STATE OF WISCONSIN	CIRCUIT COURT	MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

v.

STEVEN AVERY,
Defendant-Appellant.

Case No.:

EVIDENTIARY HEARING REQUESTED

MOTION FOR RELIEF PURSUANT TO WIS. STAT § 974.06

PLEASE TAKE NOTICE that the defendant-appellant, Steven Avery (hereinafter "Avery"), *pro se*, respectfully moves this Court pursuant to Wis. Stat. § 974.06, for the entry of an order vacating the judgment of conviction and sentence and ordering a new trial and granting him such relief as the Court may deem appropriate.

Avery requests an evidentiary hearing on this motion, and that he be allowed to appear in person or by telephone for this hearing.

STATEMENT OF THE CASE AND FACTS

On October 31st, 2005 Avery met with Teresa Halbach (hereinafter "Halbach") at or near his home to have a vehicle his sister wanted to sell photographed for Auto Trader magazine.

On November 3rd, 2005 Karen Halbach (Halbach's mother) contacted the Calumet County Sheriff's Department. Karen Halbach stated that Halbach had not been seen or heard from since October 31st. Karen Halbach said it was unusual for her daughter not to have had personal or telephone contact with her family or friends for this length of time. Karen Halbach stated that her daughter was driving a 1999 Toyota Rav 4, dark blue in color.

On November 4th, 2005 Manitowoc County Sheriff's Department interviewed Avery at his home. Avery candidly answered questions and allowed the investigator to search his residence.

On November 5th, 2005 the Manitowoc County Sheriff's Department requested Calumet County Sheriff's Department lead the investigation on behalf of the Manitowoc County Sheriff's Department under the doctrine of mutual aid. This was because Avery had a $36,000,000 law suit against Manitowoc County for having previously put Avery in prison illegally.

On November 5th, 2005 officers received information from volunteer searchers that they had located a vehicle matching the description of the vehicle owned by Halbach at Avery Auto

Salvage. The volunteers were able to gain access to the property through an employee of Avery Auto Salvage. The volunteers provided a partial description of the vehicle's VIN#. Taking this as confirmation that Halbach's vehicle was on the property Calumet County investigators entered Avery Auto Salvage, without a warrant, and began to investigate. Avery's curtilage is located adjacent to the Avery Auto Salvage property.

Soon after, on that same date, a search warrant was sought and obtained. This was the first of many search warrants in this case. Every one of the warrants were issued from judges, but the warrant applications were not presented to these judges. Instead, the actual prosecutor in the case, Kenneth Kratz, signed off on the affidavits. There is no indication in the record that any of the issuing judges ever saw or read these affidavits.

Among these warrants was a warrant issued on November 5th, 2005 that authorized the search of Avery's residence, which was a single-family trailer, Barb Janda's trailer, and the rest of the 40-acre salvage yard. (101:225; 125; 21-2; 337-133). The warrant authorized police to search for Halbach, her vehicle, clothing and camera equipment, forensic evidence and weapons or instruments capable for taking human life. (337:134). A vehicle identified as Halbach's RAV-4 was subsequently obtained. From the pictures taken by the State, there is no indication that this vehicle was sealed prior to being sent to the state crime lab in Madison (hereinafter "lab").

On that same day a warrant was issued to obtain Avery's vehicle and a tow truck belonging to Avery Auto Salvage.

The State charged Avery with first degree intentional homicide, mutilation of a corpse and felon in possession of a firearm. (26). The charges related to the October 31, 2005, death of Halbach.

While being housed in the Calumet County jail ("jail"), Avery met with his attorneys and his private investigator. The jail engaged in active monitoring of his conversations with his attorneys and his investigator. See Exhibits 1, 2, and 3. His attorneys never challenged the information provided them in Exhibit 1. However, Avery only found out about the monitoring by four jail workers through an open records request after his conviction was final.

After nearly five weeks of trial testimony, the case was submitted to the jury. (328:122-23). At that point, the jurors had been sequestered just one day. (327:226). The court retained the remaining alternate juror and ordered her sequestered separate from the deliberating jurors.

(*Id.*). Juror M. was one of the 12 jurors to whom the case was submitted. (362:12). In a preliminary vote taken during the first day of deliberations, Juror M. voted not guilty. (362:18).

During the evening after the first day of deliberations, the court received a call from Calumet County Sheriff Gerald Pagel indicating that Juror M. had asked to be excused. (329:4). The next day, after Juror M. was discharged, the court prepared a memorandum describing the information he received from Pagel, which is included in a traffic accident, totaling her vehicle, although there was no information about any injuries. Further, the juror's wife was upset about the accident and the amount of time he had been away from the family because of the trial. There was a "suggestion" that they had some marital difficulties before the trial. (*Id.*)

After speaking with Pagel, the court called the district attorney and both defense counsel, who authorized the court to speak with the juror and excused him "if the information provided to the court was verified." (329:4-5).

The court spoke with Juror M. by telephone. None of the court's conversations that evening – with Pagel, the attorneys and the juror – was on the record. The court described its conversation with Juror M. in the memo. (359:2).

When Juror M. arrived home, he learned there was no accident, but rather, his stepdaughter had car trouble. (326:29). At the postconviction hearing, Juror M. testified he had called his wife after dinner following the first day of deliberations to "check in" with her, not because he had any information about a family emergency. (362:20-21). When he spoke with the judge he was uncertain about what was happening at home, but he was also frustrated with the deliberations. (362:59, 68-69). He was disturbed by one juror's comment made at the outset of deliberations that Avery was "fucking guilty." (*Id.* at 18, 36). He was also upset that, when he expressed to another juror at dinner that he was frustrated with the deliberations, the juror who had pronounced Avery "fucking guilty" responded in a sarcastic tone: "If you can't handle it, why don't you tell them and just leave." (*Id.* at 16, 34).

On the morning after Juror M.'s removal, Judge Willis and counsel met in chambers. (329). Avery was not present. Relying on ***State v. Lehman***, 108 Wis. 2d 291 (1982), the court and counsel agreed there were three options: proceed with 11 jurors; substitute in the alternate

with directions that the jury begin deliberations anew; or declare a mistrial. (329:5; 362:96-97, 209; 370:4; App. 150).

In a subsequent 20-minuet meeting with his attorneys Avery learned Juror M. had been let go. (362:99-100, 211). Counsel explained the three options and advised Avery to substitute in the alternate juror and turn down a mistrial. (362:100-01, 211-12). Avery took their advice. Defense counsel testified that, had they recommended a mistrial, Avery would have chosen a mistrial. (362:191).

When Avery was brought to court, Judge Willis engaged in a colloquy with him about the stipulation to substitute the alternate. (329:7-8). The court then informed the remaining jurors that one had been excused and that an alternate would take his place. (329:9-10). The court instructed the jurors to begin deliberations anew. (362:11). The newly-constituted jury returned with verdicts after three more days of deliberations. (331:3-5). The court subsequently sentenced Avery to life imprisonment. (288, 289).

Avery filed a postconviction motion seeking a new trial. (350; 351). He argued he had been deprived of a fair trial based on the handling of the jury once deliberations had begun, as well as the trial court's denial of the opportunity to present third-party liability evidence. (*Id.*). Following an evidentiary hearing, Judge Willis filed a written decision and order denying Avery's claims. (370; App. 147-252).

Avery appealed, raising the same issues as those in postconviction motion. In addition, he argued the trial court had erred when it denied his pre-tiral motion to suppress as evidence the key found in Avery's bedroom. The court of appeals affirmed Avery's convictions in a decision recommended for publication. (App. 101-44). The Supreme Court of Wisconsin denied review.

AS GROUNDS THEREFORE, Avery states as follows:

ARGUMENT

I. AVERY WAS DENIED HIS RIGHTS UNDER ARTICLE ONE, § 7 OF THE WISCONSIN CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO COUNSEL

LEGAL STANDARD

A. The Right to Confer in Private

The Article 1, §7 and Sixth Amendment right to counsel protects the integrity of the adversarial system of criminal justice by ensuring that all persons accused of crimes have access to effective assistance of counsel for their defense. The right is grounded in "the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense." ***United States v. Levy***, 577 F.2d 200, 209 (CA3 1978). Although the right to counsel under these constitutional provisions is distinguishable from the attorney-client privilege, the two concepts overlap in many ways.

The Sixth Amendment is meant to assure fairness in the adversary criminal process. ***United States v. Cronic***, 466 U.S. 648, 656 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." ***Id.*** at 655 (quoting ***Herring v. New York***, 422 U.S. 853, 862 (1975)). Because this "very premise" is the foundation of the rights secured by the Sixth Amendment, where the Sixth Amendment is violated, "a serious risk of injustice infects the trial itself." ***Id.*** at 656 (quoting ***Cuyler v. Sullivan***, 446 U.S. 335, 343 (1980)).

The right to counsel exists in order to secure the fundamental right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. ***Strickland v. Washington***, 466 U.S. 668, 684-85 (1984); see also ***Estelle v. Williams***, 425 U.S. 501, 503 (1976). It follows that the "benchmark" of a Sixth Amendment claim is "the fairness of the adversary proceeding." See ***Nix v. Whiteside***, 475 U.S. 157, 175 (1986) (citing ***Strickland***, 466 U.S. at 695). The Supreme Court has therefore declared that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." ***Cronic***, 466 U.S. at 658. At the same time, however, "[i]n certain Sixth Amendment contexts, prejudice is presumed." ***Strickland***, 466 U.S. at 692. This is particularly true with regard to "various kinds of state interference with counsel's assistance." ***Id.***; see also ***Perry v. Leeke***, 488 U.S. 272, 279-80 (1989) (stating that the Supreme Court has "expressly noted that direct governmental interference with the right to counsel is a different matter" with regard to whether prejudice must be shown, and collecting representative cases where prejudice

need not be proved); ***Cronic***, 466 U.S. at 658 & n. 24 (citing cases in which the Court has discussed circumstances justifying a presumption of prejudice).

