STATE OF WISCONSIN | CIRCUIT COURT BRANCH 3 | MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 06-CF-88

BRENDAN R. DASSEY,

Defendant.

MOTION IN LIMINE TO BAR AND LIMIT CERTAIN TESTIMONY

PLEASE TAKE NOTICE that as soon as counsel for the State of Wisconsin may be heard, the state will move the court for an order barring the testimony of defense expert witness Charles Honts, Ph.D. and former defense investigator Michael O'Kelly and to limit the scope of the inquiry of former defense attorney Leonard Kachinsky. In the alternative, and in lieu of the court's granting the motion to bar and/or limit testimony, the state respectfully requests the following alternative relief:

1. Unseal the record of the June 30, 2009, *ex parte* proceeding in which the state was not allowed to participate and had no formal notice.

2. Lift the gag order imposed on defense witness Michael O'Kelly and both his local counsel in Wisconsin and his California counsel, Ken Rosenfeld.

3. Issue an order demanding production of the items contained in Exhibit 2, attached, entitled "Privileged Log" from postconviction appellate counsel.

As grounds therefore and in support of said motion, the state asserts the following:

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REQUEST TO BAR AND LIMIT TESTIMONY

Postconviction counsel has devoted a substantial amount of their pleadings to the allegation that former defense counsel Leonard Kachinsky and his investigator Michael O'Kelly were ineffective in representing Brendan R. Dassey in the pretrial proceedings regarding the above-captioned prosecution. Postconviction counsel alleges that Kachinsky and O'Kelly's work in the creation of a May 13, 2006, videotaped interview of Brendan Dassey constituted deficient performance which prejudiced the defendant and breached their fiduciary duty of loyalty to their client. However, whether there was deficient performance leading up to the production of the May 13 videotaped statement is irrelevant. Whether the performance was deficient is irrelevant because prejudice cannot be established. Prejudice cannot be established because the May 13, 2006, videotaped interview was never introduced into evidence. Consequently, the existence of that statement had no bearing whatsoever on the verdict. Thus, it is not possible for postconviction counsel to prove "there is a reasonable probability that, but for counsel's unprofessional errors (Attorney Kachinsky's efforts at reaching a plea agreement resulting in the creation of the May 13, 2006, statement), the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 694 (1984). A "reasonable probability" under the *Strickland* standard is defined as a "probability sufficient to undermine confidence in the outcome." *Id.* at 694. Since the "disloyalty" and or error[1] did not lead to a plea or the introduction of evidence used to convict the defendant, there is no prejudice. Therefore, the circumstances surrounding the creation of the May 13, 2006, statement; *i.e.,* the efforts of defense investigator Michael O'Kelly to convince the defendant to give such a statement, the

[1] The state assumes solely for the sake of argument only that error may have occurred. The state by no means agrees that error occurred or that counsel's performance was deficient with respect to his efforts to present his client in a favorable light to obtain a favorable plea agreement.

administration of a polygraph examination and the actual results of said examination, as well as any of the interviews between or amongst Kachinsky, O'Kelly, and defendant are all irrelevant and immaterial since the fruits of those efforts were never introduced at trial. This fruit was never harvested, nor was it served to the jury. Consequently, there is no prejudice from such behavior.

Similarly, any questioning of Kachinsky's handling of the motion to suppress as it relates to the February 27, 2006, statement should likewise be barred for the very same reason. The February 27, 2006, statement was never introduced into evidence. It did not play a part in the conviction. Therefore, there was no error that contributed to the conviction. Again, it is not possible for postconviction counsel to prove "there is a reasonable probability that, but for counsel's unprofessional errors (his handling of the suppression hearing as it relates to the February 27 statement and his concession on *Miranda* issues), the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. at 694. The scope of the inquiry as it relates to Kachinsky must be limited to conduct-related evidence that was admitted at trial; *i. e.* the March 1, 2006, statement.

Additional support for barring the testimony of Investigator O'Kelly is found in SCR 20:3.5(b). SCR 20:3.5(b), **Impartiality and Decorum of the Tribunal**, reads as follows:

> A lawyer shall not:
>
> . . . .
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order or for scheduling purposes if permitted by the court. If communication between a lawyer and judge has occurred in order to schedule the matter, the lawyer involved shall promptly notify the lawyer for the other party or the other party, if unrepresented, of such communication.

