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STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY  
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STATE OF WISCONSIN,  
PLAINTIFF, MOTION HEARING  
vs. Case No. 06 CF 88  
BRENDAN R. DASSEY,  
DEFENDANT.

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**DATE:** DECEMBER 15, 2006  
**BEFORE:** Hon. Jerome L. Fox  
Circuit Court Judge

MANITOWOC COUNTY  
STATE OF WISCONSIN  
**FILED**  
DEC 11 2007

**APPEARANCES:** **CLERK OF CIRCUIT COURT**  
  
KENNETH R. KRATZ  
SPECIAL PROSECUTOR  
On behalf of the State of Wisconsin.  
  
MARK R. FREMGEN  
Attorney at Law  
On behalf of the Defendant.  
  
RAYMOND L. EDELSTEIN  
Attorney at Law  
On behalf of the Defendant.  
  
BRENDAN R. DASSEY  
Defendant  
Appeared in person.

\* \* \* \* \*

**TRANSCRIPT OF PROCEEDINGS**

Reported by Jennifer K. Hau, RPR  
Official Court Reporter

(1)

1 THE COURT: This is in the matter of the  
2 State of Wisconsin vs. Brendan R. Dassey, Case No.  
3 06 CF 88. Appearances, please.

4 ATTORNEY KRATZ: The State appears by  
5 Calumet County District Attorney Ken Kratz,  
6 appearing as special prosecutor in this case.

7 ATTORNEY FREMGEN: Brendan Dassey  
8 appears in person by Attorneys Mark Fremgen and  
9 also Raymond Edelstein.

10 THE COURT: All right. Uh, we're here  
11 today to discuss a number of motions. I'm going to  
12 start with motions that were filed by counsel for  
13 the defense on November 10, 2006 and, specifically,  
14 I'm going to start with a motion that's captioned,  
15 motion to suppress statements, motion to reopen  
16 hearing to suppress statement, motion to continue.

17 Uh, in this motion, the defendant  
18 acknowledges that a hearing has already been held  
19 to suppress statements given by this defendant to  
20 authorities on February 27 and March 1 of 2006.  
21 But the defendant says that the previous motion  
22 failed to specifically assert that the  
23 defendant's statements were the product of undue  
24 suggestion. The defendant would like to have the  
25 hearing reopened or continued so he can present,

1           uh, psychological testimony from an expert  
2           witness relating to the suggestibility of the  
3           defendant.

4                     Uh, defense counsel, Mr. Fremgen, have I  
5           fairly stated the motion?

6                     ATTORNEY FREMGEN: That's correct, Judge.

7                     THE COURT: Do you wish to be heard on it?

8                     ATTORNEY FREMGEN: Judge, briefly.

9                     THE COURT: Go ahead.

10                    ATTORNEY FREMGEN: I don't want to add  
11           any more to the motion. I won't repeat what's in  
12           the motion itself. However, Your Honor, what  
13           we're asking is, essentially -- what we're  
14           asking, essentially, is to allow us to supplement  
15           what has already occurred.

16                    Granted, we understand the Court has  
17           already ruled previously on a motion brought  
18           before by his previous attorney essentially  
19           making the argument that the motion should be  
20           suppressed since the -- or excuse me, the  
21           statement should be suppressed since the  
22           statement wasn't a voluntary statement.

23                    And within the general or the larger  
24           text of voluntariness is the issue of  
25           suggestibility. I believe previous counsel

1 alluded to that in the motion, or in his  
2 arguments, and by presenting the, uh, school  
3 counselor who addressed the issue of maturity  
4 level and intelligence quotient, as well as the  
5 mother to essentially provide similar type of --  
6 of, uh, layperson testimony about my client's  
7 maturity level, I think that is what counsel was  
8 attempting to do.

9 We feel, after having reviewed the  
10 transcript of the motion hearing, reviewed the  
11 tapes, uh, and hired a psychologist from  
12 Janesville to go through that, uh, who's offered  
13 us a tentative opinion that he believes that the  
14 statements could potentially be unreliable based  
15 upon undue suggestibility, we would like to  
16 reopen that motion hearing, bring forth that  
17 additional evidence to support what I think has  
18 been tacitly attempted, but this would  
19 completely, uh -- or would complete that  
20 argument, uh, based on that statement.

21 We understand that reliability can still  
22 be addressed at trial, but we're asking to deal  
23 with this essentially on a -- a pretrial basis to  
24 avoid having to, uh, unduly prolong the  
25 proceedings at trial to raise the issue and have

1 the doctor testify at that time on the issue of  
2 reliability in front of the jury. Thank you.

3 THE COURT: Response, Mr. Kratz?

4 ATTORNEY KRATZ: As to Mr. Fremgen's last  
5 statement, his, um, claim that this can obviously be  
6 addressed at trial, or a claim of it being a false  
7 confession can obviously be raised, uh, is not  
8 necessarily an accurate statement. There will have  
9 to be a showing, uh, made at a pretrial motion to  
10 allow such a -- a course to occur.

11 That having been said, Judge, this Court  
12 did make, uh, independent analysis and review of  
13 the statement itself. It was from the  
14 defendant's own words, from the defendant's own  
15 statement that this Court made specific rulings  
16 as to suggestibility, as to undue or improper  
17 influence by law enforcement, and as this Court  
18 is aware, uh, made a detailed set of findings  
19 that, in fact, uh, Mr. Dassey's statement was a  
20 product of his own free will and not, uh,  
21 improper suggestibility which is, of course, the  
22 legal standard.

23 Uh, to allow at this time, uh, review or  
24 a revisiting of that motion, uh, is something not  
25 supported by Mr. Fremgen's motion. The issue of

1           voluntariness was fully litigated in a previous  
2           hearing. I'd urge the Court then deny the  
3           motion.

4                   THE COURT: Any reply?

5                   ATTORNEY FREMGEN: I -- I would -- Well, I  
6           agree with, uh, Counsel in regards to there would  
7           have to be some sort of pretrial motion in regards  
8           to the issue of trial testimony. But as far as  
9           having fully, uh, uh, addressed the issue at motion  
10          hearing, that is essentially what we're arguing,  
11          that we don't believe it has been fully addressed.  
12          There wasn't a -- for instance, somebody who can  
13          offer expert testimony as to the issue of  
14          suggestibility, uh, who has actually met with  
15          Brendan and -- and reviewed the tapes, versus just  
16          the counselor that would simply say -- that simply  
17          said at the motion hearing, he had an IQ between 74  
18          and 78, depending upon the year.