The right to counsel would be meaningless without the protection of free and open communication between client and counsel. See ***Id.*** The United States Supreme Court has noted that "conferences between counsel and accused ... sometimes partake of the inviolable character of the confessional." ***Powell v. Alabama***, 287 U.S. 45, 61 (1932). See also ***State v. Penrod***, 892 P.2d 729, 731 (Oregon 1995) ("We believe that confidentiality is inherent in the right to consult with counsel; to hold otherwise would effectively render the right meaningless. Accord ***State v. Cory***, 62 Wash.2d 371, 382 P.2d 1019 (1963) ("it is universally accepted that effective representation cannot be had without such privacy"); *see also* cases collected in 5 ALR3d 1360 (1963)).

The right to counsel includes "the right to private consultation with the attorney." ***In the Matter of Fusco v. Moses***, 304 N.Y. 424, 433 (1952). Indeed, the very essence of the Sixth Amendment right to effective assistance of counsel is privacy of communication with counsel. ***Glasser v. United States***, 315 U.S. 60 (1942); ***Weatherford v. Bursey***, 429 U.S. 545 (1977); ***United States v. Rosner***, 485 F.2d 1213 (CA2 1973); ***State v. Milligan***, 40 Ohio St. 3d 341 (1988). It is clear "that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him." ***Coplon v. United States***, 191 F.2d 749, 757 (CADC 1951). See ***Geders v. United States***, 425 U.S. 80 (1976); ***Hoffa v. United States***, 385 U.S. 293 (1966); ***Massiah v. United States***, 377 U.S. 201 (1964); ***United States v. Rosner***, 485 F.2d 1213 (CA2 1973), cert. denied, 417 U.S. 950 (1974); ***United States v. Brown***, 484 F.2d 418 (CA5 1973), cert. denied, 415 U.S. 960 (1974); ***Caldwell v. United States***, 205 F.2d 879 (CADC 1953). "As was said by Judge DESMOND in ***People v. McLaughlin***, (291 N.Y. 480, 482-283): 'To give it [the right to counsel] `life and effect *** it must be held to confer upon the relator every privilege which will make the presence of counsel upon the trial a valuable right, and this must include a private interview with his counsel prior to the tiral.'" ***Fusco***, 304 N.Y., at 433. See also ***State v. Sugar***, 84 N.J. 1, 12-13 (New Jersey 1980); ***State v. Holland***, 147 Ariz. 453 (Arizona 1985); ***McNutt v. Superior Court***, 133 Ariz. 7 (Arizona 1982).

In ***Ellis v. State***, 2003 ND 72, ¶9, the Court stated,

> An essential element of an accused's Sixth Amendment right to assistance of counsel is the privacy of communications with counsel. ***State v. Clark***, 1997 ND 199, ¶4 (quoting ***United States v. Brugman***, 655 F.2d 540, 546 (CA4 1981). There is a legitimate public interest in protecting confidential communications

between an attorney and a client, see ***Clark***, at ¶14 (quoting ***State v. Red Paint***, 311 N.W. 2d 182, 185 (N.D. 1981)), and the attorney-client relationship extends to communications between the client and the attorney or the attorney's representative. *See* N.D.R.Ev. 502. See also ***State v. Copeland***, 448 N.W.2d 611, 614-16 (N.D. 1989); ***Red Paint***, at 184-85.

The Sixth Amendment imposes an affirmative obligation on the State to respect and preserve an accused's choice to seek assistance of counsel, and "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." ***Maine v. Moulton***, 474 U.S. 159, 171 (1985). See also ***Arizona v. Warner***, 150 Ariz. 123, 127-28 (1986); ***Wilson v. Superior Court***, 70 Cal. App.3d 751 (1977); ***Barber v. Municipal Court***, 24 Cal.3d 742 (1979).

The guarantees of the Sixth Amendment right to assistance of counsel recognize the obvious but important truth that "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty ..." ***Johnson v. Zerbst***, 304 U.S. 458, 462-63 (1938). Without the guiding hand of counsel, an innocent defendant may lose his freedom because he does not know how to establish his innocence. ***Powell v. Alabama***, 287 U.S. 45, 69 (1932); see ***Argersinger v. Hamlin***, 407 U.S. 25, 31 (1972). Because the assistance of counsel is essential to insuring fairness and due process in criminal prosecutions, a convicted defendant may not be imprisoned unless counsel was available to him at ever "critical" point following "the initiation of adversary judicial criminal proceedings," ***Kirby v. Illinois***, 406 U.S. 682, 689 (1972). See e.g., ***Scott v. Illinois***, 440 U.S. 367 (1979); ***Moore v. Illinois***, 434 U.S. 220 (1977); ***Argersinger***, supra; ***United States v. Wade***, 388 U.S. 218 (1967); ***Massiah***, 377 U.S. 201; ***Douglas v. California***, 372 U.S. 353 (1963); ***Gideon v. Wainwright***, 372 U.S. 335 (1963).

Because the Constitution requires the assistance of counsel and not merely his physical presence, counsel must be effective as well as available. ***Cuyler v. Sullivan***, 446 U.S. 335, 344-345 (1980); ***Tollett v. Henderson***, 411 U.S. 258, 266-67 (1973); ***McMann v. Richardson***, 397 U.S. 759, 771 n. 14 (1970). The right to counsel would be an empty assurance if a formal appearance by an attorney were sufficient to satisfy it. ***Avery v. Alabama***, 308 U.S. 444, 446 (1940); see ***Cuyler***, supra, at 344-45. The circumstances under which a lawyer provides counsel must not "preclude the giving of effective aid in the preparation and tiral of the case." ***Powell***, supra, at 71. "A defense attorney's representation must be `untrammeled and unimpaired' ..." ***State v. Bellucci***, 81 N.J. 531, 538 (New Jersey 1980); see ***Glasser***, 315 U.S. at, 70 (1942). If

counsel is not "reasonably competent," ***Cuyler***, 446 U.S. at 344; See ***McMann***, 397 U.S. at 770-71, or if counsel's ability to be a vigorous partisan has been curtailed, ***Bellucci***, 81 N.J. at 540-41, then the assistance provided is not constitutionally adequate. Attorney-client conversations are constitutionally protected and cannot be invaded by the State, ***In re Bull***, 123 F. Supp. 389 (D. Nev. 1954); ***Cory***, supra, 62 Wash.2d 371. "A defendant and his attorney must be afforded the opportunity to discuss freely and confidentially." ***Stuart v. State***, 801 P.2d 1283 (Idaho 1990).

The United States Supreme Court in ***Hoffa v. United States***, 385 U.S. 293 (1966), though not finding it warranted in that case, recognized: "it is possible to imagine a case in which the prosecution so pervasively insinuated itself into the councils of the defense as to make a new trial on the same charges impermissible under the Sixth Amendment." ***Id.*** at 416. The factual circumstances in at least six cases have been held to require dismissal of charges because of the surreptitious interception of attorney-client communications by government agents. See ***Cory***, 62 Wash.2d 371, ***Graddick v. State***, 408 So.2d 533 (Alabama 1981), ***United States v. Orman***, 417 F. Supp. 1126 (D.C. Colo. 1976), ***Barber***, 24 Cal.3d 742, ***United States v. Peters***, 468 F. Supp. 364 (S.D. Florida 1979), and ***Levy***, 577 F.2d 200.

B. Balancing Tests Where the Right to Private Consultation is Infringed Upon

There are no Wisconsin cases that Avery can find that he can point to to inform the Court on this particular point, therefore this appears to be a case of first impression for the Wisconsin courts. Other jurisdictions have addressed this point at length. A clear split exists between the various jurisdictions however, so Avery has compiled the following authorities.

It has been noted in an annotation, *Scope and Extent, and Remedy or Sanctions for Infringement of Accused's Right to Communicate with this Attorney*, 5 A.L.R.3rd 1360, 1365:

> One class of cases in which the courts have had little difficulty in trying to strike a balance between liberty and authority involves "eavesdropping" on counsel-client conversations, either by electronic devices installed in conference rooms or by means of paid informers who gain access to the privileged communications of the defense. In such instances, courts have not hesitated to rule as unconstitutional and in violation of the attorney-client privilege such underhanded methods of the prosecution.

As the Court in ***United States v. Rosner***, 485 F.2d 1213, 1227 (CA2 1973):

> In all such cases the Government has been treated as ruthless beyond justification. It has stooped to conduct well below the line of acceptability. These strictures, while legal principles in constitutional terms, are also moral judgments. They assess the guilt not of the defendant but of the Government.

> ...
> When the Government is found guilty of such a charge, the dereliction is more than the bungling of the constable, in Judge Cardozo's phrase. (***People v. Defore***, 242 N.Y. 13, 150 N.E. 585 (1926).) It is a corrupting practice which may justify freeing one guilty person to vindicate the rule of law for all others. See Mr. Justice Holmes dissenting in ***Olmstead v. United States***, 277 U.S. 438, 469 (1928).

The majority of the United States Supreme Court cases have rejected the contention that electronic surveillance of attorney-client communications was *per se* prejudicial under ***Black v. United States***, 385 U.S. 26 (1966), ***O'Brien v. United States***, 386 U.S. 345 (1967), and ***Weatherford***, 429 U.S. 545, and will not automatically require a new trial. The Supreme Court ruled that "when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." The trial court must make a "'judicial determination'" (most likely a "taint hearing" as described in ***Alderman v. United States***, 394 U.S. 165 (1969), of the effect of the overheard conversations on the conversations on the conviction, and if there was "'use of evidence that might otherwise be inadmissible'" the conviction should be reversed for a new tiral. ***Id.*** at 552.

Upon a showing of probable interception of attorney-client communications by State agents, the Court should require the prosecutor to take affirmative steps to determine the existence of such surveillance and certify his actions and findings to the Court. See, e.g., ***United States v. Alter***, 492 F.2d 1016 (CA9 1973). If there has been surreptitious interception of the defendant's attorney-client communications, the trial court should grant broad discovery of the logs, summaries, reports, recordings and transcripts of the intercepted communications. ***United States v. Fannon***, 435 F.2d 364 (CA7 1970). If the governmental agency or agent refuses to disclose that information, the pending charges must be dismissed. ***Alderman***, supra; ***United States v. Seale***, 461 F.2d 345 (CA7 1972).

