STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S MOTION FOR NEW TRIAL

Steven A. Avery, by counsel, now moves the Court for an order granting a new trial on two or more counts, as explained below. The bases for this relief are as follows:

1. ***Inconsistent verdicts.*** The jury convicted Avery on Count One of the Second Amended Information, charging first degree intentional homicide, but acquitted him on Count Two, charging mutilation of a corpse. Those verdicts are inconsistent and irreconcilable. The State abandoned its party to a crime theory during trial, and presented no evidence of the involvement of any other actor in either crime. Then, in closing argument, the State argued that all the evidence showed that one man and one man only was responsible for the two crimes. There

was no rational basis on which to find that Avery killed Teresa Halbach, but did not also mutilate her body by gunshot wounds to the head or by burning it.

The general rule in Wisconsin – importantly, only for criminal cases – is that inconsistent and irreconcilable verdicts do not require a new trial in the interest of justice. *See State v. Mills*, 62 Wis. 2d 186, 191-92, 214 N.W.2d 456, 458-59 (1974). However, the Wisconsin Court of Appeals also has held more narrowly that "inconsistency in verdicts is not per se grounds for reversal." *State v. Johnson*, 184 Wis. 2d 324, 347-48, 516 N.W.2d 463, 471 (Ct. App. 1994). The *Mills* rule traces its origin to *Dunn v. United States*, 284 U.S. 390 (1932), which held that consistent verdicts are not required in federal criminal cases, because each count stands as if it were a separate indictment.

Mills added two more justifications for its rule. First, it offered an unsupported assertion that a rule requiring logical consistency of verdicts would entitle the State to a jury instruction that an acquittal as to one count would be fatal to guilty verdicts on other counts. *Mills*, 62 Wis. 2d at 192, 214 N.W.2d at 459. The *Mills* court offered no citation for that proposition. It made no effort to explain why a judge could not decide legal inconsistency later, and never noted that very often, split verdicts would not be factually or legally inconsistent.

Second, the *Mills* court mused that juries historically are given to lenity, and often acquit when the evidence suggests conviction. As to that suggestion, there is no *a priori* reason to suppose that juries more often compromise to acquit in the teeth of the law, than they do to convict in the teeth of the law. The assumption that juries err – or, more accurately, compromise – on the side of lenity, is wholly speculative.

Mills and cases following it that discuss inconsistent verdicts in criminal cases also overlook two other important points. First, when only money is at stake and liberty is not, Wisconsin courts are not so indulgent of inconsistent verdicts. In civil cases, logically inconsistent verdicts may require a new trial. *See, e.g., Sharp v. Case Corp.*, 227 Wis. 2d 1, 20, 595 N.W.2d 380, 388 (1999); *Westfall v. Kottke*, 110 Wis. 2d 86, 92-98, 328 N.W.2d 481, 485-88 (1983); *Statz v. Pohl*, 266 Wis. 23, 62 N.W.2d 556 (1954). Here, unlike in a civil case, a mandatory term of life in prison is at stake. There is no good reason to tolerate inconsistent verdicts in this context, when a court would not tolerate such verdicts in a civil case arising from a car crash, in which only modest sums of money are at stake.

Second, when verdicts in a criminal case are logically inconsistent, either the acquittal or the conviction necessarily is contrary to law. In either event, the jury has refused to follow the trial court's instructions. It has nullified the law. Allowing

such inconsistent verdicts to stand is a rule itself irreconcilable with the clear rule in Wisconsin that juries have no right to engage in nullification of the law. *See State v. Bjerkaas*, 163 Wis. 2d 949, 959-963, 472 N.W.2d 615, 619-20 (Ct. App. 1991). As the *Bjerkaas* court explained, a defendant has no right to a lawless jury. That is true. But neither does the State. And, when a jury returns inconsistent verdicts in a criminal case, the Court cannot know which party has had the benefit of nullification.

The State may respond, though, that an order granting a new trial now in effect would shift the benefit of the nullification to Avery, thanks to his constitutional double jeopardy protection. Avery would have an absolute right to stand on his acquittal of the mutilating a corpse charge, and insist upon a new trial only on the homicide count, perhaps to the State's disadvantage. That objection has logical force. Accordingly, Avery now unconditionally waives the jeopardy bar to retrial on the mutilating a corpse count, if the Court grants a new trial on the homicide count. In other words, Avery agrees that the Court, if it grants his motion for a new trial, can and should permit a new trial on *both* Count One and Count Two of the Second Amended Information. Avery offers to stand trial again on first degree intentional homicide and mutilating a corpse, without asserting the bar of former jeopardy. His waiver of jeopardy will restore both parties to a position of

parity at retrial. On this ground, Avery also does not seek a new trial on the felon-in-possession count.

2. ***Three Unfounded Counts.*** Initially, in November 2005, Steven Avery faced charges of first degree intentional homicide, mutilation of a corpse, and felon in possession of a firearm. The state added three new charges 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. Those charges were first degree sexual assault, kidnaping, and false imprisonment.

Those new charges came less than two weeks after a pair of remarkable news conferences that the state conducted on live television, on March 1 and 2, 2006. One of those news conferences the prosecutor prefaced with a warning that children and friends of Teresa Halbach ought not watch, because of the graphic content that would follow. Loosely, the prosecutor declared the news conference R-rated.