The ABA comment[2] to SCR 20:3.5(b) is also instructive. The second paragraph reads "during a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters, or jurors unless authorized to do so by law or court order."

In this case, the state is aware of no court order authorizing the occurrence of *ex parte* communications concerning the appearance of defense investigator Michael O'Kelly at an *ex parte* proceeding held before the court on June 30, 2009. Further, the state is unaware of any law authorizing such contacts or hearing without participation by and notice to the state. Attached, the court will find two pages recording the events obtained from the Wisconsin Circuit Court Access (WCCA) website. The records reflect that a hearing was held on June 30; and under the court's direction, the clerk's minutes from that hearing have been filed under seal. Additionally, on July 14, 2009, an *ex parte* order was likewise filed under seal. The state has not been advised as to the nature of these proceedings, nor was the state advised that an order was entered or even that these proceedings were to be conducted. Had it not been for defense investigator Michael O'Kelly calling the prosecutors in this case to inquire about that proceeding, the state would not have known these proceedings were underway. The state complained in a letter faxed to the court dated June 29, 2009.[3] The state received no response from either court or counsel. The state assumed that once pleadings were filed, relief or an explanation in some form would be granted. At the very least a copy of order granting the *ex parte* contact and the reasons therefore.

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[2] The state acknowledges that the comments are simply advisory and that they have not been adopted by the Wisconsin Supreme Court.

[3] A copy of the letter is attached and marked Exhibit #3.

More importantly, as the state prepares for these postconviction proceedings in this case, it is unable to fully debrief and interview defense investigator O'Kelly. Mr. O'Kelly has informed the state that the court issued a "gag order" preventing him and his attorneys from discussing anything related to events of June 30, 2009. Mr. O'Kelly figures prominently in the defense pleadings and is expected to be a witness on behalf of the defendant Brendan R. Dassey. Yet, while Mr. O'Kelly and former counsel Leonard Kachinsky remain focal points in the defendant's postconviction motion for a new trial, the state is precluded from adequately preparing for these proceedings because Mr. O'Kelly and his California attorney, Ken Rosenfeld, have declined to comment and provide information relative to the June proceeding which they (O'Kelly and Rosenfeld) believe relates to the substance of the postconviction claim.

In addition, Mr. O'Kelly refuses to provide the very same information to the state that he was required to provide to the defense during the *ex parte* proceedings. Clearly, this puts the state at an unfair disadvantage.

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Wardius v. Oregon, 412 U.S. 470, 474 (1973) (internal citations omitted). In this alibi notice case the United States Supreme Court noted that discovery—hence fundamental fairness, absent some compelling interest—is a two-way street. *Id.* at 475. *Accord*, *State v. Grande*, 169 Wis. 2d 422 (Ct. App. 1992), and *State v. McClaren*, 2008 WI App 118, 313 Wis. 2d 398, 756 N.W.2d 802. O'Kelly's testimony should be barred both on grounds of relevance and fundamental fairness. The state is entitled to a fair shake just as is the defendant.

In addition, the state asks the court to bar the testimony of Charles Honts, Ph.D. Dr. Honts's testimony is related entirely to the activities of investigator Michael O'Kelly. Honts is expected to testify regarding his interpretation of the polygraph administered to the defendant Brendan Dassey on April 16, 2006. Honts's testimony is equally irrelevant and immaterial to the issues at hand. First, the fact that Brendan Dassey took a polygraph was never made known to the jury in this case. More importantly, the results of that polygraph examination were never revealed to the jury; and, most importantly, the May 13 statement—the lynch pin and fruit of the allegations of ineffectiveness as they relate to Attorney Kachinsky and Investigator O'Kelly—was likewise never introduced to the jury. His testimony in effect that Dassey passed such a polygraph is therefore inadmissible. Lastly, polygraph results are inadmissible in Wisconsin. *State v. Dean*, 103 Wis. 2d228, 307 N.W.2d 628 (1981)

It is also inadmissible because permitting such testimony under these facts runs afoul of the fifth amendment right to fundamental fairness due both parties in an adversarial proceeding. Again, the defense attempts to shield the state from evidence regarding O'Kelly's activities surrounding the May 13 statement and at the same time casts aspersions on Mr. O'Kelly's character and competence by bringing in Dr. Honts. The defense wants to introduce evidence of what occurred on May 12 (exhibits 95, 96) but claims privilege/work product for the exact same type of information on May 14 and May 16. Rules of completeness and fairness dictate that Dr. Honts be barred from testifying.