In light of ***Weatherford***, it appears that the petitioner must show (1) a surreptitious electronic interception (2) by government agents (3) of attorney-client communications (4) involving defense plans and strategy or facts concerning the offense charged or under investigation. Proof of these facts is sufficient to raise a presumption of prejudice because the violation of the accused's constitutional right to private communications with his attorney "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount or prejudice arising from its denial." ***Glasser***, supra.

The burden of persuasion should then shift to the State[1] to prove that such interception was not prejudicial, for "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it is harmless beyond a reasonable doubt." ***Chapman v. California***, 386 U.S. 18 (1967). However, "[o]ver time, the rule that began to emerge would have required either a showing of deliberate prosecutorial misconduct or prejudice, but not both. See ***State of South Dakota v. Long***, 465 F.2d 65 (1972) ("It is certainly true that where there is gross misconduct on the part of the Government, no prejudice need be shown.") (citing ***Black***, 358 U.S. 26, ***O'Brien***, 386 U.S. 345, ***Caldwell***, 205 F.2d 879, ***Coplon***, 191 F.2d 749; ***Fajeriak v. State***, 520 P.2d 759 (Alaska 1974) ("Following ***Coplon***, courts have agreed that proof of deliberate eavesdropping upon attorney-client communications automatically invalidates a conviction. The United States Supreme Court implicitly adopted this rule in ***Black v. United States***.")." ***State v. Quattlebaum***, 338 S.C. 441, 447 (2000).

The ***Quattlebaum*** court went on to state:

> ***Weatherford*** is inapplicable to the case *sub judice*, where a member of the prosecution team intentionally eavesdropped on a confidential defense conversation. We conclude, consistent with existing federal precedent, that a defendant must show either deliberate prosecutorial misconduct *or* prejudice to make out a violation of the Sixth Amendment, but not both. Deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice. The content of the protected communication is not relevant. The focus must be on the misconduct. In cases involving unintentional intrusions into the attorney-client relationship, the defendant must make a prima facie showing of prejudice to shift the burden to the prosecution to prove the defendant was not prejudiced.

Id. at 448-49. *See also* ***United States v. Davis***, 646 F.2d 1298, 1303 n.8 (CA8 1981) (stating no prejudice need be shown where there is gross misconduct by government).

Further, California has noted that ***Weatherford*** may not be appropriate to guide a state in its balancing test. The California Supreme Court stated in ***Barber***, 24 Cal.3d 742:

> It is irrelevant to the reasons underlying the guarantee of privacy of communication between client and attorney that the state is intruding for one purpose rather than for another. "[T]he purpose and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosure to the attorney of the client's objects, motives, and actions." (***In re Jordan***, [7 Cal.3d 930] at 940.) The chilling effect of full

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[1] See also ***State v. Penrod***, 892 P.2d 729, 732 (1995) (stating "when a defendant contends that his or her right to a confidential conversation with counsel has been unreasonably restricted, it is incumbent upon the state to show that the restriction was justified by the need to collect evidence..."); ***State v. Milligan***, 40 Ohio St. 3d 341, 345 (Ohio 1988) ("the burden is upon the state, after a prima facie showing of prejudice by the defendant, to demonstrate that the information gained was not prejudicial to the defendant. See ***Commonwealth v. Manning***, 373 Mass. 438, 442-443 (Mass. 1977)").

> and free disclosure by a client would be the same, whatever the state's asserted purpose for intruding. The intruding state agent by his presence will be privy to confidential communications. Aware of this possibility, a client will be constrained in discussing his case freely with his attorney.

Id. at 753. The Court went on to state:

> Not only is ***Weatherford*** inapposite, it cannot be used as authority to justify the police action here since the right to privacy of communication between an accused and his attorney has consistently been grounded on California law.

Id. at 755.

In like fashion, the 10th Federal Circuit Court of Appeals stated in ***Shillinger, v. Haworth***, 70 F.3d 1132 (CA10 1996):

> Given the Supreme Court's consideration of the requirements of "effective law enforcement" and the absence of purposeful misconduct under the circumstance in ***Weatherford***, commentators and courts have suggested that in cases where the prosecution acts intentionally and without legitimate purpose, such intrusions might not wholly governed by the ***Weatherford*** decision. Specifically, ***Weatherford*** may not dictate a rule that would require a showing of prejudice in cases where intentional prosecutorial intrusions lack a legitimate purpose. *See* ***Briggs v. Goodwin***, 698 F.2d 468, 493 n. 22 (D.C. Cir.). (noting that "[a] deliberate attempt by the government to obtain defense strategy information or to otherwise interfere with the attorney-defendant relationship through the use of an undercover agent may constitute a *per se* violation of the Sixth Amendment."), reh'g granted, opinion vacated, and on reh'g, 712 F.2d 1444 (D.C. Cir. 1983), cert. denied, 464 U.S. 1040, (1984); ***United States v. Morales***, 635 F.2d 177, 179 (CA2 1980) ("[B]ecause the ... evidence ... does not disclose an intentional, governmentally instigated intrusion upon confidential discussions between appellants and their attorneys, the evidence does not support appellants' claim of a *per se* violation of their right to counsel."); 2 Wayne R. LaFave & Jerold H. Isreal, *Criminal Procedure* § 11.8, at 75 (1984) ("***Weatherford's*** conclusion that a state invasion of the lawyer-client relationship does not violate the Sixth Amendment unless there is at least a realistic likelihood of a governmental advantage arguably was limited to case in which there was a significant justification for the invasion.").

The ***Shillinger*** Court went on to state:

> Because we believe that a prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant, and because a fair adversary proceeding is a fundamental right secured by the Sixth and Fourteenth Amendments, we believe that absent a countervailing state interest, such an intrusion must constitute a *per se* violation of the Sixth Amendment. In other words, we hold that when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the tiral process must be presumed. In adopting this rule, we conclude that no other standard can adequately deter this sort of misconduct. We also note that "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." ***Strickland***, 466 U.S. at 692.

Id. at 1142.

The Third Circuit has adopted the rule that intentional intrusions by the prosecution constitute *per se* violation of the Sixth Amendment. *See* ***United States v. Costanzo***, 740 F.2d 251, 254 (CA3 1984), cert. denied, 472 U.S. 1017 (1985); ***Levy***, 577 F.2d at 210. The Second and District of Columbia Circuits, on the other hand, have recognized that prejudice may not be required when an intrusion is intentional, but have not specifically decided. See ***Briggs***, 698 F.2d at 493 n. 22; ***Morales***, supra, 653 F.2d at 179. The First, Sixth, and Ninth Circuits have held that something beyond the intentional intrusion itself is required to rise to the level of a Sixth Amendment violation. See ***United States v. Mastroianni***, 749 F.2d 900, 907 (CA1 1984) (holding that even in the context of an intentional intrusion lacking any justification, "[a] Sixth Amendment violation cannot be established without a showing that there is a `realistic possibility of injury' to defendants or `benefit to the State' as a result of the government's intrusion," but placing a "high burden" on the state to rebut the defendant's prima facie showing of prejudice) (quoting ***Weatherford***, 429 U.S. at 558); ***United States v. Steele***, 727 F.2d 580, 586 (CA6 1984) ("Even where there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted.") (citing ***Morrison***, 449 U.S. at 365-66); ***United States v. Glover***, 596 F.2d 857, 863-64 (CA9) (holding that even in the context of an intentional intrusion into the attorney-client relationship, that "distinction [does not] overshadow [] an important principle to be read from [***Weatherford***]: that the existence or nonexistence of prejudicial evidence derived from an alleged interference with the attorney-client relationship is relevant in determining if the defendant had been denied the right to counsel") cert. denied, 444 U.S. 857, and cert. denied, 444 U.S. 860 (1979).

Under 9th Federal Circuit Court of Appeals precedents, "improper interference by the government with the confidential relationship between a criminal defendant and his counsel violated the Sixth Amendment only if such interference 'substantially prejudices' the defendant." ***United States v. Danielson***, 325 F.3d 1054, 1069 (CA9 2002) (citing ***Williams v. Woodford***, 306 F.3d 665, 683 (CA9 2002). "'Substantial prejudice results from the introduction of evidence gained through the interference against the defendant at trial, from the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial.'" ***Id.*** (citing ***Williams***, 306 F.3d at 682).

"In cases where wrongful intrusion results in the prosecution obtaining the defendant's trial strategy, the question of prejudice is more subtle. In such cases, it will often be unclear whether, and how, the prosecution's improperly obtained information about the defendant's trial strategy may have been used, and whether there was prejudice. More important, in such cases the government and the defendant will have unequal access to knowledge. The persecution team knows what it did and why. The defendant can only guess." ***Danielson***, 325 F.3d at 1070.

Danielson set forth that once a defendant can show that there has been prejudice "the government ... must show that all the evidence it introduced at trial was derived from independent sources, and that all of its pre-trial and trial strategy was based on independent sources. Strategy in this context is a broad term that includes, but is not limited to, such things as decisions about the scope and nature of the investigation, about what witnesses to call (and in what order), about what questions to ask (and in what order), about what lines of defense to anticipate in presenting the case in chief, and about what to save for possible rebuttal." ***Id.*** at 1074.

C. Fashioning a Remedy.

It is fortunate in this instance that Wisconsin case law contains a reference to one of the most cited cases that gives guidance on the issue of remedy. In the concurrence to ***State v. Hoyt***, 21 Wis. 2d 310 (1963) Justice Gordon restates the guiding words of ***Cory***, 382 Pac. 2d 1019, 1022 (Wash 1963):

> There is no way to isolate the prejudice resulting from an eavesdropping activity, such as this. If the prosecution gained information which aided it in the preparation of its case, that information would be as available in the second trial as in the first. If the defendant's right to private consultation has been interfered with once, that interference is as applicable to a second trial as to the first. And if the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try he case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's tiral strategy.

In ***Levy***, 577 F.2d 200, the Court stated:

> Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government, we think that there are overwhelming considerations militating against a standard which tests the sixth amendment violation by weighing how prejudicial to the defense the disclosure is.
>
> ...
>
> ... it is unlikely that a court can, in such a hearing, arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might

> benefit the government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of trial itself.
>
> ...
>
> At that point a trial court applying an actual prejudice test would fact the virtually impossible task of reexamining the entire proceeding to determine whether the disclosed information influenced the government's investigation or presentation of its case or harmed the defense in any other way.