He did not then disappoint with graphic content. As Avery has argued more than once, those two news conferences, alleging in lurid narrative fashion a story of rape, torture, bondage, and murder, effectively destroyed Avery's opportunity for a fair trial before an impartial jury. Even ten months later, individual voir dire in this case bore out the powerful impact that the prosecutor's inadmissible news

conferences had on the public. Nearly every member of the jury panel that counsel for both sides questioned either recalled the news conferences, or retained some of the story that the state there spread before a television audience and readers of newspapers.

Avery believed at the time that the state had no admissible evidence to support those new charges, and said so. First, on March 16, 2006, he filed a memorandum opposing the state's request for leave to file the amended complaint. Shortly after, Avery asked the Court to dismiss the new charges or, alternatively, to grant a preliminary hearing on the new counts.

The state resisted all efforts to require it to show any admissible evidence to support the new counts. This Court indulged the state, ruling without any evidentiary hearing or proffer that the new counts were transactionally related to the original three counts, and therefore properly filed without even the minimal evidentiary testing that a preliminary hearing would have afforded. Avery then sought leave from the Wisconsin Court of Appeals to pursue a permissive appeal. That court denied his petition. Avery would have to face trial on the three additional charges – crimes that linked him inseparably in the public mind to Brendan Dassey, and that echoed the chilling and horrifying story that the prosecutor told at the March 1 and 2, 2006 news conferences.

By January 24, 2007, when Avery filed a motion to dismiss the three new counts in the Amended Information, the state no longer could deny that it had no sufficient evidence to take two of those charges, first degree sexual assault and kidnaping, to a jury. Avery had known, or strongly suspected, this all along. The state insisted on moving to dismiss those two counts itself, rather than acceding to Avery's motion to dismiss. But the two counts were dismissed, with the state's promise that they would not reappear during the course of Avery's trial.

The state clung to the third charge, though. It insisted that it could proceed to trial on false imprisonment. Over Avery's objection (and denying Avery's motion to dismiss that count), the Court again bowed to the state's prosecutorial prerogative. Avery's jury was told that it would hear evidence of false imprisonment, and would consider a false imprisonment count. That, of course, was the last vestige of the story attributed to Brendan Dassey and the dark tale the prosecutor told at the March 2, 2006 news conference.

The Court also denied Avery's request that it give this, or a substantially similar, preliminary jury instruction:

> 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.

Motion to Dismiss Sexual Assault, Kidnaping, and False Imprisonment Charges at 8-9 (January 24, 2007).

Avery warned before trial that he would consider the necessity of a mistrial manifest if the state failed at trial to prove the false imprisonment charge. The prejudice to Avery of that charge was obvious, of course. It was the last remaining reminder of, and link to, Brendan Dassey and the tale attributed to him. The state insisted upon proceeding with the false imprisonment count all the same.

At trial, the state offered insufficient evidence to support any reasonable jury in concluding that false imprisonment was proven beyond a reasonable doubt. This Court acknowledged that failure of proof when it granted Avery's motion to dismiss that count at last, after the state rested its case-in-chief.

But even that ruling did not remove the taint of Brendan Dassey and the March 2006 news conferences. At the outset of the trial, the state convinced the Court to instruct the jury preliminarily on a party-to-a-crime theory of accomplice liability as to the homicide, mutilation of a corpse, and false imprisonment charges then to be tried. The state even convinced the Court, notwithstanding the Court's

expressed doubts, to make no reference to Brendan Dassey in the preliminary jury instructions.

By the end of the trial, the state had to concede that this, too, had been overreaching. The state had offered no evidence to support the proposition that Avery had been a party to *anyone's* crime, let alone Brendan Dassey's, or that Brendan or anyone else had been a party to Avery's crimes. The jury's final instructions included no reference to the party-to-a-crime theory. Indeed, in rebuttal closing argument, the prosecutor insisted to Avery's jury that the evidence showed that one person, and one person only, was responsible for the crimes against Teresa Halbach: Steven Avery (a stunning admission, even more stunning now as the state is beginning a trial in which, apparently, it will make the inconsistent argument to a judge and jury that Brendan Dassey also is responsible for those crimes after all).

Tainted by inflammatory pretrial publicity, especially the March 2006 news conferences, and led to believe that the state could prove false imprisonment and the participation of another party to the crimes right up through the end of the state's case-in-chief, Avery's jury convicted him of killing Teresa Halbach. Incongruously, and irreconcilably as he argues above, the jury also acquitted Avery of mutilating her corpse.

As Avery argued in his motion to dismiss on January 24, 2007, 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, Avery explained in the January 24 motion that the allegations in Counts 4 and 5, at a minimum, were 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 failed timely to declare that Brendan Dassey would be a witness, and when there was no other sufficient evidence (and probably no admissible evidence at all) to support those charges. Motion to Dismiss Sexual Assault, Kidnaping, and False Imprisonment Charges at 6.

Here, though, the unfair prejudice to Avery was more serious already. 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, 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.

Yet discovery materials provided by the state demonstrated, 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 Avery's residence, let

alone in the bedroom where a gruesome, bloody murder supposedly took place. The trial later confirmed the absence of all such evidence.

Nothing then eliminated the public impression, created by inadmissible statements and unwarranted by admissible evidence, that Avery was guilty of the sexual assault, kidnaping, or false imprisonment. The prosecutor's March 2006 allegations were lengthy, detailed, and powerful. His evidence at trial to support false imprisonment, or any of the specific horrid allegations at the news conference from the Dassey complaint, was not similarly lengthy, detailed, and powerful. It was legally insufficient, if not altogether non-existent.