ALTERNATIVE RELIEF

In the event the court declines to limit the scope of the examination of Attorney Kachinsky and/or bar the testimony of Investigator O'Kelly and Dr. Charles Honts, the state requests the following relief:

1. Rescind the gag order currently imposed on Mr. O'Kelly and his counsel so that the state may adequately prepare cross-examination and otherwise address the claims of ineffectiveness related to Attorney Kachinsky and his investigator Michael O'Kelly.

2. Unseal the record from the June 30, 2009, *ex parte* proceeding and inform the state of all that occurred during the proceedings and the court orders issued related to that proceeding so that the state may interview and obtain information from Investigator O'Kelly to properly prepare for the upcoming hearing.

3. Order the defense to produce the documents described in Exhibit 2, which is attached to this motion entitled "Privilege Log." In a phone conference with the defense, Attorneys Dvorak and Drizin represented that the *ex parte* proceedings were necessary for apparently two reasons. One, they claimed that Investigator O'Kelly was uncooperative with their demands for information. Whether that is true or not is neither here nor there. What is true, is that such a reason is woefully deficient to justify *ex parte discovery proceedings*. Additionally, Attorneys Dvorak and Drizin advised that the information they sought was privileged and or confidential and thus the state was not entitled to be present. Likewise, that is not a sufficient reason to foreclose participation by the state. If, in fact, the information was privileged, the parties could have discussed in general terms the nature of the documents which were demanded of O'Kelly and the state could have offered opinion as to whether the documents were in fact privileged and/or confidential. Nevertheless, it is not a reason to foreclose participation by the state. If the documents were in fact produced at that hearing, the court could have reviewed them *in camera*, made a determination, issued an order granting the defense access, and precluded the state access *at that time* for whatever legally appropriate reasons may have existed. Nevertheless, even if those records were in fact privileged or confidential on

June 30, they were and are no longer privileged once the defense filed this postconviction motion on August 25, 2009. Once the defense made the allegation that Attorney Kachinski and his investigator Michael O'Kelly rendered deficient and prejudicial performance regarding the events leading to the May 13, 2006, statement, all records, e-mails, interviews, and information leading to the production of that May 13 statement and the strategy to obtain it become relevant and material and, thus, subject to a waiver of the attorney/client and work product privileges. *See* Wis. Stat. § 905.03(4)(c) (2007-2008); *State v. Simpson,* 200 Wis. 2d 798, 548 N.W.2d 105 (Ct. App. 1996); and *State v. Flores,* 170 Wis. 2d 272, 488 N.W.2d 116 (Ct. App. 1992). What is particularly troubling about the claim of attorney/client and work product privilege here is that the defense is seeking to introduce similar evidence regarding the activities surrounding the May 13 statement. For instance, the defense has submitted a videotape investigative interview of their client, Brendan Dassey, ostensibly conducted by Investigator O'Kelly, on the evening of May 12, 2006. As the court is aware from looking at the lengthy exhibit list in this particular case, there is a whole series of e-mails regarding how the May 13, 2006, statement came into existence. One cannot claim privilege for some of the events regarding the activities of Kachinsky and O'Kelly on May 12, 13, 14, 15, and 16, and then claim that other contents are not. Assuming of course the court finds this aspect of the claim relevant; the documents in Exhibit 2 are properly the subject of a postconviction motion alleging ineffective assistance of counsel. Quite frankly, the fact that the defense is claiming privilege regarding the four documents in question only fuels the fires of speculation that those documents undermine or otherwise challenge the legitimacy of these claims in the first place. Therefore, if

the court denies the primary relief requested, the state respectfully asks the court to grant this alternative relief.