Id. at 208.

> ... the interests at stake in the attorney-client relationship are unlike the expectations of privacy that underlie the fourth amendment exclusionary rule. The fundamental justification for the sixth amendment right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense. Free tow-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful. The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fat finding process itself. Even guilty individuals are entitled to be advised of strategies for their defense. In order for the adversary system to function properly, any advice received as a result of a defendant's disclosure to counsel must be insulated from the government. No sever definition of prejudice, such as the fruit-of-the-poisonous-tree evidentiary test in the fourth amendment area, could accommodate the broader sixth amendment policies. We thing that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.

Id. at 209. As in ***Cory***, ***Levy*** came to a similar consideration as to why a case that involved actual disclosure of defense strategy cannot be retried:

> The disclosed information is now in the public domain. Any effort to cure the violation by some elaborate scheme, such as by bringing in new case agents and attorneys from distant places, would involve the court in the same sort of speculative enterprises which we have already rejected. Even if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with key government witnesses. More important, public confidence in the integrity of the attorney-client relationship would be ill-served by devices to isolate new government agents from information which is now in the public domain. At leas in this case, where the trial has taken place, we conclude that dismissal of the indictment is the only appropriate remedy.

Id.

However, the Court in ***State v. Milligan***, 40 Ohio St. 3d 341 (1988), stated, "It is our view that neither mere suppression nor automatic dismissal is appropriate in every case irrespective of the circumstances." The only cases resulting in dismissal of the prosecution have involved the disclosure of trial strategy, ***Levy***, 577 F.2d 200; ***Peters***, 468 F. Sup. 364; ***Orman***,

417 F. Supp. 1126; ***Barber***, 24 Cal.3d 742; ***Cory***, 62 Wash.2d at 377 (1963), or interference with the ability of a defendant to place trust and confidence in his attorney, ***United States v. Morrison***, 602 F.2d 529, 533 (CA3 1979), ***Barber,*** 24 Cal.3d at 750-51, 756. Thus, there appears to be agreement that dismissal of a prosecution is the appropriate remedy for official intrusion upon attorney-client relationships only where it destroys that relationship or reveals defendant's trial strategy.

In California, the state Supreme Court stated, "The exclusionary remedy is also inadequate since there could be no incentive for state agents to refrain from such violations. Even when the illegality is discovered, the state would merely prove its case by the use of other, untainted evidence. The prosecution would proceed as if the unlawful conduct had not occurred." ***Barber***, 24 Cal. 3d at 759. See also, ***Cory***, 382 Pac. 2d at 1022, ***State v. Holland***, 147 Ariz. 453, 456 (Arizona 1985); ***Commonwealth v. Manning***, 373 Mass. 438, 442-445 (1977).

In ***United States v. Morrison***, 449 U.S. 361 (1980), the Supreme Court considered whether dismissal of the defendant's indictment with prejudice was an appropriate remedy for the intentional intrusion upon her Sixth Amendment rights by federal law enforcement agents. Recognizing "the necessity for preserving society's interest in the administration of criminal justice," the Court enunciated the following standard: "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional volition and should not unnecessarily infringe on competing interests." ***Id.*** at 364. The Court went on to describe how similar constitutional violations have generally been remedied:

> [W]hen before trial but after the institution of adversary proceedings, the prosecution had improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted...
>
> Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.

Id. at 365 (citing ***Gilbert v. California***, 388 U.S. 263 (1967); ***United States v. Wade***, 388 U.S. 218 (1967); ***Massiah***, 377 U.S. 201).

Morrison makes clear that evidence obtained through an intentional and improper intrusion into a defendant's relationship with his attorney, as well as any "fruits of [the prosecution's] transgression," see ***id.*** at 366, must be suppressed in proceedings against him.

At the same time, such an intrusion could so pervasively taint the entire proceeding that a court might find it necessary to take greater steps to purge the taint. The court may, for instance, require retrial by a new prosecutor, see, e.g. ***United States v. Horn***, 811 F. Supp. 739, 752 (D. N. H. 1992) (removing the lead prosecutor form the case and ordering her "not to discuss the documents with any prosecutor or witness in this case and not to participate further in any way, directly or indirectly, in the trial preparation or trial of this case"), rev'd in part, 29 F.3d 754 (CA1 1994). Additionally, dismissal of the indictment could, in extreme circumstances, be appropriate. Cf. ***California v. Trombetta***, 467 U.S. 479, 486-87 (1984) (noting that dismissal of the indictment might be appropriate when the government permanently loses potentially exculpatory evidence); ***United States v. Bohl***, 25 F.3d 904, 914 (CA10 1994) (dismissing the indictment because of the government's destruction of potentially exculpatory evidence).

ARGUMENT

Avery's defense team included attorneys Strang and Bueting and investigator Baetz. Any discussions with these persons were protected by the oldest legal privilege known to American law, the attorney-client privilege. However, far more importantly, the Sixth Amendment protects any discussions concerning strategy. The Sixth Amendment right to counsel includes the right to private consultation. Moreover, the denial of that right is a denial of the right to counsel, a structural defect that is not subject to harmless error analysis.

A. THE JAIL MONITORED THE CONVERSATIONS BETWEEN AVERY AND HIS DEFENSE TEAM CREATING A CHILLING EFFECT ON COMMUNICATIONS ON JULY 20th, 2006.

In the present case, Avery and Baetz had been warned by a jail worker on July 20th, 2006 that they were being recorded. This act alone had a chilling effect on Avery's Sixth Amendment rights. Avery was unable to offer full and frank information and could not be probed by his investigator for pertinent information that would or could have aided Avery's investigative efforts. Exhibit 1 is a Memorandum that existed in Avery's attorney's control. Therefore, failure to raise this issue pretrial was ineffective assistance of counsel. ***Strickland***, 466 U.S. at

686. Indeed, the failure to seek out evidence of other recordings or to obtain the recording of this conversation was improper on the part of Avery's defense.

B. THE STATE WAS CONTINUALLY MONITORING AVERY'S PROTECTED CONVERSATIONS WITH HIS DEFENSE TEAM

There is evidence that the statement made on July 20th, 2006 was not mere threat or bluster on the part of this jail worker. After his conviction Avery was able to obtain through an open records request two documents that may have been discoverable but it is certain that the State didn't furnish them to Avery based on his discovery request and that would seem to end any requirement to investigate their existence on the part of Avery or his legal team. Indeed, the recording of privileged attorney-client conversations violates the privilege under both federal and Wisconsin law but, as noted above, where the Sixth Amendment is involved the State has an affirmative obligation to protect Avery's rights. It would be unreasonable to think that his protected conversations were being observed, much less that the content in any way was being relayed to the prosecution.

What Exhibits 2 and 3 show is that *four* officers did just that. On March 17th, 2007 they proved that the warning given Baetz was far from a passing remark, innocuous or otherwise. Further, these two incidents show a pattern of monitoring of which many of Calumet County's jail workers were aware.

C. MONITORING OF AVERY'S ATTORNEY-CLIENT CONVERSATIONS IN THE JAIL

The issue of whether it is improper to monitor the private conversations between a pretrial detainee and his defense team has been well settled. In cases that go back to 1963, there has been extensive commentary on the evils of this practice.

In ***Cory***, 62 Wash.2d 371, the Washington State Supreme Court took up the issue of eavesdropping on the confidential conversations between counsel and client in a jail. The Court quoted ***Caldwell***, 92 U.S. App. D.C. 355, 205 F.2d 879, noting, "high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel." ***Id.*** at 374-75. The Court condemned the actions of the sheriff's office stating, "Not only was the conduct of the sheriff's office in violation of the constitutional provision assuring the right to counsel, but also of the statutory law." ***Id.*** at 378. The Court went on to quote ***People v. Cahan***, 44 Cal. (2d) 434 (1955), where that Court stated, "It is morally incongruous for the state to flout constitutional rights and at the same time demand

that its citizens observe the law..." ***Cory***, 62 Wash.2d at 378. The ***Cory*** Court finally completed its condemnation of the sheriff department's action by labeling it "the odious practice of eavesdropping on privileged communication between attorney and client" ***id.***, and that it was "shocking and unpardonable conduct ..."

In ***Black***, 385 U.S. 26, the United States Supreme Court reversed a conviction because federal agents placed a bug in a hotel suite and recoded conversations between Black and his attorney. ***Id.*** at 27-28. These were reduced to notes and used by the prosecution in trial preparation. ***Id.*** The High Court concluded, "In view of these facts it appears that justice requires that a new trial be held so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible." ***Id.*** at 28-29.

In ***State v. Sugar***, 84 N.J. 1 (1980), the New Jersey Supreme Court took up the issue of the recording of a criminal defendant's conversation with his attorney by way of a concealed microphone in the interview room they used. ***Id.*** at 5. The Court summed up the issue stating, "The question presented is whether the flagrantly illegal conduct of the officers irreparably impaired defendant's rights to the effective assistance of counsel and to a trial uncorrupted by public prejudice." The Court characterized the State's actions by stating, "Our present concern is the outrageous character of the illegal eavesdropping." ***Id.*** at 7. The Court went to understandable lengths to voice its disgust stating, "We are outraged. We are compelled to say exactly that." ***Id.*** at 12. "The fact that the individuals responsible for invading defendant's privacy are law enforcement officials heightens our concern and sparks our sense of outrage. It is a 'fundamental precept that courts may not abide illegality committed by the guardians of the law.' ***State v. Molnar***, 81 N.J. 475, 484 (1980)." ***Id.*** at 14. The Court decided that the single incident, though likely criminal, ***Id***, was no threat to the case. ***Id.*** at 15.

In ***State v. Quattlebaum***, 338 S.C. 441 (2000), the South Carolina Supreme Court was confronted with a single incident of surreptitious monitoring of confidential attorney-client consultation. That instance was strikingly similar the events of March 17th, 2007 in the present case. "While appellant and his attorney conferred, several sheriffs' officers and a deputy solicitor were present in the detectives office where the privileged conversation between appellant and his attorney was monitored and recorded." ***Id.*** at 444. The ***Quattlebaum*** Court addressed the issue of the State's intentional interference with the Sixth Amendment guarantee of private consultation stating, "The integrity of the entire judicial system is called into question

by conduct such as that engaged in by he deputy solicitor and investigating officers of this case." ***Id.*** at 449. The Court reversed the conviction. ***Id.*** at 454. Though it has not yet been established how high up information was passed in the present case, the involvement of the lead investigator's agents is established in the exhibits.