19                   THE COURT: All right. Uh, as the parties  
20          have acknowledged, there was a hearing already held  
21          on the statements, the statements of February 27 and  
22          March 1. That hearing was held on May 4.

23                   Uh, many of the -- the objections that  
24          prompted that hearing were the same ones being  
25          raised currently by Counsel. Counsel here takes

1 a -- a slightly different tact by suggesting  
2 that, uh -- in fact, that this defendant was  
3 suggestible, that apparently was being led by,  
4 uh, the interviewers to simply answer what they  
5 wanted him to answer in a way that they wanted  
6 him to -- to answer it.

7 Um, the transcript shows -- and I've  
8 reviewed the transcript -- shows that we had  
9 three witnesses. We had, uh, the defendant's  
10 mother testify, as well as, uh, Investigator  
11 Wiegert, who was one of the interviewers, and we  
12 had a school psychologist from the Mishicot  
13 School District, Kris Schoenenberger-Gross, who  
14 offered some testimony on the defendant's  
15 intellectual, uh, capabilities.

16 Uh, the issue of suggestibility appeared  
17 to have been raised very directly into the course  
18 of the hearing and I'm -- I'm going to advert  
19 here, very briefly, to the transcript, and  
20 specifically page 44, and this is, uh, Mr. Kratz,  
21 asking a question:

22 Question: Now, Investigator Wiegert, to  
23 ensure the accur -- accuracy or truthfulness of  
24 information you're receiving sometimes from  
25 either witnesses or suspect, there's a tech --

1           tactic or a strategy which includes deliberately  
2           providing false information. That is, providing  
3           information about the case that you very well  
4           know never happened. That it didn't happen. Are  
5           you familiar with that strategy or tactic?

6                     Answer: Yes.

7                     Was that --

8                     Question: Was that employed in this  
9           case?

10                    Answer: Yes, it was.

11                    Questions: And, uh, could you describe  
12           for the Court why that was used and, uh, what,  
13           uh, results you got therefrom?

14                    Answer: Well, the reason you do things  
15           like that is to, um, see if the witness is going  
16           to go along with the false statements or if he's  
17           going to stop you and correct you. Um, and when  
18           we did that with Mr. Dassey, when we gave him  
19           false information, he would deny it, stop us, and  
20           he would correct the information. And that the  
21           purpose is to make sure that he's not just going  
22           along with everything we're saying and to see  
23           that he is telling us the truth. And we did  
24           that.

25                    That's the end of the quote from -- from



1 the transcript. And that last portion came from  
2 page 45.

3 Investigator Wiegert went on to testify  
4 to a couple of specific instances where false  
5 information was given to Mr. Dassey and  
6 Mr. Dassey rejected it as being part of anything  
7 that he knew about.

8 Uh, the Court has viewed those tapes as  
9 well as and knows that there were other instances  
10 in which false information was given to  
11 Mr. Dassey and he rejected -- he rejected the  
12 content and context of the information.

13 I think the -- the question you raise  
14 has already been considered. We spent a fair  
15 amount of time at that hearing. Uh, I see no  
16 reason to -- to go back to either continue it or  
17 to try to supplement that record. I thought the  
18 findings of fact made at that hearing considered  
19 all of the relevant personal characteristics of  
20 this defendant, and based on those relevant  
21 personal characteristics, as well as the  
22 interview that was had of him on those two days,  
23 February 27 and March 1, I concluded that the  
24 statement should not be suppressed because it was  
25 a product of his free and unconstrained will.

1                   Uh, I see no reason to either change  
2                   that conclusion or go back and reconsider it.  
3                   Accordingly, I'm going to deny your motion.  
4                   Specifically, I'm going to deny the three --  
5                   three avenues, or -- or the three, um, items of  
6                   relief that you're asking for on page two of the  
7                   motion; a continuance of the motion hearing to a  
8                   later date to accommodate the completion of the  
9                   psychological testimony and anticip --  
10                  anticipated testimony, uh, B, the right to pursue  
11                  this motion as to the suppression of the February  
12                  27 and March 1, 2006 statements as having been  
13                  involuntary, unknowing and unintelligent in light  
14                  of the overly suggestive nature of the  
15                  questioning.

16                  Seeing in the event the Court finds that  
17                  the issue has been previously tried, the right to  
18                  reopen the hearing in light of the newly  
19                  discovered evidence in the form of expert  
20                  testimony as to suggestibility, Court denies all  
21                  the requested, uh, items of -- of relief.

22                  Court then moves onto the second motion  
23                  we are going to consider here, specifically the  
24                  motion to reopen the preliminary hearing because  
25                  of ineffective assistance of counsel.

1                   Uh, the preliminary hearing is an early  
2                   stage in a prosecution at which the State has to  
3                   show evidence that probable cause exists to  
4                   believe that a felony has been committed and that  
5                   the defendant has committed a felony.

6                   In this instance, the counsel at that  
7                   time representing this defendant waived the right  
8                   to a preliminary examination. Uh, Counsel now  
9                   wishes us to go back to that stage. He says that  
10                  the preliminary examination should not have been  
11                  waived, or suggested shouldn't have been waived,  
12                  at least under the circumstances that it was  
13                  waived. Counsel says in his petition supporting  
14                  his motion that the then counsel -- appointed  
15                  counsel -- representing this defendant did not,  
16                  uh, discuss with any specificity the allegations  
17                  in the Criminal Complaint. He didn't adequately  
18                  discuss the purpose of the preliminary hearing,  
19                  the special procedures and circumstances, and,  
20                  further, that, uh, then that time appointed  
21                  counsel may not have understood the distinction  
22                  between two different kinds of preliminary  
23                  hearings; one found at 970.03 and one found at  
24                  970.032. Um, is that, uh, a reasonably accurate  
25                  summary of your motion, Mr. Fremgen?

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ATTORNEY FREMGEN: Correct, Judge.

THE COURT: Do you wish to be heard on it?

ATTORNEY FREMGEN: Judge, if the Court would, uh, allow, I wish to be heard essentially on both at the same time. My arguments for both kind of overlap.

