

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

JUN 16 2006

v.

Case No. 2005-CF-381

CLERK OF CIRCUIT COURT

STEVEN A. AVERY,

Defendant.

**DEFENDANT'S MEMORANDUM SUPPORTING
MOTION TO SUPPRESS STATEMENTS TO MEDIA IN JAIL**

I.

INTRODUCTION

After the state filed criminal charges against Steven Avery and he appeared in court with a lawyer, the state made special arrangements for media representatives to interview Avery in the Calumet County Jail. The media taped those interviews with the state's knowledge, so the state then got benefit of statements by Avery in response to questions about the charges. Legally, allowing reporters to visit Avery in jail by special arrangement and to tape him was no different than putting an informant in his cell to question him after Avery had counsel. The state may not use these statements.

Avery moves to suppress them. This memorandum supports his motion.

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II.

FACTS

Avery expects to show the following at an evidentiary hearing, if the state disputes the facts he proffers here. But he believes these facts clear.

Between November 15 and December 14, 2005, or later,¹ members of the media interviewed Steve Avery in person in the Calumet County Jail after the state arrested and charged him in this case. At the time, the state had filed a complaint, formal court proceedings had begun, and Avery had a lawyer.

The interviews at issue² could not have occurred but for the state's efforts to permit the media access to Avery in the jail. These interviews took place in a "contact visit" room, like lawyers use to visit their clients. Even Avery's closest family members are not permitted to meet with him in a contact visit room; they must talk to him by telephone, through thick glass.

Further, media representatives taped the interviews with Avery. The state, through members of the Calumet County Sheriff's Department at a minimum, was

¹ Jennifer Kolbusz of WFRV-TV in Green Bay interviewed Avery in the Calumet County Jail on either December 14 or December 15, 2005. Avery's lawyers are uncertain now whether there were any later interviews. However, at some point in December 2005, the state agreed that the jail no longer would permit media members personal access to Avery in jail.

² This motion addresses only in-person interviews in the Calumet County Jail. Telephonic interviews that Avery himself initiated by placing a collect call are not at issue.

aware of that taping. The state permitted and facilitated the taping. Ordinarily, the state does not permit general visitors to tape meetings in the Calumet County Jail with inmates.

Avery did not waive his right to counsel in connection with those interviews. He did not arrange the interviews. He did not initiate them. And counsel did not authorize them.

The state later gathered some or all of the taped interviews that the media conducted in person with Avery. Indeed, it provided at least one of them in discovery to the defense, under cover of the special prosecutor's January 30, 2006, letter to former defense counsel (attached).

III.

ARGUMENT

A criminal defendant's Sixth Amendment right to counsel attaches at the commencement of formal court proceedings: in Wisconsin, with the filing of a criminal complaint or issuance of an arrest warrant. *State v. Dagnall*, 236 Wis. 2d 339, 357, 612 N.W.2d 680, 688 (2000). Assuming that the defendant does not waive counsel,³ from the commencement of adversarial court proceedings forward the

³ Avery believes there is no dispute that he invoked his Sixth Amendment right to counsel at the earliest opportunity, never has waived counsel, and has had counsel continuously since the criminal case began.

state must interact with the accused only through counsel. *Maine v. Moulton*, 474 U.S. 159, 176 (1985) (“The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a ‘medium’ between him and the State”). The Fourteenth Amendment’s due process clause embraces this Sixth Amendment right to counsel, so the rule is the same in a state prosecution as in a federal case. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972); *Brewer v. Williams*, 430 U.S. 387, 398 (1977).⁴

After a defendant invokes his Sixth Amendment right to counsel, the state may not “deliberately elicit[]” from him statements about the charged offense absent counsel’s involvement and agreement. *Massiah v. United States*, 377 U.S. 201, 206 (1964). This rule certainly bars the police from acting directly to obtain statements about the offense after the state charges the defendant, *see, e.g., State v. Anson*, 258 Wis. 2d 433, 439, 445-50, 654 N.W.2d 48, 50, 53-55 (Ct. App. 2002) (police initiated conversation with defendant about sexual assault without admitting to him that charges had been filed and an arrest warrant issued; Sixth Amendment violation), but the rule is broader still. It forbids the police to obtain statements indirectly from a charged defendant as well.

⁴ Avery relies as well on the state constitutional right to assistance of counsel. WIS. CONST. Art. I, § 7. That is an independent basis of his motion.

That means that the police may not enlist a co-defendant to question an unwitting defendant. *Massiah*, 377 U.S. 201. They may not use the victim's stepfather. *State v. Semrau*, 233 Wis. 2d 508, 512-15, 608 N.W.2d 376, 378-79 (Ct. App. 2000). They may not use the defendant's own stepmother. *State v. Lee*, 122 Wis. 2d 266, 270-73, 274-80, 362 N.W.2d 149, 150-52, 152-55 (1985).

Further, the police violate the Sixth Amendment even if they do not actually interrogate the charged defendant; deliberate elicitation of incriminating statements is broader than interrogation. *Fellers v. United States*, 540 U.S. 519, 523-25 (2004). That is true when the police act indirectly, too. The police violate the Sixth Amendment when they place a paid informant in the defendant's cellblock after charging, even if they tell the informant not to question the defendant, but only to "be alert" and "to pay attention" to statements. *United States v. Henry*, 447 U.S. 264, 268, 269-75 (1980). As Chief Justice Burger explained for the Supreme Court, "By intentionally creating a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel, the Government violated [the defendant's] Sixth Amendment right to counsel. This is not a case where, in Justice Cardozo's words, 'the constable . . . blundered,' [citation omitted]; rather, it is one where the 'constable' planned an impermissible interference with the right to the assistance of counsel." *Henry*, 447 U.S. at 274-75 (footnote and citation omitted).