As noted, in the present case the State definitely had been monitoring the protected conversations between Avery and his defense team on at least two occasions. Further, a jail worker clearly stated that *all* conversations in the particular room were being recorded. There can be no doubt that what the monitoring officers at least saw was passed on to Sheriff Pagel. Even if it were true that there were no recordings of the audio portion of any given conversation, the fact that the room was watched is important. Attorneys write things down. Notes prepared in the course of preparing for trial or for the purposes of investigation are protected under the work product doctrine. More importantly, the notes contain strategy. The surreptitious obtaining of defense strategy by the state is grounds for mistrial.

D. REQUEST FOR A HEARING

In ***United States v. DiDomenico***, 78 F.3d 294 (1996), the defendants and their attorney met in a federal holding facility in a bugged room. The question of whether the prosecution's lack of involvement was discussed, the Court stated, "even if the prosecution team was not complicit in the bugging, the defendants' right to counsel may have been infringed. It is one federal government after all. If the director of the MCC ordered the bugging, there would be a serious issue of the infringement of that right even if the fruits of the buffing were not turned over to the prosecutors." ***Id.*** at 301.

Avery asserts that he has presented prima facie evidence that his Sixth Amendment right to private consultation with counsel has been violated. He further asserts that that violation appears far more widespread than the exhibits he has presented, as evidenced by the statement made to Baetz. See Exhibit 1. Therefore, Avery respectfully requests that this Court allow Avery to engage in post-conviction discovery and that a hearing be held to supplement the record.

II. AVERY WAS DENIED HIS RIGHTS UNDER FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE STATE COMMENTED ON HIS SILENCE IN CLOSING ARGUMENTS

LEGAL STANDARD

Direct comment on a defendant's failure to testify is forbidden by the Fifth Amendment. ***Griffin v. California.***, 380 U.S. 609 (1965). A prosecutor's indirect commentary that the government's evidence on an issue is "uncotradicted," undenied," "unrebutted," "undisputed," etc., will be a violation of the defendant's Fifth Amendment rights if the only person who could have contradicted, denied, rebutted or disputed the government's evidence was the defendant himself. ***Freeman v. Lane***, 962 F.2d 1252, 1261 (CA7 1992); ***United States ex rel. Burke v. Greer***, 756 F.2d 1295, 1302 (CA7 1985); ***United States v. Buege***, 578 F.2d 187 (CA7), cert. denied, 439 U.S. 871 (1978); ***United States v. Fearns***, 501 F.2d 486, 490 (CA7 1974); ***United States v. Handman***, 447 F.2d 853, 855 (CA7 1971).

ARGUMENT

On the 23rd day of the trial Attorney Kratz made reference in his closing arguments to facts presented "contested." **Tr. 4-14-2007, P.55**. Attorney Strang objected to this and asked to be heard on the issue later. The judge then reminded the jury that closing arguments are merely argument and not facts.

Specifically, attorney Kratz stated:

> The facts in this case, as presented, and as I will present to you, are very much so uncontested, uncontroversial, at least most of the facts in this case are uncontroverted.

Tr. 4-14-2007, P.33, Lines 18-21. Attorney Strang's commentary outside the presence of the jury was:

> I initially interrupted Mr. Kratz's argument, reluctantly, and trying to be polite and somewhat circumspect about my comment that it was unwise and improper to describe facts as uncontested. I waited until we got to the PowerPoint slide that said fact number four, and by my recollection, that was the fourth time that the - - counsel for the State returned to the theme of an uncontested fact.
>
> As I say, I was trying to be circumspect, but the concern, of course, was that this comes too close to commenting on the decision of the defendant not to take the stand. Or, for that matter, not to offer witnesses that he did not. Mr. Kratz, in

> responding to my objection I think made the problem substantially worse. I don't have committed to memory, we could go back to the court reporter's notes if we need to, but the rejoinder from counsel for the State was that, you know, if you remember a witness being called, or if you remember someone saying this didn't happen, something to that effect, well, then that's fine, but of course, the suggestion was not called and no one did speak up to contest the fact.
>
> Doesn't warrant a mistrial, but comes way too close to commenting on the Fifth Amendment privilege mot to testify and I think warrants some curative step, either by counsel himself, or by the Court, or both.

Tr. 4-14-2007, P.70-71.

> Mr. Avery knows where Teresa's phone is, but Mr. Avery is also - - has the ability to think ahead, has the ability to know that these pone records may, in fact, be gleaned, or may, in fact, be reviewed at some point in the future. And so, although he doesn't block, because there is no reason to block the 4:35 call, he still calls Teresa Halbach. And you can see, or you can ask for those records if you need to.

Tr. 4-14-2007, P.94, Lines 5-14.

The State clearly argues that Avery had technical knowledge of investigation via voicemail systems and that he had created a plan to use the investigative process the State would employ as an alibi. Though attorney Kratz doesn't actually stat this is "uncontested" his phrasing is clear. Without having any foundation in the record to support his speculation that Avery knew how investigators "ask for those records" attorney Kratz made his assertion.

Defense counsel didn't object.

Avery contends that this was a disjointed and disguised continuation of the Stat's efforts to implicate his silence. Avery didn't have to prove his innocence. And he's not required to contest anything. The State doesn't get to forma a conclusory argument around his silence. More importantly, the State cannot argue facts not in the record. Whether Avery knew about a State investigator's ability to retrieve voicemail wasn't established. This fact would be necessary for Avery to form the alleged plan to create this "alibi." Only Avery could actually testify to his knowledge. He hadn't take the stand and attorney Kratz's argument was a clear implication of

Avery's silence. A reasonable juror could have found that Avery had premeditated the murder down to the *last* detail. The detail of an alibi.

III. AVERY WAS DENIED HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES AND WISCONSIN CONSTITUTIONS TO A TRIAL BY AN UNBIASED JUDGE

LEGAL STANDARD

The Due Process Clause guarantees litigants an impartial judge, reflecting the principle that "no man is permitted to try cases where he has an interest in the outcome." ***In re Murchison***, 349 U.S. 133, 136 (1955). Where the judge has a direct, personal, substantial, or pecuniary interest, due process is violated. ***Bracy v. Gramley***, 520 U.S. 899 (1997); ***Aetna Life Ins. Co. v. Lavoie***, 475 U.S. 813, 825 (1986); ***Ward v. Monroeville***, 409 U.S. 57, 60 (1972); ***Tumey v. Ohio***, 273 U.S. 510, 523 (1927); ***Johnson v. Mississippi***, 403 U.S. 212, 215-16 (1971); ***In re Murchison***, 349 U.S. at 137-39.

It is presumed that judges are honest, upright individuals and that they rise above biasing influences. ***Tumey***, 273 U.S. at 532; ***Withrow v. Larkin***, 421 U.S 35, 47 (1975); ***Taylor v. Hayes***, 418 U.S. 488, 501 (1974); ***Tezak v. United States***, 256 F.3d 702, 718 (CA7 2001); ***Del Vecchio v. Illinois Dep't of Corr.***, 31 F.3d 1363, 1375 (CA7 1994) (en banc). This presumption however is rebuttable. Sometimes, "the influence is so strong that we may presume actual bias." ***Del Vecchio***, 31 F.3d at 1375; see also ***Withrow***, 421 U.S. at 47. In rare cases, there may even be evidence of actual bias. See ***Bracy***, 520 U.S. at 905; ***Bracy v. Schomig***, 286 F.3d 406, 411 (CA7 2002) (en banc).

To prove disqualifying bias, a petitioner must offer either direct evidence of "a possible temptation so sever that we might presume an actual, substantial incentive to be biased." ***Del Vecchio***, 31 F.3d at 1380. Absent a "smoking gun," a petitioner may rely on circumstantial evidence to prove the necessary bias. ***Bracy***, 286 F.3d at 411-12, 422 (Posner, J., concurring in part, dissenting in part), and at 431 (Rovner, J., concurring in part, dissenting in part).

The absence of any objection warrants that the reviewing court follow "the normal procedure in criminal cases," which "is to address waiver within the rubric of the ineffective assistance of counsel." ***State v. Erickson***, 227 Wis.2d 758, 766 (1999) (citing ***Kimmelman v.***

Morrison, 477 U.S. 365, 374 (1986); ***Lockhart v. Fretwell***, 506 U.S. 364, 380 n.6 (1993) (Stevens, J. dissenting); ***State v. Smith***, 207 Wis. 2d 258, 237 (1997); ***State v. Vinson***, 183 Wis. 2d 297, 306-07 (Ct. App. 1994)).

The right to counsel includes the right to effective assistance of counsel. , 466 U.S. 668, 686 (citing ***McMann v. Richardson***, 397 U.S. 759, 771 n.14). In order to find that counsel rendered ineffective assistance, the defendant must show that counsel's representation was deficient. ***Strickland***, 446 U.S. at 687. The defendant must also show that he was prejudiced by the deficient performance. ***Id.***

Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. ***Id.***, at 688. The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, at 694.

A claim of ineffective assistance of counsel can only be resolved with an evidentiary hearing. ***State v. Machner***, 92 Wis. 2d 797, 804 (1979); ***Massaro v. United States***, 538 U.S. 500 (2003).

Where there is a structural error, such as judicial bias, harmless error analysis is irrelevant. See ***Edwards v. Balisok***, 520 U.S. 641, 647 (1997); ***Bracy***, 286 F.3d at 414; ***Cartalino v. Washington***, 122 F.3d 8, 9-10 (CA7 1997).

ARGUMENT

The Honorable Judge Willis presided over Avery's trial process starting at his initial appearance and preliminary hearing and ending with his sentencing.[2] He also issued several warrants in the case. At the preliminary hearing on December 6th, 2005 Judge Willis determined, as a matter of fact, that there had probably been a crime of murder and that Avery probably committed the crime. **Tr. 12-06-2005, Pages 180-81.** Avery argues that Judge Willis could not preside over the trial as he had already determined that Avery was guilty.

