

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

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STATE OF WISCONSIN,

*Plaintiff,*

MANITOWOC COUNTY  
STATE OF WISCONSIN  
**FILED**

*v.*

JAN 29 2007

Case No. 2005-CF-381

STEVEN A. AVERY,

CLERK OF CIRCUIT COURT

*Defendant.*

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**DEFENDANT'S MOTION TO DISMISS  
SEXUAL ASSAULT, KIDNAPING,  
AND FALSE IMPRISONMENT CHARGES**

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Steven A. Avery, by counsel, now moves the Court for an order dismissing the three counts added in the Amended Information, now that the state has elected by its silence not to call Brendan Dassey as a witness. Those are first degree sexual assault, kidnaping, and false imprisonment, Counts 4, 5 and 6, respectively. Mr. Avery further requests that the Court give a strong curative instruction to the jury panel before individual voir dire begins, again before opening statements, and again in its final instructions to counteract the effect of the state's publicity in early March 2006 suggesting that Brendan Dassey's statements supported the new charges.

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(1)

In sum, the grounds for this motion are this: the state apparently has *no* admissible evidence to support either the first degree sexual assault charge or the kidnaping charge, and insufficient admissible evidence to warrant submission of the false imprisonment charge to the jury. It would deny due process for the state to go forward on charges it knows absolutely unprovable. In greater detail, Mr. Avery shows as follows:

1. Brendan Dassey appeared the state's hope of adducing some admissible evidence, however weak, in support of the new charges. The Court set a January 22, 2007, deadline by which the state was required to disclose to the Court and the defense whether it would offer Brendan Dassey's testimony at Steven Avery's trial. The state let that deadline pass without any word and now, almost two days after the close of business on January 22, the state still has not spoken. If the Court's order is to be enforced, and the state expressly agreed in chambers that it would honor that order, the silence means the state will not call Brendan Dassey as a witness. In any event, its failure to comply with the Court's deadline should preclude the state from calling Brendan Dassey in its case-in-chief.

2. The state added the three charges at issue here on or about March 10, 2006, after statements to law enforcement officers by Brendan Dassey on February 27 and March 1, 2006, and after additional searches of the Avery Auto

Salvage property that flowed from Brendan Dassey's statements. On information and belief, the state had no factual basis for the first degree sexual assault and kidnaping charges other than Brendan Dassey's statements.

3. On the basis of discovery materials since disclosed by the state, it appears that even at the time of the Amended Information, the state had in its possession physical evidence demonstrating conclusively that many of the allegations included in Brendan Dassey's February 27 and March 1 statements were false or inaccurate. For example —

A. As of March 10, 2006, the state knew that the physical evidence did not support, but disproved, the claim that Teresa Halbach was stabbed and cut repeatedly in Mr. Avery's bedroom.

B. As of March 10, 2006, the state knew that the physical evidence did not support, but disproved, the claim that portions of Teresa Halbach's hair were cut off in Mr. Avery's house.

C. As of March 10, 2006, the state knew that despite thorough searches of Mr. Avery's house on more than 10 separate entries during a full week of searches from November 5-12, 2005, none of Teresa Halbach's DNA, blood, fingerprints or hair had been found anywhere in Mr. Avery's house.

D. As of March 10, 2006, the state knew that an independent, credible witness put Ms. Halbach outside Mr. Avery's house near the van that she was to photograph when Brendan Dassey disembarked the school bus. If so, then Ms. Halbach was not restrained in Mr. Avery's house as Brendan Dassey's statements contended.

E. As of March 10, 2006, the state knew that it had no physical evidence or witness supporting Brendan Dassey's uncorroborated claim that anyone had sexual contact or sexual intercourse with Teresa Halbach in Steven Avery's home at any time.

F. Not later than May 13, 2006, the state knew that Brendan Dassey himself had disavowed significant aspects of his February 27 and March 1 statements.

4. Most importantly, the state knew by March 10, 2006, or should have known, that Brendan Dassey's February 27 and March 1 statements were wholly inadmissible at Steven Avery's trial, unless Brendan Dassey testified in person at that trial.

5. The state's March 2 news conference in particular (at which the state took the highly unusual step of essentially declaring "R-rated" during daytime

television hours, by warning children below a certain age not to watch or listen) directed factual claims not just at Brendan Dassey, but at Steven Avery as well.

6. Knowing that it had no admissible evidence to support its first degree sexual assault and kidnaping charges, at a minimum, the state vigorously (and successfully) resisted Mr. Avery's effort to secure minimal evidentiary testing of those charges, even by a probable cause standard. Specifically, the state opposed Mr. Avery's request for a preliminary hearing on those counts, in the Manitowoc County Circuit Court and in the Wisconsin Court of Appeals. In the end, there was no preliminary hearing on those counts. This Court therefore was left to assume that the state would not have filed charges unsupported by admissible evidence.

