoked his right to counsel after speaking with his lawyer, and Marinette County Sheriff's Department Detective Anthony O'Neill knew it. This much the evidentiary hearing established. Although the state may use Avery's statements before that invocation, statements after Avery said that he did not wish to talk further without counsel must be suppressed.

This memorandum reviews the evidence and explains that conclusion.

II.

FACTS

On Saturday, November 5, 2005, Detective O'Neill interviewed Avery in an unmarked squad car. Much of the interview O'Neill taped, although he never told Avery. Hearing Transcript (Tr.) 28 (August 9, 2006) (original in court file).

O'Neill understood that Avery's education stopped before he completed high school. Tr. 30-31. The detective agreed that he calibrates his vocabulary and discussion to the apparent level of the person whom he interviews. Tr. 38-40. He also does not hold an interviewee to any magic words, Tr. 39, 40, but rather respects a request for counsel; "Very much so," O'Neill assured the Court, and added, "[I] [a]lways have." Tr. 35, 36. What matters is not how well-spoken is the request; what matters is that O'Neill understands it. Tr. 39-40, 41. Indeed, in this interview, he understood Avery to be reluctant to answer certain queries relating to his fiancee's prior legal troubles, even though Avery did not refuse explicitly to answer those questions. But O'Neill appreciated Avery's wish not to answer questions in that area and stayed away from it. Tr. 54-55.

At the time of this interview, Milwaukee lawyers Stephen Glynn and Walt Kelly represented Avery in his federal civil rights action against Manitowoc County. Tr. 60-61, 88. Glynn for 35 years has practiced criminal defense almost exclusively.

Tr. 58, 59. He also represented Avery in the Halbach investigation, which was in its early stages on Saturday afternoon, November 5. Tr. 61.

Glynn called Avery on an Avery family cell phone during the interview with O'Neill. At least twice Glynn called, and he spoke with Avery three times during the course of those two telephone calls. Tr. 67. O'Neill's recording of the interview reflects both calls. Exhibit 21, Parts 3 and 4. During the second call, Glynn also spoke with O'Neill. Tr. 49-50, 68. Glynn told O'Neill unequivocally that he did not want Avery questioned further, Tr. 69, 70, and that he (Glynn) would advise Avery to tell O'Neill that the interview should stop. Tr. 69. O'Neill then passed the cell phone back to Avery. Tr. 70. Glynn's third conversation with Avery ensued.

That third conversation featured Glynn reiterating to Avery what he had told him earlier, which is that Glynn advised Avery not to talk to the officer. Tr. 70-71. Glynn further told Avery that he wanted Avery to take the cell phone with him, so that when Avery told the officer he did not want to talk further, Glynn could hear it. Tr. 71.

Although the Court sustained the state's hearsay objection, on August 10 counsel for Avery made an offer of proof that Glynn would have testified further, had he been permitted, that he then overheard Avery say aloud that he did not wish to talk without a lawyer, or words to that effect. Glynn apparently places that statement before Avery got back into the car and while the cell phone call still was

connected, because this statement does not appear on the recording that O'Neill made (recall that O'Neill turned the recorder off while Avery was speaking on the cell phone to Glynn this third time, and turned it back on as Avery apparently was resuming his place in the car).

What is indisputable is that Avery, upon getting back into the car, said (on tape), "Well, I guess they don't want me to talk no more." Exhibit 21, Part 4, 0:04 – 0:06. The critical juncture in the interview occurred during the first minutes of Part 4 on the CD-ROM marked as Exhibit 21, with the last few minutes of Part 3 offering useful context. As counsel understands the statements recorded there (and the Court has the exhibit, so it may listen and decide for itself), the key exchange occurs immediately after Avery ended his third conversation with Glynn during the two calls. O'Neill has turned off the recorder just under two minutes after Avery left the car to speak with Glynn in private, ending Part 3. As Part 4 begins, chimes suggest that the passenger door is opening and that Avery is climbing back into the car. The exchange that follows is this:

Avery [A]: Well, I guess they don't want me to talk no more.

O'Neill [O]: They don't?

A: No, but here's his number, ' case, when you want to talk to me, contact them and they, they want to be there, too.