SCR 60.04(4) states in relevant part:

> Except as provided in sub. (6) for waiver, a judge shall recuse himself ... in a proceeding where the facts and circumstances the judge knows or reasonably should know establish knowledge about judicial ethics standards and the justice system and aware of the facts and

[2] Judge Willis also presided over the post-conviction relief hearing and made the ruling on that request.

> circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial:
>
> **(f)** The judge, while a judge ... has made a public statement that commits, or appears to commit, the judge with respect to any of the following:
> **1.** An issue in the proceeding.
> **2.** The controversy in the proceeding.

In the preliminary hearing a judge is going further than making a finding of law. He is deciding facts and expressing his opinion of those facts. He is making a public statement that "commits, or appears to commit," him to an issue. That issue is the controversy at the very heart of the charges. He is stating that he believes that **1)** a crime has been a committed and **2)** that the defendant committed it.

Though it is true that the judge's determination is that there was merely probable cause that Avery was guilty and not that he was guilty beyond a reasonably doubt, this is still a finding of fact and an opinion of the outcome of the dispute. As SCR 60.04(4)(f) and **Wis. Stat. § 757.19** make clear judge Willis was required to recuse himself. This failing on his part negates Avery's entire trial and requires a reversal.

The same sentiment was echoed in ***Franklin v. McCaughtry***, 398 F.3d 955 (CA7 2005):

> We are not saying that due process would be offended if a judge presiding over a case expressed a general opinion regarding a law at issue in a case before him or her. ***Withrow***, 421 U.S. at 48-49; see ***Del Vecchio***, 31 F.3d at 1377 n.3. The problem arises when the judge has prejudged the facts or the outcome of the dispute before her. In those circumstances, the decisionmaker "cannot render a decision that comports with due process." ***Baran v. Port of Beaumont Navigation Dist. Of Jeffery County Tex.***, 57 F.3d 436, 446 (CA5 1995); [citations omitted]. Here, the only inference that can be drawn from the facts of record is that Judge Schroeder decided that Franklin was guilty before he conducted Franklin's trial. This is clear violation of Franklin's due process rights.

Id., at 962. As with the judge in ***Franklin***, Judge Willis was on record having decided the facts and outcome. From that point forward there was no decision that Judge Willis could make that wouldn't be colored by his preconceived notion that Avery was, in fact, guilty.

The language found in ***Franklin*** and in SCR 60.04(4) combine to show that Judge Willis was required to recuse himself. However, Avery never objected to Judge Willis continuing to

preside over his trial. Therefore, Avery may have to establish that this failure to request recusal or a change of venue was the result of ineffective assistance of trial counsel.

Avery asserts that failure to request a change of venue or to request that Judge Willis recuse himself fell below professional norms. As ***Franklin*** points out, when a "judge has prejudged the facts or the outcome of the dispute before [him]" he "'cannot render a decision that comports with due process.'" ***Franklin***, 398 F.3d at 962. There is no reasonable strategy that can be pointed to in allowing a trial to go forward under such circumstances.

Avery also asserts that the result was that he was prejudiced. As ***Franklin*** points out, "the only inference that can be drawn from the facts of record is that [the judge] decided that [Avery] was guilty before he conducted [Avery's] trial." In such a situation prejudice is presumed, as judicial bias is never open to harmless error analysis. ***Edwards***, 520 U.S. at 647; ***Bracy***, 286 F.3d at 414.

Avery also directs the Court's attention to **Wis. Stat. § 971.05** which states in relevant part:

> If the defendant is charged with a felony, the arraignment may be in the trial court or the court which conducted the preliminary examination or accepted the defendant's waiver of the preliminary examination.

Clearly the Wisconsin legislature noted that the "court which conducted the preliminary examination" cannot be the trail court. The language of the statute clearly delineates the difference between the two courts with the word "or." (i.e.: "... the arraignment may be in the trial court or the court which conducted the preliminary examination..." ***Id.*** (emphasis added)). It is a "well-settled rule as to construction of statutes requires every word to be given force if possible..." ***Mutual Life Ins. Co. v. Cohen***, 179 U.S. 262, 269 (1900). In other words, Courts are required wherever possible, "to give force to each word in every statute (or constitutional provision). ***United States v. Menasche***, 348 U.S. 528, 538-539, 99 l. Ed. 615, 75 S. Ct. 513 (1955); see ***Marbury v. Madison***, 5 U.S. (1 Cranch.) 137, 174, 2 L. Ed. 60 (1803)." ***Silveira v. Lockyer***, 312 F.3d 1052, 1069 n.24 (CA9 2002).

Given that judge Willis had clearly put on record, as was intended in the judicial process of finding probable cause, that he believed that Avery was in fact guilty of the murder of Teresa Halbach there can be no way that Avery could receive a fair trail. This clearly violated his due process rights as laid out in both the United States and Wisconsin Constitutions. As a result, he had a structural defect that removes any harmless error analysis from the equation.

In like fashion to ***Franklin***, Avery had a trial that violated due process. Therefore, Avery respectfully requests that his conviction be overturned and a new trial with a judge that has not already determined that he is guilty preside.

However, Avery did fail to move for a change of venue or to request that judge Willis recuse himself. As a result of this ineffective assistance of counsel in failing to make such motions or requests Avery requests an evidentiary hearing under ***State v. Machner***, to supplement the record.

Avery further notes that his post-conviction counsel failed to raise the issue in his petition for post-conviction relief. Therefore, a ***Machner*** hearing is also necessary to establish if it was unreasonable for his post-conviction counsel to fail to raise this issue and if this failure prejudiced him.

IV. AVERY WAS DENIED HIS RIGHTS UNDER THE UNITED STATES AND WISCONSIN CONSTITUTIONS TO A POST-CONVICTION HEARING BY AN UNBIASED JUDGE

In like fashion to the obvious denial of his rights to a fair and impartial tribunal in his trial, Avery was entitled to an unbiased judge in his post-conviction relief proceedings. His attorneys failed to request that judge Willis should have recused himself or to request a change of venue.

Avery again requests an evidentiary hearing under ***State v. Machner***, to show that it supplement the record. This is also necessary to establish if it was unreasonable for his post-conviction counsel to fail to raise this issue and if this failure prejudiced him.

V. AVERY WAS DENIED HIS RIGHTS UNDER THE UNITED STATES AND WISCONSIN CONSTITUTIONS TO EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO SUPPRESS EVIDENCE

LEGAL STANDARD

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized." Fourth Amendment of the United States Constitution.

In ***Wilson v. Layne***, 526 U.S. 603 (1999), the United States Supreme Court commented on the history and content of the Fourth Amendment as follows:

> In 1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Semayne's Case*, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B.). In his *Commentaries on the Laws of England*, William Blackstone noted that "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it be violated with impunity" agreeing herein with the sentiments of antient Rome .... For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." William Blackstone, 4 Commentaries on the Laws of England 223 (1765-1769).

Id. at 609-10.

> The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home: "The right of the people to be secure in his persons, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV (Emphasis added.) See also ***United States v. United States District Court***, 407 U.S. 297, 313 (1972) ("Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is Directed").

Id. at 610.

ARGUMENT

A. THE WARRANTS WERE VOID FOR LACK OF A COURT SEAL

Writs are required to have a seal of the court, pursuant to **Wis. Stat. § 753.04**, and public documents not under seal are not self-authenticating, pursuant to **Wis. Stat. § 909.02(2)**; in turn, those public documents under seal are self-authenticating. **Wis. Stat. § 909.02(1).** Because the warrant lacks a seal it is not a valid warrant.

There is a long history in the United States and in Wisconsin of using seals on warrants. In 1977 the Wisconsin Constitution was amended, removing the Constitutional provision in Article VII § 17, requiring all writs and processes issued from a court to have a seal of the court. In that same year **Wis. Stat. §§ 753.04** and **753.30** were enacted. **Wis. Stat. § 753.04** lays out

the requirement that writs have a seal of the court and **Wis. Stat. § 753.30(3)1** lays out the procedure and rules for having writs and processes sealed.

Indeed, the requirement that writs have seals has been in force since Wisconsin became a state. The history of the legal requirement is reflected in ***Leas & McVitty v. Merriam***, 132 F. 510, 5-6 (W.D. V.A. 1904), where the Court stated "In ***Ins. Co. v. Hallock***, 6 Wall. 556-558 [73 U.S. 556 (1867)], it said: 'The authorities are uniform that all process issuing from a court which by law authenticates such process with its seal is void if issued without a seal. Counsel for plaintiffs in error have not cited a single case to the contrary, nor have our own researches discovered one.'" And this reflects the thinking of the people of the state at the time that Wisconsin adopted statehood. That the legislature shifted the requirement from the constitution to the statutes does not remove the requirement.

Further, the Wisconsin State Constitution provides that common law is still in force, unless otherwise stated by law. Wis. Const. Article XIV § 13. And **Wis. Stat. § 939.10** expressly points out that, though common law crimes are abolished, common law rules are preserved. The United States Supreme Court has pointed out that "... there was no settled rule at common law invalidating warrants not under seal *unless* the magistrate issuing the warrant had a seal of office or a seal was required by statute ..." ***Starr v. United States***, 153 U.S. 614, 619 (1894) (emphasis added). **Wis. Stat. § 753.05** places a requirement for the Wisconsin Circuit Courts to have seals. Further, **Wis. Stat. § 889.08(1)** points out that a "certificate must be under seal of the court" in order for it to be held as evidence outside of the court that issued it.

The legislative intent is found in the phrasing of **Wis. Stat. § 753.04**. Indeed, the legislature selected to distinguish all writs in general from writs of certiorari. The first sentence of the statute begins with the words "All writs ..." and the second sentence of the statute begins "All writs of certiorari ..." A search warrant has classically been referred to as a "writ of assistance" (Black's law dictionary, 8th Edition at page 1641) and falls under the definition of "writ" as laid out in Black's law dictionary, 8th Edition at page 1640.

The plain language reading of the statute requires that "All writs issued from the circuit court shall be ... sealed with the seal of the court..." Shall is mandatory language, all writs must have a seal of the court, and a search warrant is a writ.