The state denied Avery a fair trial. It now should afford a new trial, one not tainted by inadmissible claims from news conferences and by a charge and a theory of liability legally insufficient to go to a jury.

In short, the state argued successfully in March 2006 that the three new counts were transactionally related to the original three counts. Avery disagreed, but the Court thought the state correct. *See generally State v. Burke*, 153 Wis. 2d 445, 451 N.W2d 739 (1990); *State v. Richer*, 174 Wis. 2d 231, 496 N.W.2d 66 (1993); *State v. Williams*, 198 Wis. 2d 516, 544 N.W.2d 406 (1996). Very well; then false imprisonment was transactionally related to homicide and mutilation of a corpse. But that is a two-way street. The state should live with both the good and bad

consequences of its argument. That same transactional relationship, underscored by gripping live, televised news conferences, must link the charges now. And when proof of false imprisonment, or proof of acting as a party to a crime, failed, then so too should fail the trial on the "transactionally related" counts. At news conferences, in ducking a preliminary hearing, and in commencing a jury trial, the state went ahead with a charge that prosecutors knew, or should have known, they could not prove. The resulting trial was unfair.

Avery should have a new trial — one not smudged and rendered unfair by a charge and a theory of liability inextricably linked to inadmissible, inflammatory pretrial publicity. Untested and insupportable, the three new charges of first degree sexual assault, kidnaping, and false imprisonment rose together on the doctrine of transactional relationship with the three original charges. Now the verdict on one of those original charges, first degree intentional homicide, should sink together on that same doctrine of transactional relationship with the legally insufficient false imprisonment charge that the state insisted upon trying and the party-to-a-crime theory that it insisted at the outset of the trial must continue to pollute Avery's jury. The state got what it wanted. A new trial now is but one consequence of those choices.

3. *Denial of mid-trial motion to strike juror for cause.* One of the jurors seated in this trial previously served as a juror in a civil trial in which Det. David Remiker, a state witness here, was the plaintiff. The civil jury awarded Remiker more than $170,000 in a trial in which the record demonstrates his credibility was a major issue, if not the major issue. The juror did not disclose her prior familiarity with Remiker on her juror questionnaire, saying later that she did not remember his name. (Note that the State, which thought the black prospective juror's failure to disclose his father's criminal record a reason to strike that man peremptorily, had no reservations about this juror's failure to disclose her familiarity with Remiker or her explanation for the failure). At trial, after Remiker testified, to her credit the juror did give a note to the bailiff acknowledging her earlier role as a juror on Remiker's civil case. The juror's disclosure raised a concern of constitutional dimension: Avery's right to an impartial jury. U.S. CONST. amends. VI, XIV; WIS. CONST. art. I, § 7.

Wisconsin courts have confronted before a situation in which cause, or possible cause, to remove a juror does not emerge during voir dire because of the juror's omission (innocent or otherwise), but rather surfaces during trial or after. The best example may be an appeal arising from a child sexual assault prosecution, *State v. Delgado*, 223 Wis. 2d 270, 588 N.W.2d 1 (1999). There, a juror failed during

voir dire to disclose the fact that she had been the victim of sexual assault as a child; the juror remained silent in response to several inquiries touching on the topic, some directly and some quite indirectly. *Delgado*, 223 Wis. 2d at 273-76, 588 N.W.2d at 3-4. After trial and guilty verdicts, another juror wrote a letter to the trial court explaining that the juror had revealed her experience during deliberations. *Id.* at 276, 588 N.W.2d at 4. The circuit court proceeded to sentencing in spite of that information, and the defendant then filed a motion for new trial. *Id.* Both before and after remand from the court of appeals, the circuit court denied the motion for a new trial.

Eventually, Delgado's appeal reached the Wisconsin Supreme Court. That court noted the importance of voir dire in assuring an impartial jury. "The effectiveness of voir dire depends upon the thorough and well-reasoned questions posed by counsel and the circuit court, as well as the accuracy and completeness of the answers provided by prospective jurors," the supreme court wrote. "Deficiencies in either the questions asked or the answers given during voir dire may result in the seating of jurors who hold undiscovered or undisclosed biases against a defendant." *Id.* at 279-80, 588 N.W.2d at 5. Here, the failure to discover this juror's prior service as a juror on Det. Remiker's civil claim unfolds against a backdrop of a voir dire in which this Court allowed no questioning of the panel as

a whole, and set time limits on individual voir dire to which both Avery and the State objected (but which, concededly, the Court actually enforced only loosely and sporadically).

In *Delgado*, the supreme court found that the record demonstrated the juror's inferred bias and that the circuit court's failure to find inferred bias was clearly erroneous. *Id.* at 285-86, 588 N.W.2d at 7-8. This was true even though the supreme court accepted the circuit court's determination that there was no actual bias.

Not long after *Delgado*, the Wisconsin Supreme Court jettisoned the old actual/inferred/implied descriptions of juror bias. In *State v. Faucher*, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), the supreme court, while insisting that adoption of new terms "does not . . . change our existing jurisprudence" on juror bias, endorsed three new terms: statutory bias, subjective bias, and objective bias. *Faucher*, 227 Wis. 2d at 706, 596 N.W.2d at 773.