THE COURT: That's fair. Let me then just touch upon the third motion. Both of these motions, uh, the second and third motions here, are based on what this counsel says is ineffective assistance of the counsel representing Mr. Dassey at the time of the events mentioned in these separate motions, uh, were made, uh, that fact that each particular counsel -- And there are two different appointment of counsels here. There was an -- an initial of counsel representing him at the preliminary hearing stage and then another counsel representing him at a stage when he apparently gave a separate statement to law enforcement authorities on May 13, 2006 in the absence of his lawyer but with, apparently, the assistance of a private investigator who was employed by that lawyer.

The grounds for both these motions are

1           ineffective assistance of counsel. Uh, why don't  
2           you address both them, then, Mr. Fremgen.

3                   ATTORNEY FREMGEN: Judge, if the Court  
4           recalls at a -- a later, uh -- or, excuse me -- at  
5           an earlier status conference, the Court and State  
6           requested some additional authority from defense to  
7           support our purpose or the basis for our argument.  
8           Uh, we -- I can't say I've conducted exhaustive  
9           research, but certainly hours of research into the  
10          issue of ineffective assistance of counsel. And  
11          other than the case that we cite essentially for  
12          the -- for the dicta in that case, I don't believe  
13          there are any other cases on point on this issue in  
14          Wisconsin.

15                   Now, I think that -- it doesn't  
16          necessarily preclude us from bringing the motion.  
17          I think it just, uh, raises more of a unique  
18          situation for the trial Court versus a precedent  
19          it must follow from previous case law. So,  
20          essentially, there's two reasons why we believe  
21          that an evidentiary hearing into this issue, uh,  
22          is appropriate and we would be asking for that.

23                   First, is, uh, despite the, uh, case law  
24          that seems to overwhelmingly suggest that  
25          ineffective assistance of counsel is reserved for

1 post-conviction proceedings, there's no case that  
2 expressly rejects the proposition that the issue  
3 can be or should be addressed at the trial level  
4 before it actually gets to the point of a  
5 potential post-conviction, uh, matter.

6 **State vs. Armstead** is the case that I  
7 cited in my -- my motion, uh, and it's the dicta  
8 that's within that case and, uh, granted, it is  
9 essentially a paragraph or even less, but the  
10 **Armstead** case implies that a trial court may  
11 entertain an ineffective assistance motion prior  
12 to the conclusion of the case if the defendant  
13 can show that the alleged conduct is not a  
14 hypothetical deficiency or it's premised on  
15 the -- or -- and that's not premised on the  
16 possible existence of future ineffective conduct.

17 I -- I think what **Armstead** -- in the  
18 **Armstead** case there was an interlocutory appeal  
19 that came from a -- a -- a preliminary -- waiver  
20 of a preliminary hearing similar, somewhat  
21 factually, to the case here.

22 Uh, and in that case, the defendant was  
23 arguing essentially on interlocutory appeal that  
24 his trial attorney didn't know what he was doing  
25 and wasn't offering, uh, good advice in regards

1 to the preliminary hearing and potentially other  
2 advice at other critical stages of the  
3 proceedings.

4 Um, in this case we feel we have a  
5 different factual situation. It's not a  
6 hypothetical and it's not future conduct, the --  
7 the -- the crux of the -- the Complaint.  
8 Essentially, it's the, uh -- what the two prior  
9 attorneys have, uh, already, uh, done and, that  
10 is, they've inadequately, uh, provided  
11 representation to Mr. Dassey in -- in the advice  
12 of waiving the preliminary hearing despite the  
13 fact that, uh, the attorney at the time,  
14 Mr. Sczygelski, had only met with Mr. Dassey for  
15 less than a half hour and that Mr. Dassey, from  
16 the suppression motion, Court is aware, has a  
17 rather immature individual with an IQ of --  
18 registered IQ of somewhere between 74 and 78.

19 Um, and coupled with the fact that from  
20 a prop -- a -- a subsequent e-mail from that  
21 attorney to Mr. Kachinsky, indicated that he  
22 wasn't aware of 970.032, which is the issue of  
23 original jurisdiction by this Court, and the  
24 issue of whether or not, uh, an individual who  
25 comes before the Court on original jurisdiction

1 for a 940.01 allegation should be sent back to  
2 the juvenile authorities.

3 Second, I think that the pleadings  
4 adequately also establish that -- Well, I  
5 shouldn't say adequately. But I think there  
6 would be a need for an evidentiary hearing to  
7 establish whether or not there was a strategic  
8 reason for making these decision to have  
9 Mr. Dassey meet with, uh, law enforcement, makes  
10 additional statements after he's already made two  
11 videotape statements, um, without counsel being  
12 present, and whether or not there was any  
13 strategic reason to waive the preliminary hearing  
14 30 minutes after meeting with the defendant at  
15 the initial appearance without any offer of  
16 settlement or even a possible negoti --  
17 negotiation being addressed with the -- the  
18 State.

19 Um, I -- I think that we would certainly  
20 need to have that additional information. No  
21 different than a post-conviction **Machner** type of  
22 hearing. And, so, that's what we're essentially  
23 requesting then on this case prior to its  
24 conclusion.

25 THE COURT: Mr. Kratz.



1                   ATTORNEY KRATZ: Thank you, Judge. It is  
2 noteworthy that this Court directed Mr. Fremgen to  
3 provide the Court with any legal authority that  
4 would authorize the relief, uh, that Mr. Fremgen's  
5 requesting. Court directed Mr. Fremgen to provide  
6 any kind of case law, any kind of authority, didn't  
7 even have to be Wisconsin case law, on a ineffective  
8 assistance claim that at this stage of the  
9 proceedings, that is pre trial, that authorized the  
10 relief that he suggested.

11                   Mr. Fremgen has told this Court now that  
12 he's unable to do so. Why? Because there is no  
13 such law. Because this is a premature motion.  
14 Because the **Machner**-type hearings, the  
15 ineffective assistance of counsel, whether we're  
16 talking about, uh, federal cases, **Strickland v.**  
17 **Washington**, or even the Wisconsin cases that  
18 Mr. Fremgen cites. Uh, the, uh, the **Armstead**  
19 case or the **Pitsch** case, P-i-t-s-c-h, is how  
20 that's spelled, talks about the prejudice prong  
21 being that the defendant was deprived of a fair  
22 trial. We aren't at the trial stage and so  
23 there's absolutely no way for this Court to make  
24 a finding as to whether or not Mr. Dassey's trial  
25 is going to be fair.

