STATE OF WISCONSIN	CIRCUIT COURT BRANCH 3	MANITOWOC COUNTY

STATE OF WISCONSIN, **Plaintiff,**	)	
v.	)	**Case No. 2006 CF 88** **(Ct. Ap. No. 2007XX1073-CR)**
BRENDAN R. DASSEY, **Defendant.**	)	**[Filed Under Seal]** (NOT SEALED PER COURT ORDER OF 01-12-10)

RESPONSE TO STATE'S MOTION IN LIMINE TO BAR AND LIMIT CERTAIN TESTIMONY

NOW COMES Brendan R. Dassey, by and through counsel Steven A. Drizin, Robert J. Dvorak, Thomas Geraghty, Joshua Tepfer, and Laura Nirider, and submits the following Response to the State's Motion in Limine to Bar and Limit Certain Testimony:

1. In its Motion, the State makes an assertion with which the defense is in total agreement, and which provides a useful framework for the discussion of the motions that are currently pending before this Court. On page 8, the State writes: "Once the defense made the allegation that Attorney Kachinski [*sic*] 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" (emphasis added). This is precisely the position taken by the defense. The actions taken by Mr. Kachinsky and Mr. O'Kelly leading up to the events of May 13, including actions relating to the May 13 telephone calls made by Brendan at the direction of Investigators Wiegert and Fassbender and with the knowledge of Mr. O'Kelly

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(which were later used against Brendan at trial), constitute acts of unprecedented disloyalty, which may have occurred with the knowledge and perhaps the participation of the State. These actions both adversely affected and prejudiced Brendan Dassey's representation; and Attorney Kachinsky and the State's failure to disclose these disloyal acts obstructed this Court's ability to adjudicate this case.

2. Counsel for the defendant has long ago produced to the State all of the materials provided by Mr. O'Kelly relating to his actions on or before May 13, 2006 that are referenced in Mr. Dassey's post-conviction motion. Counsel for Mr. Dassey will also produce additional materials that pre-date May 13, 2006 that have now become relevant in light of the information belatedly disclosed by the State on January 7, 2010 concerning the prosecution's knowledge of and participation in some of Mr. Kachinsky's acts of disloyalty. What the defense has not produced and will not produce until ordered by this Court are additional privileged communications between Mr. Dassey and Mr. Kachinsky and/or Mr. O'Kelly that occurred *after* the culmination of Mr. Kachinsky's disloyalty on May 13, 2006. Counsel believes these communications have no bearing on Mr. Kachinsky's state of mind leading up to the events of May 13, 2006, and thus privilege is not waived as to them. *See* Wis. Stat. 905.03(4)(c); *State v. Flores*, 170 Wis.2d 272, 488 N.W.2d 116 (Wis. Ct. App. 1992) (privilege is only waived as to communications relevant to the specific ineffective assistance claims). Indeed, if raising a claim of ineffective assistance of counsel rendered all of defense counsel's files simply open and available to the State – without regard to relevance – then defendants would effectively be chilled from ever raising claims of ineffectiveness.

3. Following what it has believed to be proper procedures, counsel has identified these irrelevant materials for the State in a privilege log and invited the State to seek discovery of them

from the Court. *See, e.g., Waldrip v. Head*, 272 Ga. 572, 579 (2000) (implementing the rule that "the state is entitled only to counsel's documents and files relevant to the specific allegations of ineffectiveness" by first allowing petitioner's counsel to determine the scope of the waiver, then proceeding to in-camera review if the State so moves). The defense has no objection to turning these materials over to the Court for *in camera* inspection and letting the Court evaluate their relevance to Mr. Kachinsky's disloyalty. The defense also has no objection to allowing Mr. O'Kelly to discuss with the State any and all work he did on behalf of the defense prior to and including his disloyal actions on May 13, 2006. As the State wrote in its Motion, and as the defense agrees, these matters are clearly relevant to the issues raised in the post-conviction petition and thus privilege was waived as to them.