Factually, *Faucher* bears examination here, for it has some similarities to this case. A juror there had not recognized his acquaintance with the state's key witness until she testified, and notified the trial court of his acquaintance with the witness at the close of the state's case. *Id.* at 707, 596 N.W.2d at 774. For four years, the juror had been the witness's next-door neighbor and he thrice expressed the opinion when questioned that she was a "girl of integrity" who "wouldn't lie." *Id.* at 708,

732, 596 N.W.2d at 774, 785. The trial court denied the defendant's motion to strike the juror because in the end, the juror convinced the court that he could set aside his opinions and be impartial. *Id.* at 710, 596 N.W.2d at 775. Eventually, both the defendant and the state agreed to proceed with an 11-person jury, and the circuit court then did excuse the juror. *Id.* at 711, 596 N.W.2d at 775. That jury convicted. On appeal, the defendant argued that his waiver of a 12-person jury was not voluntary because the trial court wrongly refused to strike the juror. *Id.*

When the case reached the supreme court, that court upheld the trial judge's finding that the juror was not subjectively biased as not clearly erroneous. *Id.* at 730-31, 596 N.W.2d at 784. But that did not settle the question of objective bias.

Although the supreme court will reverse a trial court on the question of objective bias only if as a matter of law a reasonable judge could not have reached the trial court's conclusion, *id.* at 721, 731-32, 596 N.W.2d at 780, 784, that is exactly what the *Faucher* court did. The special voir dire "clearly reveals that the circuit court was presented with evidence that juror Kaiser had formed an opinion regarding [the witness's] credibility." *Id.* at 730, 596 N.W.2d at 784. The strength of that opinion, coupled with the fact that the witness was the "crucial witness in the State's case," *id.* at 733, 596 N.W.2d at 785, led the supreme court to the conclusion that a reasonable person in the juror's position "could not set the opinion aside despite the best of intentions to do so." *Id.* The court's conclusion that the juror was

objectively biased was "grounded in [the juror's] strongly held, initial assurances that [the witness] was credible." *Id.* at 735, 596 N.W.2d at 786. The defendant was entitled to a new trial.

Faucher of course is not a perfect match with this case, and no case ever will be. But the similarities are important. First, the fact that the juror in the end did not deliberate was unimportant. The defendant had surrendered his right to a 12-person jury only because the circuit court refused to strike the juror. Here, too, the juror at issue did not deliberate. However, the defense had to agree to an extra peremptory strike for both sides, and then use its strike to remove the juror, only because this Court refused to strike the juror on grounds of objective bias.

Second, although Remiker was not *the* crucial witness here as was the witness of interest in *Faucher*, he was *a* crucial witness. Remiker was the first law enforcement officer on the scene after citizens discovered Teresa Halbach's Toyota in the Avery Salvage Yard. He was the second law enforcement officer to speak to Avery about Halbach's disappearance, and the first to look through Avery's house. He was with Lt. Lenk and testified favorably for the state to Lenk's actions; Lenk himself of course was one of the two pivotal witnesses in the state's case. In fact, the state called Remiker immediately after Lenk, in part clearly to bolster Lenk with a likeable, younger and more animated witness. For that matter, Remiker testified to

one of only three statements attributed to Avery concerning Halbach's visit to the property, and Remiker is the only witness who claimed that Avery admitted Halbach had been in his house. Finally, Remiker participated in searches of Avery's bedroom and in the later search of his garage in March 2006, during which officers supposedly found the incriminating bullet fragment bearing Halbach's DNA. He was the only Manitowoc County Sheriff's Department officer who admitted direct involvement in both the November 2005 and March 2006 searches of Avery's house and garage. His credibility was very important to the state's case.

Third, just as the juror in *Faucher* had formed a prior opinion of the witness's credibility, so too had the juror here formed a prior opinion of Remiker's credibility. And that opinion clearly was favorable to Remiker (and therefore the state here). Arguably, this juror's prior opinion of Remiker's credibility was more carefully formed, and less likely to change or be set aside, then was the juror's opinion in *Faucher*. She was not just a neighbor of the witness, with casual social contact. She had assessed Remiker's credibility as a witness in a prior trial, and passed favorably on it in the formal process of jury deliberations resulting in a verdict. The file of Remiker's civil action reveals clearly that his civil trial was a contest about his credibility: was he a malingerer or not? The medical experts in that case cast malingering as an issue of honesty – which it clearly is. This juror joined the others

on that civil jury in concluding that Remiker was not malingering; that he was honest, and therefore credible. She joined as well a verdict that awarded Remiker a substantial sum of money. There simply is no gainsaying the fact that this juror had formed a prior strong opinion on Remiker's credibility.

As in *Faucher*, of course, she claimed that she could set that aside. Indeed, she claimed to have forgotten most of what she had learned in the prior case. As a matter of subjective bias, perhaps this Court no more was clearly erroneous in accepting the juror's assurance than was the trial judge in *Faucher*.

But just as a reasonable judge could not have failed to find objective bias in *Faucher*, so too here that is the only reasonable conclusion. This juror had served as a judge of facts in a prior civil case in which the credibility of the plaintiff was the core dispute. In the solemn and structured manner by which jurors decide credibility, informed by a pattern jury instruction, that juror reached a judgment that the plaintiff was credible – more credible than the defense theory or witnesses in that case. The plaintiff there of course was the same man, Remiker, who was an important state witness here. His credibility very much was at issue again. Under these circumstances, no one would believe that a "reasonable person in the individual prospective juror's position could be impartial." *Faucher*, 227 Wis. 2d at 718, 596 N.W.2d at 779. The juror here was objectively biased and the Court erred

in refusing to strike her on Avery's motion. If nothing else, this Court might have heeded the Wisconsin Supreme Court's warning in a 2001 objective bias case: "We take this opportunity to restate that 'we caution and encourage the circuit courts to strike prospective jurors for cause when the circuit courts "reasonably suspect" that juror bias exists.'" *State v. Lindell*, 245 Wis. 2d 689, 716, 629 N.W.2d 223, 235 (2001), quoting *State v. Ferron*, 219 Wis. 2d 481, 495-96, 579 N.W.2d 654, 660 (1998).