1                   Mr. Fremgen claims that Mr. Kachinsky's  
2                   decisions in his, uh, attempts to gain a, uh -- a  
3                   favorable disposition for his client, uh, was,  
4                   uh, in fact, ineffective. Mr. Kachinsky has  
5                   given this Court in prior pleadings, uh, a number  
6                   of reasons -- strategic reasons -- why he was  
7                   attempting to, uh, act in the best interests of  
8                   his client.

9                   Mr. Fremgen also claims that  
10                  Mr. Sczygelski, the first attorney in this case,  
11                  was deficient when he waived the preliminary  
12                  hearing.

13                  But when you have a four-hour videotaped  
14                  confession, and when the State's responsibility,  
15                  uh, almost literally at that preliminary hearing  
16                  would be to walk into court and to press the  
17                  "play" button on the confession, uh, even  
18                  Mr. Fremgen would have to admit that, uh, the  
19                  defendant would be bound over for trial.

20                  Uh, the strategic decision, then, to  
21                  waive that prelim, the decision for, uh,  
22                  Mr. Sczygelski and his client, Mr. Dassey, at  
23                  that time did not have that four-hour confession  
24                  played publicly, uh, was, in fact, I think, a  
25                  wise decision. But it isn't something, even,

1           that this Court need reach because the prejudice  
2           prong, as I've mentioned, cannot be, um,  
3           addressed by Mr. Fremgen.

4                     Let me note that it is the defense's  
5           burden to overcome the strong presumption that  
6           counsel acted reasonably in all of these matters.  
7           And the fact that we are pre trial, the fact that  
8           Mr. Fremgen cannot guess what's going to happen  
9           at the -- the trial, if we have a trial in this  
10          case, is the very reason that these matters are  
11          not brought pre trial.

12                    And, therefore, Judge, because this  
13          motion is brought prematurely, because there is  
14          no law that I'm aware of, or Mr. Fremgen, uh,  
15          that authorizes this remedy at this time in the  
16          proceedings, I'm urging the Court once again deny  
17          both of these motions. Thank you.

18                    THE COURT: Reply?

19                    ATTORNEY FREMGEN: Just briefly. Until  
20          **Gideon** argued for court appointed counsel, there's  
21          no precedent that said a court must provide defense  
22          counsel to the indigent. Until **In re Gault**  
23          (phonetic) argued the same, there's no precedent  
24          that said the Court had to provide counsel for  
25          juveniles. And until **Brandar** (phonetic) argued that

1 his rights were violated by the fact that the police  
2 didn't inform him of his due process rights, no  
3 precedent provi -- provided that protection to  
4 defendants.

5 Just because it hasn't been done before,  
6 doesn't mean the Court can't do it. That's what  
7 we're asking the Court to do.

8 THE COURT: I'm not so sure that last  
9 statement, just because it hasn't been done before  
10 means this Court can't do it, is -- is factually  
11 correct. But the Court, uh, has considered both  
12 these motions.

13 The first of the -- the -- the two  
14 relates to a claim of ineffective assistance of  
15 counsel, uh, at the preliminary hearing stage,  
16 because defense counsel at that time waived the  
17 right to the preliminary hearing.

18 Uh, the second of the motions relates to  
19 an ineffective assistance of counsel claim that  
20 concerns an interview given on May 13, 2006 by  
21 this defendant to law enforcement agencies, or  
22 law enforcement agents, at which the defendant's  
23 counsel was not present and it was given with the  
24 permission of that counsel.

25 Ineffective -- And I did a fair amount

1 of research on this myself. Not necessarily on  
2 Wisconsin law because, uh, that was reasonably  
3 easy to research, but I -- I researched some  
4 hours of federal case law to try to find some  
5 case that said an ineffective assistance of  
6 counsel claim could be raised in a pretrial  
7 setting. I couldn't find anything. Uh, all of  
8 it relates -- and I'm not saying there doesn't  
9 exist a case or cases out there -- but if they  
10 are, they're few and far between, and they're  
11 certainly ones I didn't see.

12 Ineffective assistance of counsel is a  
13 motion that is raised exclusively as a post-trial  
14 motion in Wisconsin. It then gives rise to what  
15 is called a **Machner** hearing. We've heard that  
16 term discussed. And that is, uh -- derives from  
17 a case called **State v. Machner**.

18 There is a two-prong test for  
19 ineffective assistance of counsel. The first  
20 prong is that the performance of the lawyer must  
21 be deficient. Must not have met standards that  
22 would typically be met by lawyers practicing in a  
23 reasonable manner in that area of law.

24 The second prong -- prong, uh, says that  
25 the person bringing the motion must affirmatively

1 show the reasonable probability but for counsel's  
2 unprofessional errors a result or proceeding  
3 would have been different. And I'm -- I'm citing  
4 here from a Wisconsin case call **State vs. Hicks**  
5 at 195 Wis. 2d, uh, 620, uh, specifically at page  
6 632.

7 Uh, Counsel, in support of his motion  
8 cites a case called **State v. Armstead**,  
9 220 Wis. 2d 626 at page 636, and he said, what he  
10 refers to as dicta here, and I think he's  
11 probably correct, dicta means the Court is simply  
12 saying this, it may not have the -- the full  
13 force of law, but the Court considers the  
14 question of ineffective assistance of counsel in  
15 the context of a pretrial motion.

16 I'm going to read from that case, and  
17 it's a -- it's a short paragraph, and that's all  
18 that's here. The court says as follows:

19 Quote, **Armstead** appears to claim that  
20 her trial counsel either has been or currently is  
21 providing her with ineffective assistance because  
22 her counsel, who is unable to determine the  
23 meaning of Section 983.183 and 970.032 of the  
24 statutes does not know whether to advise her to  
25 plead guilty or go to trial.

1                   In order to prove ineffective assistance  
2 of counsel, a defendant must show both deficient  
3 performance and resulting prejudice. At this  
4 point **Armstead** has not pleaded guilty to or been  
5 convicted of any crime. Even if her counsel had  
6 been or currently is providing **Armstead** with  
7 ineffective assistance, the possibility that  
8 **Armstead** will actually be prejudiced by that  
9 alleged ineffective assistance, amounts to a  
10 hypothetical and future fact. I've omitted some  
11 citations from the -- the -- the quote.