O: OK. So, . . .

A: But if . . .

O: Let me ask you this, Steve. Although they're telling you that they don't want you to talk no more, is that your wishes? I'm gonna ask . . .

A: Well, I gotta listen to the lawyer . . .

O: Well, you're your own person.

A: Oh, yeah.

O: And . . ., we're not talking about you committing any crime here, what we're talking about is a missing person, right?

A: Oh, yeah.

O: So, in the interest of a missing person, last being seen by you that we're aware of, and trying to figure out where this person may be, am I understanding you correctly in the idea that you could help in this investigation to find this missing person, that you're refusing to cooperate because your attorney is telling you not to talk to us?

A: Oh, no, no.

O: OK. So, I mean, you're, you're, you're . . .

A: I wanna help.

O: You're a forty-some year old man, you're an intelligent guy, y', y', if you have nothing to fear, uh, you know, do you wanna finish this conversation?

A: [pause] . . . Well, ' long as it's easy, uh, whatever I know . . .

O: unnhh

A: unnhh, well, yeah . . .

O: Ya know, that's up to you . . .

A: Yeah, we can . . .

O: It's up to you. Now, your attorneys may be givin' you this advice, I'm just sayin' lookit, here it is, person to person, you understand what we're talking about, a missing person, and it's purely up to you, they can't [can? Not crystal clear] invoke it on your behalf but you can on your behalf say hey lookit, no, this is my own decision and this is what I'm going to do, OK?

A: Well, yeah, I'd like [unintelligible] . . .

O: I haven't threatened you . . .

A: No.

O: I haven't promised you anything, I told you you're free to leave, you don't have to talk to me, and I'm gonna ask you, Steve, do you continue, do you still want to talk to me about this so we can finish . . .

A: Yeah, we can talk a little longer, you know . . .

O: OK.

A: 'n, I want to help.

O: I understand that . . .

A: . . . 'n that's what I wanna . . .

O: And that's where I'd wanna be, too, you know, we're talking about a serious issue here and I'm sure there's plenty . . .

A: Well, yeah, an' I don't like people being missing, an' the family's gotta go through it.

O: mm-hmm.

A: Like I did, it's rough on 'em . . .

O: Sure. How do we explain this vehicle being on your family's property after you seen it go out the driveway and hang a left?

Exhibit 21, Part 4, 0:04 – 2:12.

Avery then continued to answer O'Neill's investigative questions for another 14 minutes or more that day. The next day, O'Neill returned to resume with Avery for another 73 minutes plus. *See* Exhibit 21, 110605 File, Parts 1-3. Together, this was much longer than the five or ten minutes that O'Neill told Glynn on November 5 the conversation would continue. Exhibit 21, Part 3, 4:47.

III.

ARGUMENT

The Court faces two principal questions. First, did Avery make clear that he wanted to stop talking until his lawyer could be present? Second, if so, did that statement require the police to stop? The answer to the first question is straightforward. To the second, it is not.

A. After Avery thrice talked to his lawyer in Detective O'Neill's presence, after O'Neill himself talked to the lawyer, and after the lawyer told O'Neill he wanted the interview to stop and that he would advise Avery to stop the interview, Avery told O'Neill that he guessed the lawyers did not want him to talk further. When O'Neill asked disingenuously, "They don't?," Avery confirmed, "No." Then Avery offered O'Neill the lawyer's telephone number, saying to call the lawyer when the police want to talk with Avery, because "they" want to be there, too. In fact, O'Neill had the names of both of Avery's lawyers; he wrote them down. Exhibit 22. When O'Neill still persisted and asked if not talking was Avery's wish, Avery said diplomatically, "Well, I gotta listen to the lawyer."

There was no ambiguity, given all the circumstances, about what Avery said. There was no ambiguity that he wished to act on his lawyer's advice. And there was no ambiguity about the fact that he had a lawyer — in fact, two. O'Neill, who was perceptive enough to honor Avery's request not to answer certain questions about his fiancee when Avery was far less explicit than this, Tr. 54-55, understood fully that Avery had invoked his option to have a lawyer present before further questioning. The detective demonstrated that understanding ("OK," he said first) in part by asking Avery, rhetorically, whether "you're refusing to cooperate because your attorney is telling you not to talk to us?" Skillfully making Avery feel guilty for that refusal, O'Neill then talked Avery out of his request to stop until his lawyer

could attend. Avery recanted his request in the end, capitulating to O'Neill's spirited effort to obtain precisely that result.