No other Wisconsin case addresses an analogous situation. *But see generally French v. State*, 85 Wis. 400, 55 N.W. 566, 567-68 (1893), *overruled in part on other grounds by Boehm v. State*, 190 Wis. 609, 209 N.W. 730 (1926) (murder defendant entitled to new trial, where his jury earlier had failed to reach a verdict on his special plea of insanity; a "judicial outrage" that denied defendant an impartial jury). Neither has Avery found a case from any other state or federal court directly on point.

But two federal cases make similar useful points. In *United States v. Stevens*, 444 F.2d 630 (6th Cir. 1971), two men faced charges for disposing of stolen cars at a junk yard. One defendant owned the yard; the second worked there. The employee, Stevens, went to trial after the owner's trial on a separate but identical charge. *Stevens*, 444 F.2d at 631. Stevens went to trial next and the jury convicted. He complained on appeal that eight of his jurors had served on his employer's jury, and the other four had sat through that trial. But he had not objected to the jurors

who merely watched the employer's trial, and did not exhaust his peremptory strikes. *Id.*

On those facts, the court found no prejudicial error. *Id.* at 632. All the same, the court observed:

> We express our disapproval of the practice of permitting prospective jurors to witness trials in progress because of the risk of exposure to disclosures which might affect their impartiality if impanelled to try other cases. *We also believe that, whenever avoidable, jurors should not be called to serve in cases involving witnesses or parties who participated in cases in which they were previously impanelled.*

Id. at 632 (italics added).

Using a juror here who served in a prior case involving the same important witness was avoidable (because alternates remained), and unlike the defendant in *Stevens*, Avery did object promptly when the issue arose. This Court chose the very course that the Sixth Circuit counseled against.

The First Circuit considered a situation a bit closer to this case still in *United States v. Carranza*, 583 F.2d 25 (1st Cir. 1978). Several people were arrested in Massachusetts at about the same time as part of a general crackdown on federal firearms offenses. The defendant was among them. Convicted, he complained on appeal that the court denied his constitutional right to a fair trial because members of the jury panel from which the parties selected his jurors had sat on a prior case in which the chief government witnesses were the same and some of the evidence

the same. *Carranza*, 583 F.2d at 26. But he made no claim that any of his jurors actually sat on the prior case. *Id.*

The *Carranza* court noted that, "A review of the cases reveals that the circuit courts, while expressing disapproval of the practices of using jurors who had served in prior similar cases involving the same government witnesses, have been loathe to upset convictions where such use of jurors has occurred." *Id.* at 28. The court went on to cite *Stevens* approvingly. It commented then that "we think the better practice here would have been for the court sua sponte to have conducted a searching voir dire of the jury panel as to their service in the [prior] case or allowed defense counsel challenges for cause to the jurors who had sat on that case." *Id.* at 29.

In the absence of any showing that members of his jury panel actually sat on a prior case involving the same transaction, and where peremptory challenges eliminated all members who served on the prior case, in the end the defendant in *Carranza* got no relief. *Id.* Avery's case is different in several respects, of course, but in one way a stronger case for a new trial: a juror here really did sit on a prior case in which an important state witness's credibility was central, and Avery moved to excuse her for cause.

With the stakes what they are here, the Court ought not have retained a juror who previously had judged Remiker's credibility in the solemn role as juror. She hardly was likely to reverse her earlier judgment here, or even to reconsider it seriously. This is a juror who, at least by an objective measure, was not impartial on the question of an important state witness's credibility. Avery should have a new trial.

4. ***Denial of* Batson *challenge.*** The group of prospective jurors questioned individually during voir dire included only two members of minority groups. One was a Vietnamese immigrant, struck for cause on the State's motion (over defense objection). Contrary to the State's argument and the Court's ruling, that prospective juror's Buddhist beliefs did not preclude him from following the Court's legal instructions. The Court erred in striking the juror. Avery asserts that mistaken ruling as a basis for a new trial.

But that ruling also provides context for the facts concerning the second and last minority member of the qualified panel from which the parties drew the trial jury by exercising peremptory strikes. That panel included one man of African ancestry. The State used a peremptory strike to remove him. The defense timely challenged that peremptory strike under *Batson v. Kentucky*, 476 U.S. 79 (1986).

In response, the State argued principally that a white defendant, like Avery, has no standing to challenge the exclusion of a black prospective juror. Secondarily, the State argued that the prospective juror failed to disclose on the juror questionnaire his father's criminal record.

The State's first argument was unsustainable. *See Powers v. Ohio*, 499 U.S. 400 (1991). If there was an argument for distinguishing or overruling *Powers*, the State never offered it. The State's first justification for its strike, then, was not the "neutral explanation related to the particular case to be tried" that *Batson* requires. 476 U.S. at 98. Indeed, the State's reliance on this argument, flatly rejected by the United States Supreme Court more than 15 years earlier, itself calls into question the State's motivations for the strike.