This is not an issue that can be considered a singular incident. This warrant cannot be said to have a mere defect that doesn't affect Avery's rights. In the criminal case against Avery

there were several warrants that had a seal of the court on it. Therefore, this isn't a form over substance issue. This is a habitual ignoring of the well established law Federal common law and State law that warrants that issue without a court seal are void. Avery asserts that only if these officers hadn't habitually ignored the statutory and common law requirement that this issue would be without merit.

Further, similarly situated persons are afforded the statutory protections of the statutory and common law requirements pointed to above in the State of Wisconsin and under long standing common law as asserted by the United States Supreme Court. And Avery has a right to protections created by state law under the Fourteenth's Amendment's procedural Due Process clause. By failing to follow the legal requirements for issuance of a search warrant in Wisconsin Avery's equal protection and due process rights were violated.

B. THE WARRANTS WERE VOID BECAUSE THERE WAS NO RECORD

The warrants are defective because there is no indication that the affidavit was ever seen by the issuing judge. The affidavit is witnessed by the actual prosecutor in the case, attorney Kratz. **Wis. Stat. § 968.23** gives an example of an affidavit for a warrant. At the bottom of the example the legislature took the time to put in the text "..., Judge of the ... Court." Clearly the legislature saw that the United States Constitution requires that a neutral magistrate be *accountably* placed between the State and a defendant. Without a way of knowing that the judges were actually involved in the process of establishing probable cause the procedure was invalid and the warrants are illegal.

In ***Franks v. Delaware***, 438 U.S. 154 (1978), the Supreme Court recognized that the pre-search proceeding was *ex parte* and that a defendant could challenge the information placed before the court. ***Id.*** at 169. Holding an evidentiary proceeding with the actual prosecutor doesn't meet the mandates of the Constitution. See ***Coolidge***, 403 U.S. at 450, 454-55; ***Johnson v. United States***, 333 U.S. 10 (1948); ***Camara v. Municipal Court of San Francisco***, 387 U.S. 523 (1967).

The affidavits for the search warrants act as the only record for the issuance of those warrants. In the present case the judges signed none of the affidavits therefore there is no record

that they saw them. In other words, there is no record. And without a record, there is no court of record.

VI. AVERY WAS DENIED HIS RIGHTS UNDER THE UNITED STATES AND WISCONSIN CONSTITUTIONS TO EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ARGUE A BREAK IN THE INTEGRITY OF THE STATE'S CHAIN OF CUSTODY OF HIS AND HALBACH'S VEHICLE

LEGAL STANDARD

Physical evidence is admissible when the possibility of misidentification or alteration is "eliminated, not absolutely but as a matter of reasonable probability." ***United States v. Allen***, 106 F.3d 695, 700 (CA6 1997) (citations omitted). Merely raising the possibility of tampering or misidentification is insufficient to render evidence inadmissible. ***United States v. Kelly***, 14 F.3d 1169, 1175 (CA7 1994).

"[T]he prosecution's chain-of-custody evidence must be adequate." ***United States v. Ladd***, 885 F.2d 954, 957 (CA1 1989). A break in the chain of custody goes to the weight of the evidence. ***United States v. Sparks***, 2 F.3d 574, 582 (CA5 1993); ***United States v. Levy***, 904 F.2d 1026, 1030 (CA6 1990), cert. denied, 498 U.S. 1091 (1991). Where there is no evidence indicating that tampering with the exhibits occurred, courts presume public officers have discharged their duties properly. ***United States v. Aviles***, 623 F.2d 1192, 1197-98 (CA7 1980).

All the government must show is that reasonable precautions were taken to preserve the original condition of evidence; an adequate chain of custody can be shown even if all possibilities of tampering are not excluded. ***Aviles***, 623 F.2d at 1197. In ***Aviles***, the Court concluded that since the seals on the evidence bags were intake when the bags were opened by the chemist who would analyze the evidence, the trial court could reasonably find that the narcotics evidence was in the same condition as when it was purchased.

ARGUMENT

The seals on the doors to Avery's vehicle were broken prior to being taken to the crime lab. Conversely, there were no seals placed on the doors of Halbach's Rav-4. Avery argues that the seals on the doors were either nonexistent or broken. This shows that there was a break in the chain of custody that the jury should have been made aware of.

VII. AVERY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE CHARGE OF FELON IN POSSESSION OF A FIREARM WASN'T SEVERED

LEGAL STANDARD

Joinder is improper when the State joins a strong evidentiary case with a much weaker case in hope that cumulation of evidence will lead to conviction in both cases. ***Sandoval v. Calderon***, 231 F.3d 1140 (CA9 2000).

The statutes governing joinder of crimes in Wisconsin state:

> **Wis. Stat. § 971.12 Joinder of crimes and defendants.**
> **(1) JOINDER OF CRIMES.** Two or more crimes may be charged in the same complaint, information or indictment in a separate count from each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more case or transactions connected together or constitution parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.
>
> **(3) RELIEF FROM PREJUDICIAL JOINDER.** If it appears that a defendant or the state is prejudiced by a joinder of crimes or defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials or courts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates anther defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.
>
> **(4) TRIAL TOGETHER OF SEPARATE CHARGES.** The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendant, if there is more than one, could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such complaint, information or indictment.

Whether severance should be granted lies within the discretion of the circuit court. See ***State v. Nelson***, 146 Wis. 2d 442 (1988); ***State v. Hoffman***, 106 Wis. 2d 185, 209 (1982) (dealing with substantial prejudice).

ARGUMENT

When Avery was first arrested it was for the charge of Felon in Possession of a Firearm. Eventually that charge expired due to a procedural requirement since the State failed to bring Avery to have a probable cause hearing inside the statutory time limit. Avery was subsequently charged with First Degree Intentional Homicide and Mutilation of a Corpse. Eventually the State recharged the dismissed Felon in Possession of a Firearm charge and it was joindered without objection.

At trial Avery stipulated to the element of being a felon. In so doing Avery introduced evidence against himself that would normally not be introduced to a jury unless he took the stand. The jury was then aware of the fact, by Avery's own admission, that he had been previously convicted of an "infamous crime."

The joindering of this charge was unfair and should have been challenged.

VIII. AVERY WAS DENIED EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL WHEN THEY FAILED TO ARGUE THAT HE WAS ENTITLED TO A NEW TRIAL DUE TO RETROACTIVE MISJOINDER

LEGAL STANDARD

Dismissal of some counts charged in the indictment does not automatically warrant reversal of convictions reached on remaining counts. See ***United States v. Pelullo***, 14 F.3d 881, 897 (CA3 1994); ***United States v. Friedman***, 845 F.2d 535, 581 (CA2 1988). The Wisconsin Court of Appeals stated the following concerning retroactive misjoinder, in ***State v. McGuire***, 204 Wis. 2d 372, 380-81 (Ct. App. 1996):

> We conclude that where an appellate court has determined that conviction on one or more counts should be vacated, even if the defendant did no move for severance before the trial court, the defendant is entitled to a new trial on the remaining counts if the defendant shoes compelling prejudice arising form the evidence introduced to support the vacated counts. We adopt the three-factor analysis or [***United States v.***] ***Vebeliunas*** [, 76 F.3d 1283, 1293 (CA2 1996)] as the proper method for making this determination.
>
> The three factors to determine whether there is prejudicial spillover are:
> **(1)** Whether the evidence introduced to support the dismissed count is of such an inflammatory nature that it would have tended to incite the jury to convict on the remaining count;
> **(2)** The degree of overlap the similarity between the evidence pertaining to the dismissed count and that pertaining to the remaining count; and
> **(3)** The strength of the case on the remaining count.

In ***United States v. Lane***, 474 U.S. 438, 449 (1986) the United States Supreme Court stated:

> [A]n error involving misjoinder 'affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." ***Kotteakos v. United States***, 328 U.S. 750 at 776 (1946).

In ***United States v. Pigee***, 197 F.3d 879 at 891 (CA7 1999), the court stated:

> We review the defendant's claim of misjoinder de novo. See ***United States v. Sill***, 57 F.3d 553, 557 (CA7 1995). However, "a misjoinder 'requires reversal only if the misjoinder results in actual prejudice because it had substantial and

injurious effect or influence in determining the jury's verdict.'" ***United States v. Schweihs***, 971 F.2d 1302, 1322 (CA7 1992), quoting ***United States v. Lane***, 474 U.S. 438, 449.

ARGUMENT

In the present case Avery had been charged with mutilation of a corpse. The State's contention was that he destroyed the body of Halbach to cover for his crime. But the State failed to prove its case beyond a reasonable doubt here. Nonetheless, the State had presented evidence that supported this charge that could reasonably have influenced the jury to find Avery guilty on the charge he was convicted of. As a result, Avery is entitled to a new trial that is free of this noncumulative evidence that prejudiced him.

IX. AVERY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO DEVELOP AN ARGUMENT BASED ON AVAILABLE INFORMATION THAT THE STATE HAD PLANTED EVIDENCE

Avery's defense attorneys failed to develop evidence that the camera found in a burn barrel on or near his property had been taken from on John Campion. Further, that the tire that was supposedly burnt in the burn barrel couldn't have fit into that barrel. Finally, that a rubber tire burns too hot to leave the plastic components and the aluminum can seen in the evidence pictures in the form it was in. See Exhibits 4 through 10.

Avery asserts that there is evidence available to show that this tire hadn't burnt the contents of the barrel. Most important is that a tire burns exceptionally hot. The components and the can in the barrel would have been destroyed. Anyone whose burnt an aluminum can in a camp fire knows that it becomes ash from a wood fire alone. The idea that a tire fire would do less is absurd.

This opens up the finding of the "evidence" to attack. The State's contention being absurd, Mr. Campion's story becomes plausible. See Exhibits 11 and 12. The State could easily have burnt the phone and other evidence and planted it in the burn barrel.

As Avery had asserted the affirmative defense that he was being framed, it is only reasonable to present evidence and argument that the defense is valid.

X. AVERY WAS DENIED DUE PROCESS BECAUSE THE COURT WAS INCOMPETENT TO HEAR AN APPOINTED SPECIAL PROSECUTOR

LEGAL STANDARD

A circuit court has subject matter jurisdiction, conferred by the state constitution, to consider and determine any type of action; have, failure to comply with a statutory mandate may result in a loss of competency which can prevent a court from adjudicating a specific case before it. ***State v. Kywanda F.***, 200 Wis.2d 26, 33 (1996).