So it is not that Avery failed to request counsel, or did so ambiguously. It is that he failed to resist O'Neill's applied effort to win a recantation of his request. The Fifth Amendment requires a person to ask for a lawyer unambiguously, bearing in mind that the person need not "speak with the discrimination of an Oxford don." *Davis v. United States*, 512 U.S. 452, 459 (1994). This Avery did; he had a lawyer, said he was following the lawyer's advice to stop talking, said the detective could call the lawyer to arrange an interview that the lawyer could attend, and offered the lawyer's telephone number. The Fifth Amendment does not require a person to resist successfully all police efforts to convince him to repudiate or withdraw that request. Instead, the Fifth Amendment requires the police to honor a request for counsel "scrupulously." *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975); *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). This O'Neill did not do, in spite of his protestations that he always does. Tr. 35, 36.

The difficult question here is not whether Avery invoked his right to counsel. He did. The difficult question is whether, because Avery was not in custody when he asked to discontinue the interview in his lawyer's absence, the police were obliged to honor that invocation.

B. Poorly reasoned Wisconsin opinions hold that, as a matter of federal constitutional law, the police can ignore a request for counsel when an interviewee is not in custody, as O'Neill did at a minimum. Almost all of these opinions are unpublished, but *State v. Pheil*, 152 Wis. 2d 523, 534-35, 449 N.W.2d 858, 862-63 (Ct. App. 1989), and *State v. Hassel*, 280 Wis. 2d 637, 641-44, 696 N.W.2d 270, 273-74 (Ct. App. 2005), also stand for that proposition. Worse, the (il)logic of these Wisconsin decisions would not bar a police officer from seeking actively to dissuade a suspect (not in custody) from his request for counsel or pressing the suspect to withdraw the request, as O'Neill also did. Under these rulings, only the due process requirement of voluntariness provides an outer limit on police coercion to drop a request for counsel if a suspect is not in custody. *See generally State v. Clappes*, 117 Wis. 2d 277, 287-88, 344 N.W.2d 141, 147 (1984); *Oddsen v. Bd. of Fire & Police Commissioners*, 108 Wis. 2d 143, 151, 157, 321 N.W.2d 161, 166, 169 (1982).

Those decisions rest on a basic misunderstanding, or misreading, of *Miranda* and cases after. Wisconsin courts and others have taken *Miranda* to create a Fifth Amendment right to counsel, limited to a suspect's time in custody. On its face, *Miranda* did no such thing. *Miranda* instead created prophylactic rules, rooted in the Fifth Amendment, designed to protect the Fifth Amendment privilege against self-incrimination by requiring warnings of that privilege's contours before custodial interrogation. *Miranda*, 384 U.S. at 467-74; *Dickerson v. United States*, 530 U.S. 428,

435-40, 442 (2000). The 1966 decision did not create the underlying rights. It created a rule requiring four warnings, so that the underlying rights, already extant, might be vouchsafed to all – particularly those in custody, who are least likely to have the presence of mind or will to assert their rights. "[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves," the *Miranda* court explained. "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda*, 436 U.S. at 467.

In short, *Miranda* established "a doctrine designed to secure the constitutional privilege against compulsory self-incrimination." *Brewer v. Williams*, 430 U.S. 387, 397 (1977). It did not design or establish the rights that the doctrine discusses.