The State's secondary reason fares little better. There was no reason to believe that the prospective juror knew of his father's criminal problems. His answers suggested that he lived only with his mother. The State offered no basis on which to attribute to the son knowledge of the father's transgressions. Neither did the State claim that it ran criminal record checks on all prospective jurors and their families, regardless of race. Note that this was not a case in which the prosecutor immediately recognized the challenged juror as having the same name as known

criminals in the area. *Compare State v. Lamon*, 262 Wis. 2d 747, 782, 664 N.W.2d 607, 625 (2003).

In the end, the State did not rebut Avery's *prima facie* showing of racial discrimination. The Court should have disallowed that peremptory strike. A new trial on all three counts submitted to this jury is proper. *See Lamon*, 262 Wis. 2d at 811, 664 N.W.2d at 639 (Abrahamson, C.J., dissenting) (new trial is the required remedy if the defendant proves a *Batson* violation; the majority did not disagree with this proposition).

5. ***Exclusion of Debra Kakatsch.*** The state's theme throughout its case-in-chief was that Manitowoc County Sheriff's Department officials turned control of this investigation over to the Calumet County Sheriff's Department and the Division of Criminal Investigation (DCI) the afternoon of Saturday, November 5, 2005, but that Manitowoc County resources and investigative personnel remained important and appropriate contributors to the investigation. Repeatedly, the state defended the role of Manitowoc County Sheriff's Department officers in specific. Several state witnesses from different agencies described and defended the ongoing roles of Manitowoc County officers. These included at least DCI SA Thomas Fassbender, Det. David Remiker, Lt. Brett Bowe, Deputies Pete O'Connor, David Siders, and Dan

Kucharsky, Sgt. Bill Tyson, Sgt. Jason Orth, Lt. Todd Hermann, Lt. James Lenk, Sgt. Andrew Colborn, Inv. Gary Steier, Inv. Mark Wiegert, and Det. David Remiker.

Late in the state's case, it called Jeffrey Jentzen, M.D., to establish the cause and manner of death. Dr. Jentzen is the Milwaukee County Medical Examiner. He examined bone fragments and reports more than one year after Teresa Halbach disappeared. The bone fragments he reviewed were in Madison, in the custody of forensic anthropologist Leslie Eisenberg, Ph.D., at the time he viewed them.

Among its very few witnesses, the defense sought to call Debra Kakatsch, the Manitowoc County Coroner in November 2005 and now. On the state's motion, the Court excluded Kakatsch's testimony during the early minutes of her direct examination, and struck her testimony up to that point. The defense made an oral offer of proof, but the Court persisted in its ruling.

Kakatsch's testimony was relevant and not excludable under WIS. STAT. § 904.03. As the county coroner, she had statutory responsibilities as to a death "in which there are unexplained, unusual or suspicious circumstances." WIS. STAT. §§ 59.34(1)(d), 979.01(1)(a). That certainly seems to include Teresa Halbach's death, and the events unfolding on the Avery Auto Salvage property on November 8, 2005. Likewise, the coroner has statutory responsibilities in the case of all "homicides." WIS. STAT. § 979.01(1)(b). That provision reasonably appeared to apply on

November 8, 2005, as well. Among her other duties, Kakatsch had the right under these circumstances to "take for analysis any and all specimens, body fluids and any other material which will assist him or her in determining the cause of death." WIS. STAT. § 979.01(3).

Kakatsch would have testified that she was prepared to fulfill those duties. When she learned by television or radio of the unfolding events at the Avery property on November 8, 2005, she arranged immediately for the services of a forensic anthropologist and a forensic pathologist. They were prepared to come to the property at her request. Of course, had a forensic anthropologist been present for the recovery of bone fragments from Steven Avery's burn area, the Janda burn barrel, and the gravel quarry site, questions about the place and manner of the destruction of Halbach's body might have been answered, or answerable. The investigators who handled that recovery instead did not obtain help from a forensic anthropologist trained in the recovery of cremated human remains. In the end, the methods of recovery spoiled any chance to ascertain the original burn site and perhaps other details surrounding Halbach's death, as Dr. Scott Fairgrieve later testified. Kakatsch's testimony would have supported an inference of reckless spoliation or indifference to truth, which bore on the state's investigative bias.

Moreover, the mere willingness of the investigators to exclude the Manitowoc County Coroner from the site reflected on the credibility of their claims that the involvement of the Manitowoc County Sheriff's Department by contrast was essential. The Sheriff's office had direct involvement in the events underlying Steven Avery's federal civil lawsuit over his 1985 wrongful conviction. The Coroner's office had no connection to that civil suit, or to the underlying conviction. The Coroner had sufficient resources to help, and a statutory role to fill. Indeed, she was prepared to bring resources – a forensic anthropologist and a forensic pathologist – that investigators otherwise did not have. Their deliberate decision to forego the resources and assistance of a county official with no conflict, while using the resources of a county office with a conflict, would have cast important and relevant light on the state's repeated claims of justification for the role of the Manitowoc County Sheriff's Department. In light of Kakatsch's evidence, a jury surely would have been entitled to discount or disbelieve altogether the state's asserted rationale for the involvement of the Sheriff's Department. At a bare minimum, Kakatsch's testimony would have revealed a double standard at work on the part of the DCI, the Calumet County Sheriff's Department's investigators at the scene, and the Manitowoc County Sheriff's Department.

At least as importantly, the Manitowoc County Sheriff had a statutory obligation, mandatory, "immediately upon notification of a death" that falls under § 979.01(1), to "notify the coroner or the medical examiner, and the coroner or medical examiner of the county where the death took place" of the death. WIS. STAT. § 979.01(1g). The jury was entitled to know that the Manitowoc Sheriff failed that statutory obligation here, and was entitled to consider that information in weighing the credibility both of Calumet County Sheriff's employees and of Manitowoc County Sheriff's employees – both groups of whom surely knew of their duty.