Dated this 11th day of January, 2010.

Respectfully submitted,

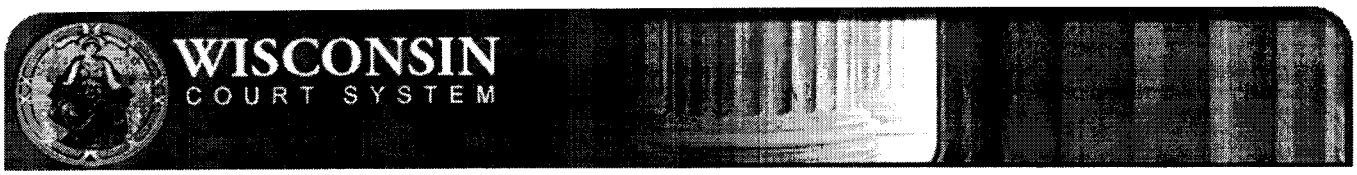
THOMAS J. FALLON,
Assistant Attorney General and
Special Prosecutor
State Bar # 1007736

KENNETH R. KRATZ
District Attorney and Special Prosecutor
State Bar # 1013996

NORMAN A. GAHN
Assistant District Attorney and
Special Prosecutor
State Bar #. 1003025

Attorneys for Plaintiff

Calumet County Courthouse
206 Court Street
Chilton, WI 53014-1127
Telephone: (920) 849-1438
Fax: (920) 849-1464



Wisconsin Circuit Court Access (WCCA)

Return to Case 2006CF000088

Printable Version (PDF)

State of Wisconsin vs. Brendan R. DASSEY

Manitowoc County Case Number 2006CF000088
Court Record Events

What is RSS?

	Date	Event	Court Official	Court Reporter
1	12-22-2009	Notice		

Additional Text:

Motion hearing is set for 01-04-10 at 9:45 a.m.

2	12-21-2009	Motion		

Additional Text:

Motion to Compel Production of Witness Information and Requested Documents.

3	12-10-2009	Order	Fox, Jerome L	

Additional Text:

Order from the Court of Appeals ordering that Attorney Thomas F. Geraghty may appear pro hac vice as co-counsel for the defendant.

4	12-03-2009	Motion		

Additional Text:

Motion to Admit Thomas F. Geraghty Pro Hac Vice.

5	09-24-2009	Order	Fox, Jerome L	

Additional Text:

Order from the Court of Appeals ordering that the time for deciding the defendant's postconviction motion is extended to July 26, 2010.

6	09-17-2009	Motion		

Additional Text:

Motion to Extend Time to Decide Post-Conviction Motions.

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7 09-16-2009 Letters/correspondence

Additional Text:

Postconviction motion hearing is set for January 15, 2010, January 19, 2010, January 20, 2010, January 21, 2010 and January 22, 2010.

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8 08-25-2009 Motion

Additional Text:

Section 809.30 Post-Conviction Motion.
Memorandum of Facts and Law Accompanying Section 809.30 Post-Conviction Motion.
Exhibits to Section 809.30 Post-Conviction Motion - Volume One: Exhibits 1-35.
Exhibits to Section 809.30 Post-Conviction Motion - Volume Two: Exhibits 36-55.
Exhibits to Section 809.30 Post-Conviction Motion - Volume Three: Exhibits 56-80.
Exhibits to Section 809.30 Post-Conviction Motion - Volume Four: Exhibits 81-96.

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9 08-03-2009 Transcript

Additional Text:

Transcript of motion hearing held on 06-30-09. (FILED UNDER SEAL)

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10 07-20-2009 Order Fox, Jerome L Hau, Jennifer K.

Additional Text:

Order from the Court of Appeals ordering that the time for filing a notice of appeal or postconviction motion is extended to August 25, 2009.

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11 07-14-2009 Order Fox, Jerome L

Additional Text:

Ex Parte Order (FILED UNDER SEAL)

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12 06-30-2009 Motion hearing Fox, Jerome L Hau, Jennifer K.