Indeed, the state's duty under the Sixth Amendment is quite sweeping. It requires more than that the state refrain from certain actions. It requires positive steps. The Sixth Amendment guarantee of counsel "includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." *Maine v. Moulton*, 474 U.S. at 176. "[K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Id.*

The Wisconsin Supreme Court has provided perhaps the best distillation of the state's duty under the Sixth Amendment right to counsel. "An inculpatory statement will be suppressed if the police intentionally create a situation, by directing, controlling or involving themselves in the questioning of a person in custody by use of a private citizen, which is likely to induce an accused to make incriminating statements without the assistance of counsel." *Lee*, 122 Wis. 2d at 275, 362 N.W.2d at 153.

Within that framework, the Court encounters the state's actions here. A jail is not an open place. Visitors ordinarily may not talk with an inmate unless they are

his lawyer, his religious adviser, his probation agent, or a friend or relative whom the inmate himself has listed as a requested visitor. Even then, contact visits ordinarily are not permitted to visitors other than a lawyer, a probation agent, or perhaps a minister. A visitor may not tape a visit under the usual rules.

Here, the state for its own reasons allowed ordinarily impermissible access of the media to Avery in jail. Avery had not listed media members on his visitor list. He had not requested to see them. The media members were not Avery's lawyers, probation agents, or spiritual advisers. The state had no reason to believe that Avery's lawyer had arranged the media visits, approved of the visits, or even knew of them.

The state ignored its own rules to permit these visits in the first place. It further set aside its rules to arrange contact visits. Yet again it ignored its own rules to allow taping by the media. The state knew that the interviews would be taped, for the cameras and microphones and other equipment were open and obvious.

And the state knew the purpose of these visits would be to question Avery. The media visitors were reporters; they were there for interviews. The state knew this when it admitted them to the jail. The state knew the reporters' purpose was questioning when jailers, or other agents of the state, procured Avery from his jail cell and affirmatively brought him to the interview room.

Finally, the Court can entertain no doubt that the state knew that the purpose of the taped interviews was to address the crimes charged. Media coverage of these charges was extensive in the area in which the investigators and prosecutors involved in this case work, Manitowoc and Calumet Counties. The lead prosecutor and the Calumet County Sheriff themselves, as well as lead investigators Thomas Fassbender and Mark Wiegert, personally participated in or attended televised press conferences about the Halbach investigation and the arrest and charging of Avery. The state had no reason to believe that reporters were clamoring for access to Steven Avery in jail so that they could question him instead about how high the Federal Reserve board would hike the prime lending rate, whether the Milwaukee Brewers would have better than a .500 season in 2006, or what could be done to avert the rapid shrinkage of the polar ice caps because of global warming. The state knew the reporters were there to question Steven Avery about the criminal charges he faces.

Later, the state obtained those taped interviews for its consideration and possible use against Avery at trial. At least one such interview the state produced to the defense as discovery material.

By these steps, agents of the state were “involving themselves in the questioning of a person in custody by use of a private citizen,” *Lee*, 122 Wis. 2d at 275, 362 N.W.2d at 153, in ways that were likely to lead to incriminating statements

by the accused – and that did. Media interviews that the state contrived to cause in the Calumet County Jail violated Avery’s Sixth Amendment right to counsel.

IV.

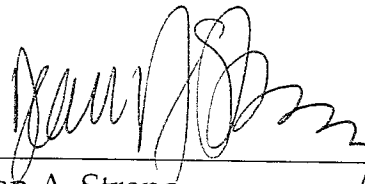
CONCLUSION

For the reasons he explains here and in his motion to suppress statements to the media while in jail, Steven Avery asks the Court for an evidentiary hearing if the state opposes this motion. He also asks the Court to enter an order suppressing all of Avery’s statements to media representatives during in-person interviews in the Calumet County Jail, and any direct or indirect products of those statements. The statements violated the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution.

Dated at Madison, Wisconsin, June 15, 2006.

Respectfully submitted,

HURLEY, BURISH & STANTON, S.C.



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January 30, 2006

Attorney Erik Loy
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**Re: State of Wisconsin vs. Steven A. Avery
Case No. 05-CF-381**

Dear Attorney Loy:

Recognizing this office's continuing duty of providing discovery, enclosed please find additional information regarding the above-captioned case:

- a. Calumet County Sheriff's Department narrative reports pgs. 319-346 (28 pages)
- b. Report dated 1/17/06 from Federal Bureau of Investigation regarding results of mitochondrial DNA examination (3 pages)
- c. Wisconsin Crime Laboratory Bureau photos; case no. M05-2467 (26 - 8" x 10" photos of Teresa Halbach's vehicle)
- d. Prison inmate records of Steven A. Avery (617 pages)
- e. CD - Sergeant Tyson's Video of Property - 11/12/05
- f. CD - Fox 11 Footage Through 11/15/05
- g. CD - WBAY Footage 11/4/05
- h. CD - WBAY Footage 11/7/05
- i. CD - WBAY Footage 11/12/05
- j. CD - WFRV Avery Jail Interview 11/18/05
- k. CD - WFRV General Avery Footage
- l. CD - NBC 26 Avery Coverage
- m. CD - WHBY Avery Interviews 11/8/05 & 11/9/05
- n. CD - Avery Fly-Overs
- o. CD - Interview With Bryan Dassey

Sincerely,



Kenneth R. Kratz
Manitowoc County Special Prosecutor

KRK:mlm
Enclosures

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