In that regard, there was one other important piece of information for the jury to consider. The sheriff or his delegates committed a state misdemeanor crime when they failed to notify the Manitowoc County Coroner of the death. WIS. STAT. § 979.01(2). They committed the same crime again when they prevented her from taking specimens and other materials for analysis under § 979.01(3). This jury was entitled to consider whether the state's failure to charge the Manitowoc County Sheriff or his deputies with their criminal conduct reflected further investigative bias and a willingness to bend – or even ignore – the law in the pursuit of Avery.

Finally, in weighing what importance to assign Dr. Jentzen's opinion, after he was brought in from Milwaukee more than one year after the fact, the jury should have learned that the person whose statutory duty it was to determine cause and

manner of death was prepared to do that at the time, not one year later, and with the assistance of a forensic pathologist and a forensic anthropologist. The state's decision to circumvent that statutory process and the responsible official, in favor of an expert imported from Milwaukee as an afterthought one year later, bore on the weight the jury might have chosen to give Dr. Jentzen's testimony.

Kakatsch's testimony certainly would not have been unduly lengthy. It was not complicated, or at least no more complicated than the state's evidence about the investigation, recovery of bone fragments, and efforts to determine cause and manner of death. True, Kakatsch's testimony would have put in dispute the motives and bias of the state's investigators, but that is not a reason to exclude under § 904.03: it is what trials are for, the disputation of material facts. Kakatsch's testimony also was not cumulative; it was repetitive of nothing.

The Court erred in excluding Kakatsch. Avery should have a new trial.

6. ***Marc LeBeau's testimony***. The Court conceded that Avery violated no disclosure or discovery order with respect to the blood vial that defense counsel uncovered in the Clerk of Court's office. This was a necessary concession, for two reasons: the blood vial was in a public office, available to anyone and not under Avery's control; and defense counsel disclosed their discovery of it several days before the general discovery deadline. At one time, too, the Court understood that

there were no accepted tests for EDTA quantitation, that such testing would "lack the probative value and evidentiary certainty of other scientific evidence," and that only two laboratories in the country ever had done tests for EDTA in blood at all: the FBI Laboratory, entirely unavailable to defense lawyers and defendants; and the thoroughly discredited National Medical Services. *See* Decision and Order at 6, 8 (January 9, 2007); *see also* 2/2/07 Tr. 50 (state's concession that there presently was no credible laboratory that could do the EDTA testing proposed, other than the FBI).

All the same, midway into this trial, the Court ruled that Avery could have moved more quickly in seeking EDTA testing of the blood vial and the stains in Teresa Halbach's Toyota, and that the defense's failure to seek such (unavailable and unreliable) testing earlier meant a practical forfeiture of Avery's opportunity to meet the FBI's mid-trial testing with independent testing of his own. The Court appeared untroubled, in imposing the burden of delay entirely on Avery, by the fact that the state had considered EDTA testing of the bloodstains in the Toyota as early as February 2006, but had elected then to do nothing until more than three weeks after Avery told what his lawyers had found in the Clerk's office (Avery disclosed the blood vial's existence on December 6, 2006, and the state first moved for testing on January 3, 2007).

The Court also earlier had acknowledged that, "Even if the FBI conducted its testing within the time frame provided to the State, the defense, should it be dissatisfied with the FBI test results, would probably be entitled to conduct a test of its own. This is especially likely given the absence of scientifically accepted protocols for the testing of EDTA in [sic] the interpretation of results." Decision and Order at 8-9.

None of this mattered during trial. The Court allowed the state to call an FBI chemist, Marc LeBeau, who testified to a hastily prepared protocol and to hurried testing that produced results very helpful to the state's theory. The defense had no opportunity to conduct testing, mid-trial, that might have rebutted the FBI's slapdash work. One side and one side only had the opportunity to test physical evidence that was key to the theory of defense.

Obviously, the state's superior access to testing, indeed its one-sided access to testing under the circumstances, worked. Although the jury acquitted Avery of mutilating Halbach's corpse, it did convict him of murdering her. That guilty verdict necessarily required the jury to reject Avery's claim that he was framed for the murder, in part by the police planting his blood in her Toyota.

EDTA testing was neither available (to the defense, at least) nor reliable at any time before trial. That was as true on July 20, 2006, when the state guesses Avery's

lawyers must have known about the blood vial – a guess that overlooks the fact that counsel never opened the box until state agents also were present on December 14 – as it was the day the trial started. So there was no improper delay by the defense, because there was nothing reliable to seek or do.

But the state prevailed upon the FBI Laboratory not just to undertake testing it had abandoned more than 10 years earlier, after the O.J. Simpson trial. The state also cajoled the FBI into compressing the process of developing a protocol, validating it, and completing testing from the three to four months that the FBI had insisted was necessary to two or three weeks. Then the state persuaded this Court to admit those results at a trial then ongoing, despite the Court's earlier reservation that such results "lack the probative value and evidentiary certainty of other scientific evidence," even though they might be admissible in Wisconsin. Decision and Order at 8.

At that point, and at that point only, a fair trial required that Avery have an opportunity to meet that evidence with independent testing of his own. Basic due process – the right to be heard – required that. Yet the Court denied it.

