

STATE OF WISCONSIN v. STEVEN A. AVERY
MANITOWOC COUNTY CASE No. 05-CF-381
DEFENDANT'S BRIEF REGARDING TESTIMONY
AT THE POSTCONVICTION HEARING

MANITOWOC COUNTY
STATE OF WISCONSIN

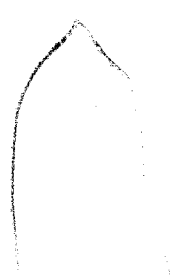
FILED

JUL 24 2009

CLERK OF CIRCUIT COURT

FILED UNDER SEAL

07-30-09
Ordered Unsealed



STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY
BRANCH 1

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

JUL 24 2009

CLERK OF CIRCUIT COURT

**DEFENDANT'S OFFER OF PROOF
CONCERNING THE TESTIMONY OF JUROR R.M.**

The defendant, Steven A. Avery, by his undersigned attorneys, intends to call Juror R.M. as a witness at the hearing on his Wis. Stat. § 809.30(2)(h) postconviction motion. The juror's testimony is offered in support of the allegations contained in paragraphs 18 and 28 to 31 of the postconviction motion.

Specifically, Mr. Avery has alleged that the record made at the time of trial does not establish cause for the juror's removal and, therefore, his convictions must be vacated, without the need for any further showing of prejudice. However, should this or a higher court require that prejudice be established, Mr. Avery offers the testimony of Juror R.M. to show that, in fact, no cause existed for his removal, and, accordingly, Mr. Avery was prejudiced by the court's failure to follow the mandated procedure before discharging a deliberating juror (§18 of postconviction motion). Testimony showing no cause for removal is also relevant to prove

Mr. Avery's allegations that trial counsel provided deficient and prejudicial representation by authorizing the court to speak with the juror and to discharge him without the opportunity for an on-the-record *voir dire* in the presence of counsel and the defendant (¶¶28 -31 of postconviction motion).

The defendant expects R.M. to testify as follows:

1. R.M. had been selected to serve on the jury in this matter. At the time of jury selection in early February of 2007, R.M.'s wife had been upset by a press report that he lived off his wife's trust fund. Nevertheless, his wife was generally supportive of R.M.'s duty to serve on the jury.

2. Like other jurors, R.M. was not sequestered and, therefore, went home to his wife and family every evening during the more than four weeks of trial testimony. When the jury began deliberations on March 15, 2007, R.M. had spent one night sequestered and away from his family due to his jury service.

3. After the first day of deliberations, R.M. went to dinner at a restaurant with the other jurors. At dinner, R.M. expressed to another juror, C.W., that the process was stressful and weighing on him. Indeed, R.M. was feeling frustrated because some other jurors, especially C.W., appeared close-minded during deliberations. In response to R.M.'s comment about the stress of the trial and deliberations, C.W. told R.M. that if he couldn't handle it, he should tell them and get off the jury. R.M. felt intimidated by C.W. and believed that C.W. wanted him off the jury. In the initial vote taken that first day, C.W. was among a minority voting guilty, and R.M. was with those voting not guilty.

4. Following dinner, R.M. returned to the motel with the other jurors. R.M. knew that jurors were allowed to use a bailiff's cell phone to call home while

the jury was sequestered. Using a bailiff's cell phone, R.M. called home and spoke with his wife. During the course of their conversation, R.M.'s wife mentioned that her 17-year-old daughter (R.M.'s stepdaughter) had been involved in some sort of accident. His wife provided no details about the accident. R.M. knew his wife was tired of the trial and had earlier been upset by the media's reference to her trust fund. But in that conversation, his wife never said she needed him to come home. Their marriage was not on the brink of collapse.

5. R.M. returned to his motel room after the phone conversation with his wife. R.M. felt frustrated and discouraged, but his mood was attributable more to what was occurring on the jury than at home. In particular, R.M. was upset about his exchange with Juror C.W.

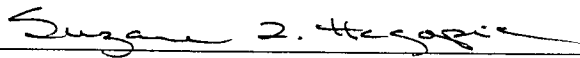
6. R.M. spoke briefly with an officer stationed in the hallway near his room. Shortly thereafter, Sheriff Pagel arrived and the two spoke in R.M.'s motel room. R.M. told Pagel that he needed to go home because of a family emergency and mentioned that his stepdaughter had been in an accident. Sheriff Pagel called Judge Willis and spoke to the judge while in R.M.'s motel room.

7. R.M. spoke to the judge on Pagel's cell phone, which Pagel had handed to R.M. He believes his conversation with the judge lasted less than five minutes. R.M. told the judge that his stepdaughter had been in an accident and he needed to go home and deal with it. The judge did not ask him if the stepdaughter had been injured or whether she was hospitalized. At the end of the conversation, the judge told R.M. he could leave, and an officer drove him to his car.

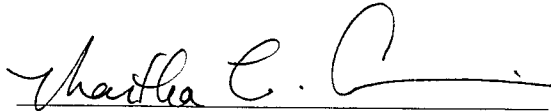
8. The next day, R.M. learned that there was no accident. Rather, the stepdaughter had car trouble. Within two days, R.M. started having regrets about not completing his jury service.

Dated this 23rd day of July, 2009.

Respectfully submitted,



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