Whether the misreading of *Miranda* is willful or just careless, decisions flowing from it are intellectually sloppy and logically indefensible. If the "right" to

counsel exists before charging only for those in custody, how would anyone in a civil case ever have a right to counsel? They do, whether by custom, statute, rule, or, occasionally, constitution. *See, e.g.*, WIS. STAT. § 51.20(3) (right to counsel in civil commitment proceeding); WIS. STAT. § 980.03(2)(a) (right to counsel in commitment as sexually violent person); *Joni B. v. State*, 202 Wis. 2d 1, 10-11, 12-16, 549 N.W.2d 411, 414, 415-17 (1996) (courts have inherent authority to appoint counsel in civil cases in interests of court, not because of litigant's right to counsel; although in some cases, due process may require appointment of counsel under balancing test); WIS. SCR 20:6.1, 20:6.2 (lawyers' duties to provide *pro bono* service and to accept court appointments); *Ferris v. State ex rel. Maass*, 75 Wis. 2d 542, 546, 249 N.W.2d 789, 791 (1977) (contemnor has right to counsel in civil contempt action, apparently as a matter of due process); *Matter of Termination of Parental Rights to M.A.M.*, 116 Wis. 2d 432, 342 N.W.2d 410 (1984) (under WIS. STAT. § 48.23(2), statutory right to counsel in TPR cases); *In re Termination of Parental Rights to Torrance P.*, 2006 WI App. 55, ¶ 6, 711 N.W.2d 690, 693 (right to counsel in TPR cases is "at least" statutory in Wisconsin); *see also Sherman v. Heiser*, 85 Wis. 2d 246, 254-55, 270 N.W.2d 397, 401 (1978) (in civil case, party has right to appear by counsel); *Medved v. Medved*, 27 Wis. 2d 496, 499-500, 135 N.W.2d 291, 293 (1965) (discharge of counsel in civil case does not entitle litigant to adjournment as matter of right; trial court must use discretion).

If even the criminal suspect's right to counsel depends upon police custody, how could that right once invoked be violated when the police re-initiate questioning, presumably including *after* release from custody? It can. *State v. Harris*, 199 Wis. 2d 227, 250-51, 544 N.W.2d 545, 554-55 (1996); *see also Michigan v. Jackson*, 475 U.S. 625, 636 (1986) (Sixth Amendment right to counsel violated if police re-initiate interrogation at any time after arraignment). Indeed, if the Fifth Amendment right to counsel exists only when in custody, how could it ever apply to a different crime for which the suspect has never been in custody and may never be in custody, let alone charged? It does. *Arizona v. Roberson*, 486 U.S. 675, 682-85 (1988); *State v. Coerper*, 199 Wis. 2d 216, 223, 544 N.W.2d 423, 426 (1996).

The truth, of course, is that every American has a right to retain counsel at any time, for almost any reason. Avery had exercised that right, both in his civil rights action and in this incipient criminal investigation. Tr. 61. The Court therefore need not truck here with more exotic applications, such as under what circumstances police must stop questioning if a non-custodial suspect announces a wish for services of a lawyer he does not have, or cannot afford. This Court's decision may rest on the limited facts of this case: Avery invoked not just silence, but the option to have a lawyer's assistance in any further questioning; he did so with adequate clarity; Avery actually had an available lawyer; the police officer plainly did not stop questioning; and Avery himself never re-initiated questioning.

On those facts, there are two reasons to suppress Avery's statements after the critical exchange on the recording. First, Wisconsin courts are wrong as a matter of federal law on the Fifth Amendment, applied to the states through the Fourteenth. Second, and independently, Article I, § 8 of the Wisconsin Constitution should bar use of Avery's non-custodial statements after invoking his right to counsel. Avery addresses both reasons in that order.

1. ***Federal Constitution.*** The heresy in limiting the right to counsel to custodial interrogation (rather than just limiting the duty to warn to that setting under the Fifth Amendment) arises in Wisconsin as much from a misinterpretation of *Edwards v. Arizona*, 451 U.S. 477 (1981), as from a misreading of *Miranda* itself. *Miranda* announced, time and again, that it was establishing "procedural safeguards" (using that phrase or synonyms) to assure that custodial interrogation would not erode the Fifth Amendment's privilege against self-incrimination. *Miranda*, 384 U.S. at 444, 457 ("adequate safeguards"), 458 ("adequate protective devices"), 465, 466 (ditto), 466 ("adequate warning"), 467 ("proper safeguards," "safeguards"), 468 ("adequate warning"). To be sure, these safeguards have constitutional roots in the Fifth Amendment privilege. *Dickerson*, 530 U.S. 428. But *Miranda* was a case concerned with prophylaxis of present rights, not with propagating new underlying rights.