12                   That's precisely where we're at here.  
13 Whether or not there has been ineffective  
14 assistance of counsel is exclusively a post-trial  
15 motion and we will not know until something has  
16 happened, a trial has happened, a conviction has  
17 been had or not had, whether or not counsel has  
18 been ineffective and whether or not that  
19 ineffectiveness has prejudiced the result of --  
20 of -- of the -- of the trial, the result of the  
21 case.

22                   Um, under those circumstances, really,  
23 the Court has -- has no other alternative,  
24 Counsel, but to deny both your motions.

25                   All right. Um, predecessor counsel

1 filed on March 17 a motion for change of venue.  
2 Uh, current counsel has supplemented that motion  
3 with additional materials that have been supplied  
4 to the Court on December 6, 2006. The materials  
5 are on the -- the clerk's desk, they're in boxes  
6 and in folders, and I'll allude to those in a  
7 minute.

8 Under Wisconsin law, specifically  
9 Section 971.19, venue, which simply means the  
10 place of trial, is supposed to be in the county  
11 where the alleged act or crime was committed.  
12 971.22 of the statutes permits the Court to move  
13 the place of trial to another county if the  
14 defendant shows to the satisfaction of the Court  
15 that there is a reasonable likelihood that an  
16 impartial jury cannot be impaneled in the county  
17 in which the trial should be held.

18 If the defendant makes such a showing,  
19 the Court can move the entire trial to a  
20 different county or, under certain circumstances,  
21 choose the jury in a different county outside the  
22 area, in this case the media area, of -- of the  
23 county in which the crime is committed, and try  
24 the case in the county in which the -- the crime  
25 was committed.



1                   To support his motion, the defendant has  
2                   filed with the Court the following:

3                   An index of TV coverage from the four  
4                   major network stations in Green Bay. Those show  
5                   the dates and titles of the television  
6                   transcripts used by each station in its coverage  
7                   of Teresa Halbach's disappearance and events  
8                   associated with the investigation of her death  
9                   and the prosecution of the persons charged in  
10                  that death.

11                  Uh, the defendant has also filed two  
12                  boxes -- and those are the ones on the clerk's  
13                  table that have been marked as exhibits -- two  
14                  boxes, an expandable file and CD-ROM of  
15                  television news scripts relating to the  
16                  disappearance of Ms. Halbach, the subsequent --  
17                  subsequent investigation, the arrest and  
18                  prosecution of Steven Avery and Brendan Dassey  
19                  for her death and a wrongful death suit.

20                  There is, as well, a CD-ROM of newspaper  
21                  articles appearing in the Manitowoc Herald Times  
22                  that has been filed as part of the defendant's  
23                  submission. And, lastly, the defendant has filed  
24                  a brief supporting his argument to change venue  
25                  in this particular case.

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Counsel, do you wish to be heard on this motion?

ATTORNEY FREMGEN: Again, Judge, I'll try to be brief. Rather than point to particular dates, what we had prep -- had attempted to do is provide a list for both the State as well as the Court of the dates in which there was television coverage of -- of the -- just the Halbach disappearance and arrests of the two individuals involved in -- in -- in -- in the, uh, disappearance, and now the charges of first degree intentional homicide.

It's impossible to actually, in our opinion, to remove one from the other. Oftentimes, in many of these, uh, reports, especially after, uh, March 1, whenever Mr. Avery was in court or there was a -- a television update on the case would refer to Mr. Dassey as well.

There were times within many of the, uh, television reports and, uh, the -- and the print reports that some of the details of the, um, allegations were released. At times there were comments attributed to law enforcement. There was a press conference with the State and law enforcement. Um, there was comments in regards

1 to the statements, the videotape statements. And  
2 there was also, in various broadcasts, such  
3 terminology as "gruesome" and "torture."

4 The -- And -- and -- and one other  
5 matter, I know we're not looking into the future,  
6 but I will assume that come February 5 when  
7 Mr. Avery's trial starts, this will all start up  
8 again as far as the publicity. And I will also  
9 assume that since it's been that way since  
10 Mr. Avery's, uh -- or since Mr. Dassey's, uh,  
11 charge, that every time they bring up one name,  
12 they always bring up the other. That  
13 Mr. Dassey's name will be brought up as the other  
14 person charged, the nephew, etc.

15 Now, I believe that the transcripts --  
16 there's approximately 150 transcripts from Fox 11  
17 that are relevant transcripts and, oftentimes,  
18 there would be broadcasts at five, six, noon,  
19 five in the afternoon, six again, and then ten  
20 o'clock. And, so, when on the index when I  
21 indicate one day, it could be, at times, six or  
22 seven different broadcasts in that day. Not  
23 always, but often that was the case as well.

24 There were about 110 telecasts of WBAY,  
25 50 telecasts of WGBA, NBC, about 120 telecasts of

1 WFRV, as well as the, uh, Times Herald (sic)  
2 articles, between 25 and 30.

3 I think it would be fair to state, that  
4 I don't believe the State would -- would even  
5 disagree that this case has drawn some extensive  
6 regional coverage. There have been, as I noted,  
7 many articles and reports about Mr. Dassey,  
8 Mr. Avery, and there have been, uh, comments from  
9 the families. Both sides. From the -- from the  
10 Avery family as well as from the Halbach Family.

11 And -- and, as I pointed out, I'm  
12 expecting that will probably increase two-fold  
13 when the Avery trial starts in February.

14 But, because of the graphic nature of  
15 many of the -- the alleg -- of the allegations  
16 that are -- been publicized, and the press  
17 conferences, and the law enforcement comments,  
18 the severity of the offense and the notoriety  
19 this case has gained, I think that, due to the  
20 saturated news coverage, and the dissemination of  
21 these graphic details, and reactions from family  
22 members, that the local jury pool is -- is all  
23 too aware of this case, and would be very  
24 difficult to, uh, pick a unbiased or uneducated  
25 jury in regards to the publicity which would

1 result in -- what we believe, unfortunately, in  
2 an unfair trial for Mr. Dassey.