4. With regard to the remaining claims made by the State, it is important to understand why the defense needed an *ex parte* hearing on June 30, 2009, concerning Mr. O'Kelly's actions and why this Court was wholly justified in excluding the State from that hearing. For months prior to the hearing, the defense had been trying to obtain Mr. O'Kelly's files relating to his work for Brendan. Mr. Kachinsky claimed he did not have them, and while Mr. O'Kelly told us that he had probably kept his polygraph charts and his videotaped interviews of Brendan, he would not produce them despite repeated requests. Mr. O'Kelly was so uncooperative that counsel had to track Mr. O'Kelly all over the country and eventually served him in Idaho with a subpoena (under relevant interstate compacts permitting such a procedure) in order to get him to come to Wisconsin so that he could be ordered to produce work-product information that belonged to Brendan.

5. When it sought the *ex parte* hearing, the defense was most interested in obtaining a videotape of Mr. O'Kelly's May 12, 2006 interrogation of Brendan – the very meeting in which

Mr. O'Kelly coerced Brendan into making a series of incriminating statements both during and immediately after he met with Investigators Weigert and Fassbender on May 13. The defense also sought Brendan's polygraph charts, because it had reason to believe that Mr. O'Kelly had confronted Brendan with the results of his polygraph on May 12 and possibly lied about those results to Brendan in a disloyal effort to coerce his confession (both classic interrogation tactics, as the defense anticipates that Dr. Richard Leo will testify). Beyond these items, counsel had no idea before the June hearing what else was in Mr. O'Kelly's files; specifically, it did not know if there was incriminating information in Mr. O'Kelly's files unrelated to Brendan's ineffective assistance of counsel claims that would still be protected by the attorney-client and work product privileges. Moreover, this June hearing occurred well before counsel had filed the post-conviction motion in August and made claims of disloyalty on the part of O'Kelly and Kachinsky. Under such circumstances, the State had no business being at this hearing. Under no set of circumstances, in fact, would the State be entitled to learn of work-product and attorney-client privileged material *at the same time that the defense learned of it*. This Court had every right – and even a duty – to hold the hearing *ex parte*. If, for example, Mr. O'Kelly were to produce inculpatory material, and that material were to become part of the public record, it would be unfair to Brendan to allow the State to use this material in a new trial (if the post-conviction motion or appeal were to be granted).

6. Prior to receiving this material, the defense had known that on May 12, 2006, Michael O'Kelly, an investigator hired by defense attorney Len Kachinsky, went into the juvenile detention center in Sheboygan to obtain a confession from his client, Brendan Dassey, despite Brendan's claims of innocence. Counsel also knew that during the entire week before the May 12 interrogation, Mr. O'Kelly and Mr. Kachinsky had planned this meeting; Mr. O'Kelly even

told Mr. Kachinsky that he should not be there when Mr. O'Kelly confronted Brendan because an attorney's presence might make it harder to "steer" Brendan into making a confession and to shift Brendan away from his firmly held "illogical position" (i.e., innocence). Counsel also knew that Brendan had been the subject of a hastily arranged police interrogation the following day, and that prior to that police interrogation on May 13, Mr. O'Kelly briefed Officers Wiegert and Fassbender about what Brendan had told him on May 12. Further, counsel knew that Mr. Kachinsky did not attend this interrogation on May 13, 2006 because he had a prior commitment to attend a National Guard training. Instead, he sent a non-lawyer, Mr. O'Kelly, to monitor it. Finally, counsel knew that the State had pressured Brendan into making incriminating (and recorded) telephone calls to his mother during the May 13 interrogation, which were then used against him at trial.

7. The material we received from Mr. O'Kelly after that hearing contained valuable new information demonstrating Mr. Kachinsky's and Mr. O'Kelly's disloyalty. As current counsel discovered after tracking Mr. O'Kelly down in Idaho and bringing him to Wisconsin to testify under oath, Mr. O'Kelly used clearly illegal and coercive tactics including direct threats of harm and promises of leniency, as well as the presentation of false polygraph results, to coerce admissions from Brendan on May 12 in disregard of Brendan's protests of innocence; Mr. Kachinsky and Mr. O'Kelly similarly coerced Brendan's consent to be interrogated by Officers Weigert and Fassbender on May 13; and Mr. O'Kelly was well aware of (and perhaps even the origin of) the officers' plan to instruct Brendan to make an incriminating telephone call to his mother on May 13 that was later used against him at trial. None of this material was brought to light until Mr. O'Kelly was ordered to produce his files at the *ex parte* hearing on June 30, 2009; indeed, neither Mr. Kachinsky nor Mr. O'Kelly had produced this material to successor counsel,