True, the *Miranda* court did write briefly that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." *Miranda*, 384 U.S. at 469. But *Miranda* did not create that right to counsel; the Court recognized it as a longstanding fixture of both our culture and our mode of administering criminal justice. Hence the Court wrote of a "need for counsel to protect the Fifth Amendment privilege," which "comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." *Id.* at 470. These were not new rights. They were recognized needs that dove-tailed with the Fifth Amendment privilege. Courts have understood for four decades since *Miranda* that the decision's primary purposes were "prophylactic," and they still do. *See, e.g., State v. Knapp*, 285 Wis. 2d 86, 96, 700 N.W.2d 899, 904 (2005); *United States v. Patane*, 542 U.S. 630, 639 (2004).

Still, *Edwards* unnecessarily, and presumably unintentionally, caused confusion. Initially, it described the holding in *Miranda* unobjectionably: the earlier decision required "that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney." *Edwards*, 451 U.S. at 481-82. So far, so good. But then *Edwards* immediately went on to add, "*Miranda* thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial

interrogation." *Id.* at 482. Yes and no; this was shorthand, and it can be – it has been – misread. The accused has a Fifth (and, for the states, Fourteenth) Amendment privilege against self-incrimination. His right to have a lawyer may be essential to securing that privilege, particularly under pressures of custodial interrogation. From these pressures followed the warnings that *Miranda* required. So, under a correct reading, this shorthand is not inaccurate: the Fifth Amendment privilege relies on, and may be companion to, the right to counsel and *Miranda's* warning rules protect both.

But under an incorrect reading, this shorthand can mislead. It suggests that *Miranda* birthed an independent right to counsel under the Fifth Amendment, only good during custodial interrogation. *Miranda* did no such thing. It was a case about the privilege against self-incrimination and the protective devices, the safeguards, the warnings, that the privilege requires if it is to serve the citizenry under the rigors of custodial interrogation.

Unfortunately, Wisconsin courts and others have adopted the latter misunderstanding of *Edwards's* shorthand reference to the lengthy and nuanced *Miranda* decision. In that way, *Edwards* has spawned a misconception of *Miranda* that makes the case at once both broader and narrower than it is. The misconception makes *Miranda* broader in the sense that it allows lower courts to accuse the Supreme Court of stitching entirely new rights out of whole cloth and dyeing them

in the Fifth Amendment. The Court did not do that; it established rules to protect the privilege against self-incrimination, referring to and incorporating customary rights to a lawyer's assistance in doing that. But it did so only to keep the police out of the Fifth Amendment wardrobe, not to fill the wardrobe with new clothing. This overstatement of *Miranda* subtly serves the interests of those who portray the Warren Court as "activist," because it makes the Court appear more creative than it was. Avery of course does not know the actual motives of those who read *Miranda* this way.

And the misconception makes *Miranda* narrower than it is by inviting the mistaken conclusion that a newly-woven Fifth Amendment right to counsel applies only to suspects in custody. It does not. The right to counsel exists independently of the Fifth Amendment: an American may hire a lawyer when he chooses, for whatever he chooses, almost without limits. What is limited by custodial status is the police duty to warn the accused of that right, and even then the warning requirement stands only to protect the privilege against self-incrimination that the Fifth Amendment establishes explicitly. And the warning requirement is all that custodial status limits under *Miranda*. Custodial status has no bearing on the underlying right to hire a lawyer.

Yet the misconception took hold. By 1991, when the Supreme Court decided *McNeil v. Wisconsin*, 501 U.S. 171 (1991), the majority could write without

blushing of a "*Miranda* right to counsel," 501 U.S. at 173, and even describe *Miranda* as establishing "prophylactic rights" rather than just prophylactic rules to protect the Fifth Amendment's express privilege. *Id.* at 176. Whatever a 'prophylactic right' may be, and however activist the Warren Court may have been, *Miranda* established no such thing. In truth, the very notion of a 'prophylactic right' is gibberish that would have made the great jurisprudential taxonomist, Professor Hohfeld, shudder. *See generally* Wesley Newcomb Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 36-50, 65-72 (1964) (being a reprint of articles of the same name in 23 YALE L.J. 16 (1913), and 26 YALE L. J. 710 (1917)).