3 And for that reason, we believe that,  
4 uh, change in the venue -- And we're only asking  
5 for a jury from another, uh, county. We do  
6 believe that that would be an undue hardship on  
7 both families, Mr. Dassey's family as well as the  
8 Halbach family, to have to up -- uproot and move  
9 to another county for the trial. We don't  
10 certainly think that's appropriate. But we do  
11 believe that bringing a jury from a different  
12 county would be.

13 THE COURT: Mr. Kratz.

14 ATTORNEY KRATZ: Thank you, Judge.  
15 Mr. Fremgen -- and, once again, I'm going to start  
16 at the end of his argument rather than at the  
17 beginning -- claims that, uh, the Court is to strive  
18 to find some uneducated -- and that's the word he  
19 used -- some uneducated jury. I suspect that he's  
20 talking about, uh, some jurors who don't know  
21 anything about the case. And that, of course, is  
22 not the, uh, jury pool, uh, that, uh, trials are  
23 made up of.

24 Uh, we expect our jurors to be educated.  
25 We expect our jurors to watch the news and to

1 know something about the case as, uh, publicly  
2 discussed as this one. The prohibition, of  
3 course, is if a juror has, uh, made up his or her  
4 mind about the guilt or innocence of a, uh,  
5 defendant based upon what they have read or what  
6 they have seen, not based upon the coverage  
7 itself.

8 And, so, it's impossible at this time to  
9 determine whether or not such a jury pool exists.  
10 That is, whether or not we would be able to find  
11 12 jurors who have, uh, not either made up their  
12 mind or are willing to set aside what they've  
13 already heard to decide the case.

14 I think it's important to note that, uh,  
15 Judge Willis, in a companion case, in State v.  
16 Avery, uh, is allowing the jury to be selected  
17 from this very county, uh, from Manitowoc County.  
18 And so I think whether or not a jury pool is  
19 available, uh, has already been decided.

20 But this is a different case and I will,  
21 uh, concede that with Mr. Dassey's case happening  
22 second, there is the possibility of additional  
23 pretrial publicity. I'm going to urge the Court  
24 to not rule on the motion to, uh, change venue at  
25 this time but to wait to see what kind of

1 coverage, what kind of, um, uh, events occur  
2 between now and Mr. Dassey's trial.

3 Mr. Fremgen did not talk about the eight  
4 factors that Wisconsin, uh, considers. Uh, and,  
5 uh, I just need to mention those briefly, Judge,  
6 just because we have to make a record as to those  
7 factors for -- for change of venue.

8 The, uh, **Fonte** case, F-o-n-t-e, suggests  
9 that this Court consider:

10 Number one, the inflammatory nature of  
11 any publicity.

12 Number two, the timing and specificity  
13 of the publicity.

14 Number three, the difficulty that there  
15 may be in selecting a jury.

16 Number four, the extent to which jurors  
17 are familiar with the publicity.

18 Number five, the defendant's use of  
19 peremptory challenges.

20 Number six, our, that is the State's,  
21 participation in any adverse publicity.

22 Number seven, the severity of the  
23 offense.

24 And, number eight, the nature of the  
25 verdict.

1           Well, the Court can see that several of  
2           those factors can't be addressed until the time  
3           of the attempt to select a jury. And so, again,  
4           my suggestion is, um, to wait.

5           However, if the Court is to rule today,  
6           there are, uh, some, uh, points that I feel I  
7           need to raise with the Court.

8           As to the nature of the publicity, the  
9           States argues, as it did in the Avery case, that  
10          the coverage has been factual, has been  
11          noneditorial to the most part, and not  
12          prejudicial. When we look at the manner in which  
13          the, uh, publicity has been presented, it may  
14          inform jurors. As I've argued, that's not a bad  
15          thing, uh, but certainly is not, uh, intended to  
16          sway jurors.

17          This is, in fact, uh, a highly covered  
18          case, but it should be. The facts of the case  
19          itself lend to intense, uh, media attention. Let  
20          me also state, though, Judge, that that raises  
21          the second factor, and that is the timing of the  
22          publicity. Most of the publicity on these two  
23          cases, and I guess I should, uh, distinguish  
24          Mr. Dassey's from Mr. Avery's coverage, although  
25          Mr. Fremgen lumps them together, I'm not sure if



1 he believes the Court to do that, but most of the  
2 publicity has been in the early stages, uh, of  
3 this case. Almost, uh, and, in fact, more than a  
4 year before, uh, the trial.

5 I will note that the last public  
6 statement by, I think, any of the lawyers in the  
7 case, uh, in the Avery case was, uh, November 11  
8 of '05, and in the Dassey case was March 2 of  
9 '06. That's going to be over a year before the  
10 trial in this case.

11 I've argued, and I think that the Avery  
12 Judge, uh, adopted the conclusion, that the  
13 State's complied with rule 3.6. That is, the  
14 statements that have been made in both of these  
15 cases have been in full compliance with the rules  
16 established by the Office of Lawyer Regulation.

17 Again, Judge, we don't know whether  
18 we're going to have difficulty in selecting a  
19 jury. We don't know how familiar the jurors are  
20 going to be with the publicity. We don't know  
21 Mr. Fremgen's use of peremptory challenges,  
22 although he will certainly have those.

23 And, then, when the Court considers the  
24 last primary factor, that is something you can  
25 consider before trial, that is the severity of

1 the offense, homicide in these related charges  
2 are, in fact, the most serious, uh, and would  
3 expect intense media scrutiny.

4 This Court has a responsibility to  
5 balance the public's right to information. Uh,  
6 that is the, uh, right to know what's going on  
7 from the danger of, uh, potential prejudicial  
8 information being disseminated. Once, again,  
9 because I think the information has been straight  
10 forward, because of the timing, because it's been  
11 so long before, uh, the trial in Mr. Dassey's  
12 case, I'm going to urge the Court at this time to  
13 find that there has been, uh, no proof brought by  
14 Mr. Fremgen to establish those seven factors.

15 Let me also indicate, quite candidly,  
16 however, that Mr. Fremgen, I believe, uh, may be  
17 in a position after the Avery trial, uh, after  
18 the middle of March, let's say, uh, to, uh,  
19 submit additional facts to this Court, uh, at  
20 which time, as we're closer to Mr. Dassey's  
21 trial, at which time he may, in fact, be able to  
22 establish those, uh -- those factors.