Failure to comply with a statutory mandate may result in a loss of competency to proceed in a particular case. ***State v. Zanelli***, 212 Wis. 2d 358, 365 (Ct. App. 1997). The Wisconsin Supreme Court has stated that a circuit court's "failure to follow plainly prescribed procedure which we consider central ... renders it incompetent..." ***Arreola v. State***, 199 Wis. 2d 426, 441 (Ct. App. 1996).

ARGUMENT

On April 20th, 2006 judge Willis signed an Appointment of Special Prosecutor under Chapter 978 to allow attorney Thomas J. Fallon to act as special prosecutor on the case. See Exhibit 13. The "OATH TO CONSENT TO SERVE" was not signed by attorney Fallon. Therefore, the court was not competent to hear him under law. Avery's conviction must be overturned as this violated his procedural due process rights. Failure to object or otherwise raise this issue was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to ineffective assistance of post conviction counsel.

XI. AVERY WAS DENIED DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO HAVE AN UNBIASED JURY

LEGAL STANDARD

Under the United States Constitution a criminal defendant in a state court is guaranteed an impartial jury by the Sixth Amendment as applied to the states through the Fourteenth Amendment. ***Duncan v. Louisiana***, 391 U.S. 145 (1968); ***Ristaino v. Ross***, 424 U.S. 589, 595 1976); ***Irvin v. Dowd***, 366 U.S. 717, 722 (1961). Principles of due process alos guarantee a defendant a fair trial by a panel of impartial jurors. In Wisconsin a defendant is entitled to a trial

by an impartial jury as a matter of state constitutional law under Sec. 7, art. 1 of the Wisconsin Constitution.

Wis. Stat. § 805.08 (1) states in relevant part:

> Qualifications, examination. The court shall examine on oath each person who is called as a juror to discover wither the juror is related by blood or marriage to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused.

ARGUMENT

A. A JURY FROM MANITOWOC COUNTY HAS A PRESUMPTIVE FINANCIAL INTEREST IN THE OUTCOME

Avery had a multi-million dollar lawsuit pending against Manitowoc County at the time that he was charged and brought to trial. The people of the county, who made up the jury that judged him, were liable to him if he won. Arguably, he was in an excellent position to do just that. His suit focused on the wrongful acts of law enforcement that were discovered due to the efforts of the innocent Project and revealed that his DNA did not match what was found on the victim.

Ultimately, the people of Manitowoc County would be forced to pony up for the wrong that was done to Avery. It may be true that their insurance would cover some or even all of the damages that Avery would have been awarded, however, that wouldn't mean that the people of the county wouldn't have been free of a financial hurt. Indeed, whatever isn't covered by the County's insurance would have been paid directly from the County itself. Further, the insurance rates would have gone up. The jury was composed of a group of twelve persons with a direct financial interest in the outcome. The jury's bias is evident and the case must be overturned.

Failure to raise and argue this issue was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

B. JUROR WARDMAN SHOULD HAVE BEEN STRUCK FOR CAUSE.

Juror Wardman was a volunteer with the Manitowoc County Sheriff's Department and his son was a sergeant with the department as well. This connection statutorily precluded him from being a juror. Failure to move to strike him for cause was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

C. JUROR MOHR SHOULD HAVE BEEN STRUCK FOR CAUSE.

Juror Mohr was married to the temporary Clerk of Court called in to relieve the work load created by Avery's trial. There was a great deal of concern on the part of the State concerning the implications of maintaining this person as a juror. In particular, the State was concerned that juror Mohr's participation would cause the case to be overturned due to his probable sympathy or additional knowledge of the inner workings of the Clerk of Court's office. The defense argued for maintaining juror Mohr despite the fact that he was acquainted with nearly every person that worked in the office.

There was also concerns that juror Mohr's wife had volunteered information concerning her personal knowledge of the vial of blood found in the Clerk's office. It should be noted that the fact that juror Mohr's wife had volunteered any such information is indicative of her inability to remain tight lipped concerning personal knowledge of evidence even when her husband is a juror. Further, it seems clear that the Mohr couple were lacking in the needed ethical boundaries that a Clerk of Court and a juror would have to have. Be it because they are just an open couple that freely speak or there is a dysfunctional and unhealthy lack of proper boundaries is irrelevant. For whatever reason Mrs. Mohr had shared information that was relevant to the outcome of this case.

Under the circumstances, it is clear that juror Mohr had personal relationships with several persons that worked in the Clerk of Court's office. The fact that they were merely acquaintances is irrelevant, given that his wife clearly spoke freely of her exposure to sensitive evidence. It is reasonable to infer from this that she also spoke about her coworkers in a positive light. Further, juror Mohr would be inclined to view them in a positive light regardless given that they must be persons of the same general personality as his wife. In other words, he would be inclined, as people are, to grant them deference by association. This was not explored nearly enough. And both the State and the judge shared reservations concerning keeping juror Mohr for trial.

Failure to agree to strike him for cause was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

D. JUROR TEMME SHOULD HAVE BEEN STRUCK FOR CAUSE.

Juror Temme had a professional relationship with Manitowoc County District Attorney Rohrer and Manitowoc County Clerk of Court Lynn Zigmunt. She had worked as a legal

assistant some years earlier with them, knew them on a first name basis, and felt that she could casually engage in conversation with them at any moment. Under these circumstances she should have been struck for cause.

Juror Temme was very clear that she believed that law enforcement officers are less likely to lie under oath than other persons. Indeed, she believed that they are inherently more honest than other persons and always be honest in their answers. She also was clear that there were no circumstances under which they would not be honest, in her mind.

In this juror's mind law enforcement officials are inherently "upstanding." She had a personal relationship with persons who work in the justice system. Her feelings and beliefs were unlikely to be overcome by a jury instruction, no matter what her answer was. Personal beliefs such as these are not fair or impartial. They don't protect a criminal defendant's constitutional rights to an unbiased jury.

Failure to agree to strike him for cause was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

E. JUROR NELESEN SHOULD HAVE BEEN STRUCK FOR CAUSE.

Juror Nelesen had a bias toward the State. He stated that he would be reluctant not to consider Avery's decision not to testify as the Court would instruct him. That is, he would view the right not to take the stand as an indication of guilt.

Further, he stated that he believed that law enforcement was less likely to lie under oath than other persons. Despite the fact that juror Nelesen eventually stated that he would try to view officers as just as likely to lie as anyone else, his initial reaction is very telling. He, in fact, has a friend who is a law enforcement officer. He already believed that a criminal defendant who wouldn't take the stand was trying to hide something. And he was also biased toward law enforcement officers as inherently more honest under oath than the average person.

Finally, this juror expected Avery to show who the actual killer was in this case. As noted by the court, Avery has no such burden under law. But this juror not only believed that law enforcement was more honest than most people but that they make less mistakes. This is evident in that this juror expected Avery to present more than just evidence of his actual innocence, he expected Avery to prove who the actual killer was. This bias, in conjunction with other biasing considerations noted herein, work to show that this juror was in fact a pro law

enforcement person who very much believes that when a person is accused by law enforcement he is more than just probably guilty. His personal philosophy was unlikely to be overcome by a jury instruction no matter what he said. It is clear by the shear number of biasing influences he spoke of that he had deeply rooted feelings on these issues. Under such circumstances, the presumption that a juror will follow a court's instructions should have been considered rebutted.

Failure to move to strike him for cause was due to ineffective assistance of counsel. Failure to raise the ineffective assistance of counsel issue was due to failure of post-conviction counsel.

CONCLUSION

For the forgoing reasons Avery respectfully requests that this Honorable Court grant him the relief requested.

Respectfully submitted this 10 day of February, 2013.

Steven Avery

Steven Avery #122987
Wisconsin Secure Program Facility
P.O. Box 9900
1101 Morrison Dr.
Boscobel, WI 53805

CERTIFICATE OF SERVICE

I certify and state under penalty of perjury that on this day I served a copy of the within MOTION FOR RELIEF PURSUANT TO WIS. STAT § 974.06 on the plaintiff at the address listed below, by way of prepaid first class mail;

District Attorney Mark Rohrer,
°/° Manitowoc County District Attorney's Office
325 Courthouse
1010 South 8 th Street
Manitowoc, WIS. 54220

Dated 2-10-2013

Steven Avery

Steven Avery # 122987
Wisconsin Secure Program Facility
P.O. Box 9900
1101 Morrison Dr.
Boscobel, Wis. 53805

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

v.

STEVEN AVERY,
Defendant-Appellant.

APPENDIX TO DEFENDANT-APPELLANT'S MOTION FOR RELIEF PURSUANT TO WIS. STAT § 974.06

EXHIBIT LIST

EXHIBIT NUMBER	EXHIBIT DESCRIPTION
1	Memorandum from Conrad Baetz to defense attorneys
2	Jail Inquiry concerning jail workers observing defense
3	Memo from Sheriff Pagel concerning Exhibit 3
4	Picture of burn barrel from distance
5	Picture of burn barrel with tire rim
6	Picture of burn barrel with tire rim
7	Picture of edge of tire rim
8	Picture of contents of burn barrel
9	Picture of contents of burn barrel
10	Picture of contents of burn barrel
11	E-mail to Baetz about Mr. Campion
12	E-mail from Baetz about Mr. Campion
13	Chapter 978 from
14	Personnel Commitee October 10, 2006, 9:00am Juror Wife Moho
15	Excused Juror March 16, 2007, 2 pages
16	Right doors no evidence tape on
17	Rear Cargo Door no evidence tape on
18	Left Door no evidence tape on
19	Left Door no evidence tape on
20	Right Door no evidence tape on
21	Front Hood no evidence tape on
22	Front Hood no evidence tape on
23	Dark cant see
24	No evidence tape on Vehicle
25	Dark cant see Time 17:38:15 on 2005-11-5
26	Dark cant see no evidence tape on Vehicle
27	My car Hood Seal Broken
28	Trunk lid Seal Broken
29	Right Door is good Seal
30	Left Door is Broken Seal