This Court might step back and pause. All confusion notwithstanding, the United States Supreme Court never has held that a right to counsel exists only for those in custody who are suspected of crime. It never has held that one may ask a lawyer's help only in that setting. It never has held that the police in any setting may cajole, wheedle, or bully a person into renouncing a clear statement that he wishes to rely upon his lawyer. Nothing in *Miranda* or in the holding of *Edwards* compels a court now to reach those holdings in advance of the Supreme Court. More importantly, nothing in *Miranda* or *Edwards* necessarily justifies such holdings.

To the contrary, the *Miranda* Court explained that, "An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a

waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." *Miranda*, 384 U.S. at 470. If a request for the interviewee's lawyer before interrogation "secures his right to have one," how much more should Avery's request during interrogation have secured his right, irrespective of custody. The warning here concededly was not required, and is not at issue. But the underlying right, which Avery invoked without benefit of a warning that would have been gratuitous under the circumstances, very much is at issue. Avery said that he wanted to rely on his lawyer and to have the lawyer present during questioning. Detective O'Neill had a corresponding duty to respect that right. That was a duty O'Neill did not fulfill.

2. ***State Constitution.*** Usually, the Wisconsin Supreme Court interprets Wisconsin Constitutional provisions that resemble closely the United States Constitution as co-extensive with their federal analogs. But not always. Most recently, in *State v. Knapp*, 285 Wis. 2d 86, 700 N.W.2d 899 (2005), the Wisconsin Supreme Court interpreted Article I, § 8 of the Wisconsin Constitution as supporting a broader application of the exclusionary rule than the Fifth Amendment when a *Miranda* violation leads to discovery of physical evidence.

Even were the Wisconsin courts correct in their reading of *Miranda* and *Edwards*, which they are not, Article I, § 8 properly should be read to require the

state to honor existing representation by counsel upon a person's assertion of reliance on his lawyer, irrespective of custody. Custodial status is a rational criterion on which to make a *duty to warn* pivot: the person in custody may be more vulnerable to police pressure, and less able to think clearly about his options or to exercise his will in a manner contrary to the will of the police. But custodial status is not a rational criterion on which to make pivot the ability to rely on a lawyer, once asserted. The reasons are several.

First, the person not in custody likely is the person against whom the police have less evidence of guilt, not more. While surely the guilty man is entitled to a lawyer, the innocent man can have no lesser stake in relying on a lawyer's advice. Lawyers serve at least as much to protect the innocent as they do to protect the guilty.

Second, once a person has asserted his wish to have a lawyer, without advantage of a warning reminding him of that right, the risks of improper police coercion are just as high if the law permits the police to thwart that wish by tricking, cajoling, or bullying the person under questioning. A person who has a lawyer, tells the officer he wishes to rely on the lawyer, and is denied is no less likely to make an involuntary (and thus unreliable) confession than the person never warned of his right to a lawyer's help. The former person actually is subjected to greater police pressure than the latter, who merely goes unwarned. In custody or no, the person

whose request for his lawyer's help is scorned or undermined by psychological ploy is the more likely to conclude – based on direct, present experience – that resistance to the police is futile. His will is the more likely to be overborne.

Third, inviting police officers to apply coercion, psychological pressure, or tricks to override an interviewee's request to rely on his lawyer leads to bad policing. It breeds in police officers a disrespect for the lawyer's role. It encourages potentially coercive stratagems and game-playing, rather then encouraging sound police work. In doing so, it encourages in police the indolent hope that a suspect simply will confess under inquisition and spare the officer the independent work and more reliable results that adversarial prosecution fosters. It may well have the unintended effect of encouraging police officers to pursue the socially risky course of not taking into custody a dangerous person against whom there is probable cause to arrest, again on the hope that a freer hand at coercive tactics or circumventing a lawyer will spare the police the work of proving the case independently.