23 But because we're using a Manitowoc jury  
24 in the Avery case, uh, I would ask the Court to  
25 be cautious, uh, in making, uh, too many findings

1 of fact at this time that it cannot be possible  
2 to select a fair jury from Manitowoc because that  
3 is, in fact, what we intend to do, uh, in a  
4 related case.

5 I hope as I say that, this Court is  
6 sensitive to, um, my attempts to make the record  
7 in both cases, because I have to. Because I have  
8 to urge this Court, uh, to, uh -- to not, um,  
9 make a specific findings of fact here that may  
10 have some collateral impact on another case, uh,  
11 that we are establishing.

12 I thank Mr. Fremgen for his concession  
13 that if we are going to, uh, have a -- a change  
14 of venue, that we bring in a jury from another  
15 county. Certainly the victim's family has to be  
16 considered. Uh, if, in fact, the Court is, uh,  
17 leaning that way, shall we say, uh, then, uh, it  
18 is the State's preference, obviously, that we try  
19 the case hear in Manitowoc County using a jury  
20 from a remote county. Thank you very much.

21 THE COURT: Mr. Fremgen.

22 ATTORNEY FREMGEN: Thank you. I agree with  
23 Mr. Kratz as to the -- the need to review the  
24 factors. In my brief in support with the  
25 additional, uh, supplemental information cites a

1 Court of Appeals case, and I refer to what I believe  
2 are the four major factors, and I agree with  
3 Mr. Kratz that there are seven, but those aren't  
4 exclusive factors as well.

5 I think the Court needs to also be  
6 cognizant of the fact that there might be a need  
7 for a number of "for cause", uh, challenges as  
8 well, not just the peremptory challenges, which I  
9 think is implied in that factor. This would  
10 require a larger than normal jury pool to be  
11 brought in. Could potentially require, uh,  
12 almost a size of two jury pools in order to be  
13 able to accommodate the potential "for cause"  
14 challenges.

15 Absent the change of venue, there's a  
16 likely -- there would likely be a need to conduct  
17 individual voir dire in order to avoid tainting  
18 the existing jury pool. And I think the whole  
19 point of change of venue, based upon the case  
20 law, is that the trial court has to anticipate.

21 I agree with Mr. Kratz. I don't know  
22 where the publicity is going to, uh, how it's  
23 going to actually affect the jury, but we have  
24 to -- and actually trial Court has to --  
25 anticipate the difficulties in selecting a jury

1 based upon the coverage. It does not,  
2 necessarily, limit it to inflammatory nature of  
3 the publicity. That there's that separate  
4 factor, the extent to which potential jury pool  
5 was aware of the publicity.

6 I think that the -- the record reflects,  
7 with the number of exhibits, that there certainly  
8 has been an extensive coverage of this matter,  
9 whether you wish to with -- withdraw Mr. Dassey  
10 or lump them into the Avery, slash, Dassey  
11 coverage. I think certainly the main focus, or  
12 the main point of the reason for change of venue  
13 has to be the extent to which the jury is aware  
14 of -- of the publicity.

15 THE COURT: All right. Uh, Court has heard  
16 the arguments on the motion for change of venue.  
17 We've discussed, briefly, some of the factors that  
18 the Court is to use in evaluating these motions.  
19 Uh, they're -- they're set forth in a number of  
20 Wisconsin cases and -- and Mr. Kratz is -- is  
21 correct. Many of these cases are cases that have  
22 already been tried and they are brought as  
23 post-judgment motions.

24 Uh, this is a prejudgment motion and, as  
25 I noted before, the defendant has a right under

1 Wisconsin law to be tried by an impartial jury in  
2 the county in -- where the crime was committed.  
3 Actually, this is, uh, also a constitutional  
4 right as -- as well as -- as simply a statutory  
5 right.

6 Before a motion for change of venue can  
7 be granted, the Court must find that there exists  
8 a reasonable probability or likelihood that a  
9 trial with an impartial jury cannot be had in  
10 Manitowoc County. In other words, that, uh, it  
11 will be difficult, if not, impossible to impanel,  
12 uh, a -- an impartial jury for this case and --  
13 and this case I am, as defense counsel does,  
14 lumping together with -- with Avery.

15 Um, among the factors that the Court  
16 takes into consideration are some mention by,  
17 uh -- by Mr. Kratz; the timing, the specificity  
18 of the publicity, the inflammatory nature of the  
19 publicity, the nature and severity of the  
20 offenses involved, and the permeation of the  
21 publicity. And I -- I take it permeation of  
22 publicity means not only permeation of so-called  
23 adverse publicity, but permeation of any  
24 publicity touching upon the alleged events.

25 The Court has reviewed some, though

1           certainly not all, of the materials submitted by  
2           the defendant in support of its motion. As a  
3           preliminary matter, the Court notes that I have  
4           seen no case in my 30-plus years in Manitowoc  
5           County that has received anywhere near this  
6           amount of -- the amount of news coverage that  
7           this case has received in television, print and  
8           voice media, internet activity. All have been  
9           extensive and intensive.

10                   I -- I also will note in response to  
11           something that, uh, Mr. Kratz said, the motion  
12           for change of venue is exclusively the  
13           defendant's motion. It is not the Court's  
14           motion, it is not the prosecutor's motion. And  
15           the -- in the Avery case apparently a motion had  
16           been made and withdrawn. Uh, this motion is not  
17           withdrawn. It's been supplemented and it's  
18           active and we're ruling on it today.

19                   The defendant's brief notes, uh, that --  
20           in his appendices index, over 300 separate TV  
21           news reports relating to some aspect of the Avery  
22           or Dassey cases, and many of these reports ran  
23           several or more times a day as he noted in his  
24           argument.

25                   Standing alone, the -- the sheer volume

1 of the -- the publicity, uh, might satisfy the --  
2 the factor of permeation of publicity, and I'm  
3 not even speaking here of the -- the additional  
4 newspaper, voice media and -- and other media  
5 publicity. But that alone would not, uh, suggest  
6 or conclusively tell us that -- that this is  
7 prejudicial to the extent that the -- the Court  
8 is fearful that an impartial jury might not be  
9 able to be impaneled.