Attorneys Mark Fremgen and Ray Edelstein, despite their requests for complete files at the time they were appointed. Consequently, none of this highly relevant information was brought to this Court's attention at the time that Attorney Fremgen filed a motion to reopen the motion to suppress Brendan's February 27 and March 1 statements on the basis of Mr. Kachinsky's ineffective assistance of counsel.[1]

8. The State suggests in its motion that the events of May 12 and May 13 are irrelevant because Brendan was not prejudiced by the May 13 statement that he gave police (and, along a similar vein, it argues that Mr. Kachinsky's performance at the suppression hearing is not relevant because the State did not introduce the February 27 statements into evidence at trial). In other words, the State, in effect, argues that it cured Mr. Kachinsky's breaches of loyalty by cleansing the trial proceedings of the fruits of that disloyalty. The State, however, misapprehends the law. The breaches of loyalty that Mr. Kachinsky and Mr. O'Kelly committed are not measured under the usual two-prong *Strickland* standard governing ineffective assistance of counsel claims, which requires a showing of prejudice. Instead, as counsel has clearly set out in its post-conviction motion, these types of breaches are governed by case law derived from *Cuyler v. Sullivan*, which requires this Court to presume that prejudice flows from the breaches. *See* 466 U.S. 335 (1980) (prejudice is presumed when the defendant "demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance'"); *Thomas v. McLemore*, 2001 U.S. Dist. LEXIS 6763, at *31 (E.D. Mich. Mar. 30, 2001) (an "obvious" conflict of interest arises when a defense attorney

[1] As the State admits in its Motion, it has known about this *ex parte* hearing since June 30, 2009. All of its objections to this Court's decision to hold an *ex parte* hearing ignore one simple and undeniable fact: If the State really wanted to know what happened at the hearing, it could have moved to unseal the hearing at any time during the last six-and-one-half months. At the very least, when the State saw references to O'Kelly and Kachinsky's disloyalty on May 12 in Brendan's post-conviction motion filed on August 25, 2009, it was made aware that counsel was relying on documents that the State claims to have not previously seen. The State has thus had months in which it could have sought to unseal the hearing.

"abandons his or her duty of loyalty to the client and joins the prosecution in an effort to obtain a conviction"). This is a far lesser standard than the "prejudice" *Strickland* standard. *See Strickland*, 466 U.S. 668, 692 (1984) (describing the adverse effect standard as "not quite" a "per se rule of presumed prejudice"); *see also Stoia v. U.S.*, 22 F.3d 766, 771 (7th Cir. 1994) (explaining that the "adverse effect" standard is "significantly easier to demonstrate" than the *Strickland* prejudice standard).

9. The defense, through a number of witnesses including Attorneys Mark Fremgen and Ray Edelstein (who have recently seen the May 12 videotape and are, quite frankly, furious that it was not disclosed to them earlier), is prepared to put into evidence a myriad of ways in which Mr. Kachinsky and Mr. O'Kelly's disloyalty adversely affected Mr. Kachinsky's representation of Brendan during the suppression hearing and adversely affected Mr. Fremgen's subsequent representation of Brendan at trial, and, although it is not necessary under the law, even to provide evidence regarding how Mr. Kachinsky's disloyalty prejudiced Brendan. The State's use of the May 13 telephone call to impeach Brendan's testimony at trial is simply one in a long line of examples. Furthermore, per the defense's January 8, 2010 Motion for Leave to Amend its Post-Conviction Motion, the defense has recently become aware of additional newly discovered evidence that suggests that the State was aware of Mr. O'Kelly and Mr. Kachinsky's disloyal plans; that the State facilitated and abetted their breaches of loyalty, and that the State even profited from it in their case against Brendan (as when they used the May 13 telephone call at trial). Such knowledge and aid from the State only adds to the ways in which Brendan's case was prejudiced and adversely affected by the actions of Mr. Kachinsky and Mr. O'Kelly, as laid out more fully in the January 8 Motion.