The presidentially-appointed Wickersham Commission recognized this problem fully 75 years ago, in the context of the third degree. Coercive interrogation "tends to make police and prosecutors less zealous in the search for objective evidence. * * * Or, as another official quoted remarked: 'If you use your fists, you are not so likely to use your wits.'" IV NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 5 (1931).

Fourth, allowing the police to ignore a request for a lawyer, or to dissuade the suspect from his request by what means the police choose, reflects a cynical view of the role and value of lawyers in criminal justice. If lawyers in the end are cunning obstructors of truth-finding and meddlesome obstacles to the reduction of crime, seeking craftily to free the guilty and to wreak mayhem on the community, then a rule allowing the police to circumvent a request for counsel makes sense. But it makes no less sense when the client is in custody than when he is free to go. In fact, because in general the person in custody is more likely guilty than the person not in custody, it would make more sense to allow the police to engage in a contest of wills with the custodial suspect over his claim to a lawyer than it would to allow that contest of wills with the non-custodial suspect. By contrast, if lawyers in the end are protectors of liberty and mutually-shared rights against a powerful government, and if lawyers play a critical role in protecting the innocent and society at large by assuring reliable, factually accurate and lawful outcomes of criminal charges and reducing the risk of mistaken convictions, then there is no reason to encourage the police to thwart that beneficial social role by pressing a non-custodial suspect to abandon his reliance on his lawyer. Such a rule produces a net social loss, if lawyers play a constructive, not a destructive or perverse, role in criminal justice.

Whatever the postmodern popularity of cynicism in the 21st century, American conceptions of justice are not yet so corroded by this fad. Instead, the federal and state constitutions that courts today expound are 18th and 19th century documents, still fresh with the clarity of the 17th and 18th centuries' enlightenment. The structure of criminal justice that both federal and state constitutions envision embodies a humane and optimistic view that lawyers play a valuable and constructive role in protecting the liberty of all, and in resolving criminal cases peaceably and reliably. Our structure of criminal justice does not rest on the nihilistic logic of the mob, which even today would lead some to loft a noosed rope over a tree branch on occasion. American criminal justice does not rest even on the cynic's jaded distrust of liberty and human potential that causes him to prefer the limited but predictable comforts of a bureaucratic state to the unbounded possibilities of liberty, and to favor a dispirited but consistent safety over the risks of freedom.

Fifth, a rule permitting the police to ignore or override an interviewee's request to rely upon his lawyer often would imperil the ethical duties of a prosecutor. In many investigations, the police consult and coordinate actively with lawyers employed as public prosecutors. Like all lawyers, prosecutors have an ethical obligation to refrain from "communicat[ing] about the subject of the representation with a party the lawyer knows to be represented by another lawyer

in the matter." WIS. SCR 20:4.2. To be sure, that rule has an exception when the "lawyer is authorized by law to do so." *Id.* But courts ought not expand the exception so that it swallows the rule for prosecutors. The lawyer who holds a public trust as a prosecutor should be held to an ethical standard as high as any private lawyer. He should not be held to a lower mark.

Again, Avery's argument here rests on the narrow facts his case presents. He actually had a lawyer. The police officer knew that, and had spoken to the lawyer. Avery's wishes, like the lawyer's, were clear. Under these circumstances, the state constitutional guarantees of due process and a privilege against self-incrimination should prohibit a police officer, by psychological ploy and pressure, from overriding an interviewee's express wish to rely upon his lawyer's advice and to have his lawyer's assistance in further questioning.

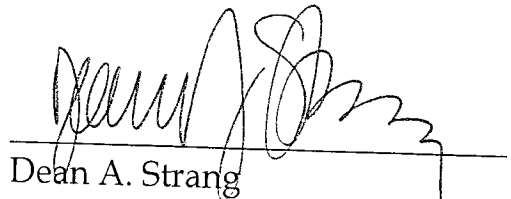
IV.

CONCLUSION

The Court should suppress all statements that Steven Avery made after invoking his right to counsel during his interview by the Marinette County Sheriff's Department. However inartfully, Avery invoked his right to counsel. The officer understood that. But the officer did not honor that request scrupulously.

Dated at Madison, Wisconsin, August 21, 2006.

Respectfully submitted,



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