Consider an analogy. Suppose that palmistry or astrology were the areas of expertise at issue. A defendant would not have been dilatory in failing to pursue an expert in those areas, for the same reason that Avery was not dilatory here: on the

known state of accepted learning, neither is reliable and neither field has available qualified forensic experts, precisely because they have not won acceptance in court. During our hypothetical trial, though, the state persuades the FBI to get into the business of palmistry or astrology. Applying *State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984), and bending to the state's plaints of need, during trial a court then rules FBI testimony on palmistry and astrology admissible. With the standard of relevance thus shifted to a new mark, and with the point of contention newly defined, a defendant would have a fair trial and due process right to secure his own experts in palmistry and astrology. To deny him that chance would be to deny him an opportunity to be heard on the crux of the dispute then being tried. It would not do to suggest that the defense should have foreseen that the state would stoop to palmistry or astrology, or foreseen that the court would drop the bar of admissibility that low.

This case remains much like *United States v. Kelly*, 420 F.2d 26 (2d Cir. 1969). There, the government performed a new test on cocaine, neutron activation. The defense learned of this test and its results only during trial. *Kelly*, 420 F.2d at 28. The trial court refused to exclude the test results, and denied a motion for a one-month continuance for the defense to carry out its own version of the new test. *Id.*

On appeal, the Second Circuit reversed. That court noted that the government sought to bolster an "already quite strong case by a concededly new and, to any trier, quite dramatic demonstration of a method of determining trace elements in a substance . . ." *Id.* at 29. "While the newness of the test is not itself reason for depriving the jury of its results, and the opportunity to weigh conflicting claims as to its reliability, fairness requires that adequate notice be given to the defense to check the findings and conclusions of the government's experts." *Id.* The court held further that the government's course "smacks too much of a trial by ambush," *id.*, and that a new trial was required "with a fair opportunity for the defense to run its own" test. *Id.*

This Court should order a new trial so that Avery is afforded the same opportunity to be heard that the Court gave the state, when it allowed mid-trial testing and LeBeau's testimony. The state has no greater claim to a fair trial and due process than Avery; indeed, the state has less, in the sense that the Sixth and Fourteenth Amendments create no rights in the sovereign against the citizen, but rather create rights in the citizen as against the sovereign. The Court gave the state an opportunity to be heard, though, through scientific testing that it denied the defense. A new trial is the only remedy.

Finally, Avery offers again two trial objections. First, *Walstad* no longer supplies the proper standard of admissibility of purportedly scientific expert testimony. Instead, the standards set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), provide the appropriate threshold for admissibility of such testimony. Under *Daubert*, LeBeau's testimony was inadmissible.

Second, even if *Walstad* remains the rule in Wisconsin, LeBeau's testimony and the FBI Laboratory testing he described were so unreliable and inaccurate that they violated the due process requirements of *Townsend v. Burke*, 334 U.S. 736, 739-41 (1948), cited favorably in *Williams v. New York*, 337 U.S. 241, 252 n.18 (1949).

7. ***Other errors***. The Court also erred at trial in reaffirming its earlier rulings denying motions to suppress searches of Avery's home and garage after Saturday evening, November 5, 2005 (the house) and Sunday morning, November 6, 2005 (the garage). Avery renewed these motions at trial, and relies here both on his written and oral arguments before trial and his oral arguments at trial. He also relies on evidence adduced at the pretrial evidentiary hearing on the suppression motions, and on the whole trial record. Likewise, the Court erred in declining to strike all evidence concerning Wisconsin Crime Laboratory Item FL, a bullet fragment recovered from Avery's garage in March 2006, on which the crime laboratory identified Teresa Halbach's DNA. Here, Avery relies on his earlier

motion for fair forensic testing, his argument at trial on that renewed motion, and on the whole trial record. Finally, Avery continues to rely on each pretrial motion and all pretrial briefs that he filed, as well as on objections raised and argued at trial.

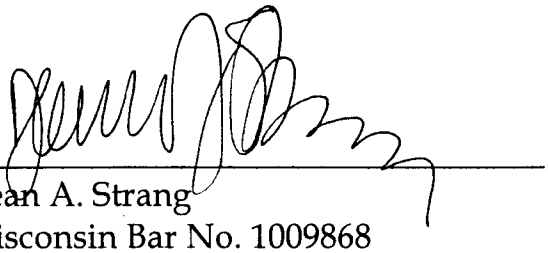
Cumulatively and individually, the Court's errors warrant a new trial. The Court also ought to grant a new trial in the interests of justice, given all circumstances here. The circumstances suggesting a miscarriage of justice include, but are not limited to, the following: the state's eight pretrial news conferences, which tainted the potential jury pool irreparably; two of those news conferences in particular, on March 1 and March 2, 2006, featured inflammatory allegations about kidnaping, rape, and false imprisonment; the State later accepted dismissal of the kidnaping and first degree sexual assault charges, shortly before trial began, because the State had insufficient evidence to support those charges, after poisoning Avery's jury pool with the allegations; the false imprisonment count failed at trial and was dismissed at the close of the State's case-in-chief for want of sufficient evidence to support a conviction; the State relied heavily on FBI testing of bloodstains and a vial of Avery's blood that Avery had no fair opportunity (having neither funds nor time) to test independently; and the jury in the end returned logically inconsistent and practically irreconcilable verdicts on the homicide and mutilation charges.

Dated at Madison, Wisconsin, April 13, 2007.

Respectfully submitted,

STEVEN A. AVERY, *Defendant*

HURLEY, BURISH & STANTON, S.C.



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