10. In its January 8 motion, counsel also has argued that the newly discovered evidence of disloyalty and of State complicity produced by the State on January 7 indicates that Mr. Kachinsky's breaches are so consequential that they may constitute an abandonment of counsel under *United States v. Cronic*, under which prejudice must also be presumed.[2] 466 U.S. 648 (1984); *see also Henderson v. Frank*, 155 F.3d 159 (3rd Cir. 1998) (deeming the deprivation of counsel at a suppression hearing "structural error" which warrants the granting of a new trial when, as here, the statements that were the subject of the suppression hearing were admitted at trial). In such scenarios, not even a minimal showing of adverse effect is required in order for relief to be granted.

11. Finally, counsel wishes to respond to the State's argument concerning the admissibility of Dr. Honts' testimony. Counsel anticipates that Dr. Honts, a well-qualified psychologist and polygrapher, will testify simply that Mr. Dassey passed the polygraph that Mr. O'Kelly gave him on April 16, 2006, during which Mr. O'Kelly questioned Mr. Dassey about his involvement in Teresa Halbach's death. While it is true that polygraph evidence is generally excluded in Wisconsin as evidence of guilt or innocence (due to concerns over whether polygraphs can reliably detect truth), counsel does not intend to offer Dr. Honts' testimony as evidence of innocence or guilt. Counsel offers it for one very limited purpose: to establish that when Mr. O'Kelly told Brendan on May 12 that his polygraph results showed he was guilty, Mr. O'Kelly was lying to his own client in a disloyal effort to coercively induce Brendan to make incriminating statements to the State. We ask this Court to follow the example of a number of other jurisdictions which, even though they exclude polygraph evidence as substantive evidence of guilt or innocence, still admit polygraph evidence for similarly limited purposes. In these

[2] It should be noted that some of this newly discovered evidence reveals e-mail contact between the State and Mr. O'Kelly, despite Mr. O'Kelly's sworn testimony at the June hearing that he had not been in contact with the State regarding Mr. Dassey's case.

jurisdictions, polygraph evidence is still admissible to show the involuntariness of a confession and the pressures brought to bear on a defendant to confess. *People v. Kogut*, 805 N.Y.S.2d 789 (New York Sup. Ct., Nassau County, 2005); *People v. Melock*, 149 Ill.2d 423 (Ill. 1992); *State v. Schaeffer*, 457 N.W.2d 194 (Minn. 1990). Just as these courts have admitted polygraph evidence for the limited purpose of showing the types of pressures brought to bear on a defendant, we submit that this Court should permit the defense to introduce Dr. Honts' testimony solely for the limited purpose of showing the rather unprecedented level of pressure brought to bear on Brendan Dassey by his own defense team. The State's claim that such testimony is irrelevant, moreover, is clearly baseless in light of the disloyalty claims brought before this Court.

12. In sum, counsel for the Defendant: (1) does not object to the State's request to unseal the record of the June 30, 2009 *ex parte* hearing, except insofar as such record relates to any work done by Mr. O'Kelly or Mr. Kachinsky after their breaches of the duty of loyalty culminated on May 13, 2006; (2) does not object to the lifting of any gag order on Mr. O'Kelly and his attorney Mr. Rosenfeld with respect to Mr. O'Kelly's and Mr. Kachinsky's representation of Brendan Dassey on or before May 13, 2006; (3) does object to any disclosures by Mr. O'Kelly or Mr. Rosenfeld concerning Mr. O'Kelly or Mr. Kachinsky's work for Brendan after May 13, 2006, on the grounds that such information is not relevant to the ineffectiveness claims in Brendan's motion and hence privileged; (4) offers to produce the documents outlined in Defendant's privilege log to this Court for in-camera inspection as to their relevance to Brendan's claims.

RESPECTFULLY SUBMITTED this 11th day of January, 2010.

/s/ Robert J. Dvorak
One of Brendan Dassey's attorneys

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