Additional Text:

Motion hearing held.
(Clerk's minutes from this motion hearing are FILED UNDER SEAL per order of the Court)

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13 06-24-2009 Motion

Additional Text:

Motion to Extend Time to File Postconviction Motions or Notice of Appeal; Motion to File Affidavit Under Seal.

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14 06-23-2009 Motion

Additional Text:

Ex Parte Motion (FILED UNDER SEAL)

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15 05-29-2009 Motion

Additional Text:

Ex Parte Motion (FILED UNDER SEAL)

165-11

CIRCUIT COURT

STATE OF WISCONSIN | BRANCH 3 | MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

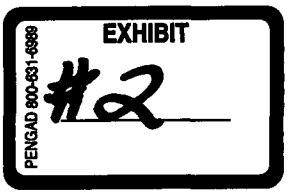
v.

BRENDAN R. DASSEY,
Defendant.

Case No. 2006 CF 88
(Ct. Ap. No. 2007XX1073-CR)

PRIVILEGE LOG

Document Number	Description	Date	Basis for Privilege
BD-1	Statement form filled out by Brendan Dassey at the direction of Michael O'Kelly	May 14, 2006	Attorney-client privilege and work product
BD-2	Videotape of May 14, 2006 meeting between Brendan Dassey and Michael O'Kelly	May 14, 2006	Attorney-client privilege and work product
BD-3	Statement form filled out by Brendan Dassey at the direction of Michael O'Kelly	May 16, 2006	Attorney-client privilege and work product
BD-4	Email from Michael O'Kelly to Len Kachinsky describing meeting between Michael O'Kelly and Brendan Dassey	May 16, 2006	Attorney-client privilege and work product



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CALUMET COUNTY
DISTRICT ATTORNEY'S OFFICE

Kenneth R. Kratz, District Attorney

Jeffrey S. Froehlich,
Assistant District Attorney
Julie L. Leverenz/Llonda K. Thomas
Victim/Witness Assistance Coordinators

206 Court Street
Chilton, WI 53014
(920) 849-1438
FAX: 849-1464

June 29, 2009

The Honorable Jerome L. Fox
Manitowoc County Circuit Court
1010 S. 8th Street
Manitowoc WI 54220

Re: State of Wisconsin vs. Brendan R. Dassey
Manitowoc Case No. 2006CF000088

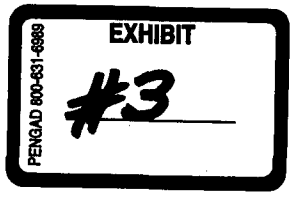
Dear Judge Fox:

At approximately 3:30 p.m., I received a telephone call from Michael O'Kelley, who indicates that he is scheduled to appear before the Manitowoc County Circuit Court sometime tomorrow, in response to a subpoena, and has been asked to bring along case file materials to provide to appellate counsel for the defense.

For whatever reason, it appears that the State has not been "invited" to participate in these proceedings, as appellate counsel has apparently convinced this Court that there is some Wisconsin authority for an ex parte appellate discovery procedure. Now that the State has been informed that there is a hearing which has been scheduled, which apparently deals with a discovery request, the State would object to said hearing being conducted ex parte, and would demand that appellate counsel provide some Wisconsin authority for such procedure.

The State can envision the Court's deciding to close the proceeding to the public, which may or may not be appropriate; the State is unaware, however, of any ex parte appellate discovery procedure in Wisconsin. See: State v. Kletzein, 314 Wis. 2d 750, which discusses post conviction discovery.

Mr. O'Kelley also complained of various veiled threats by Mr. Dvorak, an investigator for the appellate team, and several law students as to various sanctions, legal and practical, for Mr. O'Kelley's lack of cooperation with the appellate team in this case. I would suggest that the State's opportunity to be heard in matters of this type appear obvious, if for no other reason then to insure fairness and the transparency of this entire process.



165-13

The Honorable Jerome L. Fox
Re: State of Wisconsin v. Brendan R. Dassey

Should the Court wish to respond, or invite the State's participation in any future hearings which may be scheduled, I will look forward to the Court's response.

Sincerely,

Kenneth R. Kratz
District Attorney

KRK:lmc

cc: Tom Fallon, Department of Justice
Robert J. Dvorak, Attorney
Greg Weber, Department of Justice