7. That assumption was unwarranted, it now appears. More than one month after the general discovery deadline, the state's discovery materials disclose no admissible evidence in support of a claim of sexual assault or kidnaping. Although the question is closer, those materials also appear to provide no sufficient factual basis for false imprisonment to warrant submission of that charge to a jury. In particular, defense counsel perceives no admissible evidence that would allow a reasonable jury to conclude that the state can establish, beyond a reasonable doubt, the confinement or restraint that is an essential element of false imprisonment. WIS. STAT. § 940.30; WIS. JI-CRIM. 1275. The reason is straightforward: although the state

discovered handcuffs and leg restraints in Mr. Avery's home, neither proved to bear Teresa Halbach's DNA and repeated, thorough searches of Mr. Avery's home produced *no* evidence that Teresa Halbach ever was in Mr. Avery's home under any circumstances, restrained or not. Neither can the state show any other confinement or restraint during Ms. Halbach's lifetime.

8. It is improper for a prosecutor to file or pursue criminal charges when he knows "the evidence is clearly insufficient to support a conviction." *Thompson v. State*, 61 Wis. 2d 325, 330, 212 N.W.2d 109, 111 (1973); *State v. Karpinski*, 92 Wis. 2d 599, 609, 289 N.W.2d 729, 735 (1979). Indeed, a prosecutor ethically must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." Wis. SCR 20:3.8(a). Here in particular, the allegations in Counts 4 and 5, at a minimum, are so inflammatory and unfairly prejudicial that a mistrial would be necessary should the Court permit a trial to go forward on them, when the state has failed timely to declare that Brendan Dassey will be a witness, and there is no other sufficient evidence (and probably no admissible evidence at all) to support those charges. A partial remedy is to dismiss those counts now.

9. Here, though, the unfair prejudice to Mr. Avery is more serious already and a dismissal alone will not remedy it. On March 1, 2006, in a news conference exceeding 30 minutes, the special prosecutor discussed the arrest and statements of

a then-unnamed relative of Steven Avery. At that time, those statements were inadmissible at trial against Avery absent Brendan Dassey's testimony, as the prosecutor presumably knew. The special prosecutor and the Calumet County Sheriff assured the public that, based on information now known to them, Mr. Avery was very much involved in the crimes they would charge. The next day, March 2, the special prosecutor warned children and relatives and friends of Teresa Halbach not to watch the news conference then beginning, given its graphic content. He then devoted a few seconds to a standard reminder that criminal defendants are presumed innocent until proven guilty. The remainder of the news conference, which exceeded 25 minutes, the state devoted to recounting the graphic allegations included in Brendan Dassey's criminal complaint, some of which the state either knew then were in conflict with the physical evidence or at least knows now are contradicted by physical evidence. The prosecutor presented many of the allegations in narrative fashion, as if an opening statement or closing argument in court. He also assured the public that law enforcement, based in part on undisclosed information in its possession, now "knows" what happened at the Avery property to Teresa Halbach. Discovery materials provided by the state demonstrate, however, that at the moment of that declaration the prosecutor knew that a meticulous physical examination of Steven Avery's residence during more

than 10 separate entries (including the renewed warrant on November 9, 2005) proved that at least in significant part, Brendan Dassey's statements were not true. There was no blood, hair, or fingerprints of Teresa Halbach found anywhere in Mr. Avery's residence, let alone in the bedroom where a gruesome, bloody murder supposedly took place.

10. The fact that the underlying new counts now must be dismissed because unsupported by admissible evidence does not and cannot eliminate the public impression, created by inadmissible statements and unwarranted by admissible evidence, that Mr. Avery is guilty of the sexual assault and kidnaping. The prosecutor's allegations were lengthy, detailed, and powerful. The only hope for a fair trial is a jury instruction that negates those allegations in terms equally powerful. It must be fully sufficient to counteract the effect of the unsupported allegations, which have persisted in the Amended Information for more than 10 months since March 10, 2006.

11. Mr. Avery accordingly proposes that the Court instruct the jury panel before individual voir dire, instruct the jury after it is sworn but before opening statements, and then instruct the jury again before its deliberations, in substantially these terms:

Members of the jury [panel], you may be aware of past allegations by the State of Wisconsin that Mr. Avery sexually assaulted, kidnaped and



falsely imprisoned Teresa Halbach. No such crimes were committed by Mr. Avery, and you will not be asked to consider any such crimes. Indeed, at the time the State made those allegations, there was no admissible evidence to support those claims. The State's claims were improper and unfair. You may, if you wish, but you are not required to, consider the State's unsupported claims as bearing unfavorably on the strength of the State's evidence that you will hear. In the end, the weight of the evidence and the facts will be for you and you alone to determine.

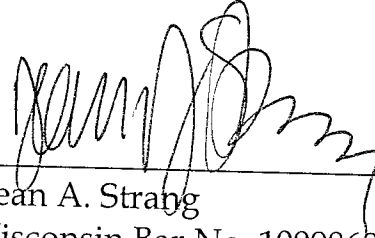
**WHEREFOR**, Steven Avery asks the Court to dismiss Counts 4, 5 and 6 of the Amended Information. The state apparently has no sufficient admissible evidence in support of those counts, and it would be improper to go forward further in the absence of sufficient admissible evidence supporting those charges. Further, in light of the significant unfair publicity that the state caused in announcing those charges and suggesting to the public that it could prove Brendan Dassey's allegations, which even at the time were disproved in large part, the Court must give Mr. Avery's jury a strongly worded curative instruction in an effort to preserve a fair trial.

Dated at Madison, Wisconsin, January 24, 2007.

Respectfully submitted,

STEVEN A. AVERY, *Defendant*

HURLEY, BURISH & STANTON, S.C.



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