10 The details of, uh, Mr. Dassey's alleged  
11 admissions, which form the basis of the State's  
12 complaint against him, were disseminated in the  
13 Complaint itself and in a televised press  
14 conference, I believe, on March 2, 2007, which  
15 was -- the conference itself was apparently  
16 preceded by a warning to children under 15  
17 because of the nature of the Complaint's details  
18 not to, uh, not to watch the conference.

19 From that date on, uh, some or many of  
20 these same details were repeated in many news  
21 stories, often in connection with words like  
22 "gruesome", "graphic", "very disturbing",  
23 "troubling", "torture." And these are all words  
24 that -- that should be in quotation marks because  
25 those were the actual words used as -- as, uh,



1           describing the events and -- and this defendant's  
2           participation in those events.

3           The defendant's brief notes that some  
4           news stories quoted an investigator, presumably  
5           anonymous, saying that this defendant was, quote,  
6           a willing participant in murder, end quote.

7           Uh, the Court also is sensitive to the  
8           argument raised by both sides that this trial  
9           follows the Avery trial. And while I think the  
10          special prosecutor makes a point saying, well, we  
11          could -- we could simply wait until the Avery  
12          trial and see what sort of publicity is generated  
13          by that, what sort of result, and then -- then  
14          make a determination. My feeling is that the --  
15          the -- this trial is scheduled so closely on the  
16          tail of the Avery trial that, uh, there would not  
17          be time to -- to seriously consider and rule on  
18          any additional motion.

19          In sum, I believe that the -- the nature  
20          and magnitude of the publicity, the fact that it  
21          has been consistent and ongoing, as well as  
22          permeating this area, that it involves major  
23          crimes of a horrific nature, that these factors  
24          all combine to lead me to conclude that there is  
25          a reasonable likelihood that it would be

1 impossible to impanel an -- an impartial jury for  
2 this trial.

3 Accordingly, I'm going to grant the  
4 defendant's motion. I am, uh, going to avail,  
5 uh -- or as part of that granting, use Section  
6 971.225, which, uh, permits the importation of a  
7 jury from some other area of the State rather  
8 than, uh, moving the trial elsewhere out of this  
9 area.

10 I think the -- the standard for having a  
11 jury come in here is that it would be too costly  
12 to, uh, move, that it would be more expensive to  
13 move the trial to another locale. I think that  
14 is probably true, although I certainly haven't,  
15 uh, gotten an accounting on that, but what  
16 primarily motivates me is the fact that there are  
17 people here on both -- representing both the --  
18 the victim and the defendant who, obviously, are  
19 going to be at that trial, and it would simply  
20 work another unfairness to -- to make them, uh,  
21 go to a trial at some distant venue and spend  
22 substantial amounts of money to stay there. So,  
23 that motion will be granted.

24 ATTORNEY KRATZ: Judge, if -- if I may, is  
25 the Court willing to include in its findings

1 specifically that, uh -- about the inability to  
2 select an impartial jury from Manitowoc County, uh,  
3 that that would be as of April of 2007? In other  
4 words, uh, you're not commenting on whether or not  
5 we're going to be able to do that in February in --  
6 in a different trial.

7 THE COURT: I -- I am not ruling on  
8 anything in the Avery case. I am ruling on a case  
9 that is going to be held in April of 2006 after a  
10 trial that begins in February of 2006.

11 ATTORNEY KRATZ: Certainly. Yes. Thank  
12 you.

13 THE COURT: Gentlemen, any objection to  
14 that?

15 ATTORNEY FREMGEN: No.

16 THE COURT: All right. Uh, with respect to  
17 the motions that were denied, uh, Mr. Kratz, would  
18 you please draft an order? With respect to this  
19 motion, uh, would you draft an order, Mr. Fremgen?

20 ATTORNEY FREMGEN: Yes, Judge.

21 THE COURT: Anything else today?

22 ATTORNEY FREMGEN: Two things. In regards  
23 to the change of venue motion, will this be then  
24 left to the clerk of court to coordinate a jury? Do  
25 you wish to have some input from counsel?

1 THE COURT: Um, certainly always happy to  
2 hear from counsel. But, typically, what happens is  
3 it's the -- the, uh -- it's the judicial assistant  
4 and clerk of court working through the district  
5 court administrator that -- that, uh, arrives at,  
6 uh, a -- a place for jury selection.

7 ATTORNEY FREMGEN: That's fine.

8 ATTORNEY KRATZ: The one issue that I had,  
9 Judge, and it's unrelated to any of -- of -- of  
10 these motions, it's more logistical in nature, um,  
11 this is the first, uh, hearing at which Mr. Dassey  
12 appears after having attained the age of majority,  
13 uh, and I didn't know if the Court was going to  
14 revisit his placement. He's in a secure juvenile  
15 facility at this point.

16 Now that he is an adult, and the reason  
17 that the Court set forth in its, uh, previous  
18 placement of Mr. Dassey was because he hadn't  
19 attained the age of majority for adult, uh,  
20 jurisdiction yet, uh, if that is going to be  
21 revisited, or if the Court wants a formal motion,  
22 that's fine. Because this is more of a  
23 housekeeping or logistical issue, I raise it now  
24 as to how the Court wishes to proceed.

25 THE COURT: Any comment from defense on

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that?

ATTORNEY FREMGEN: Judge, I wouldn't request or require a formal motion, but certainly it's not something I discussed with Mr. Dassey. If I could have time to talk to him --

THE COURT: Sure.

ATTORNEY FREMGEN: -- about that issue.

THE COURT: Sure.

ATTORNEY FREMGEN: Do you wish to put, uh, motion in limine schedules -- Want to just do that by phone conference?

ATTORNEY KRATZ: I think a scheduling conference with the Court, even after this, uh, hearing, if the Court's willing, might be --

THE COURT: Yeah, we'll -- we'll meet for a -- a brief scheduling conference for another interim scheduling order to -- to discuss any additional motions.

ATTORNEY FREMGEN: If -- if we have any objection to what Mr. Kratz has requested, um, we'll bring that to the Court and the State's attention. Otherwise we can maybe enter a stipulation to that.

THE COURT: With respect to the change of placement?

ATTORNEY FREMGEN: Correct.

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THE COURT: Oh. Okay. All right. Nothing further? We're adjourned.

ATTORNEY KRATZ: Thank you, Judge.

(PROCEEDINGS CONCLUDED.)

