

1 STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY  
2 BRANCH 1

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4 STATE OF WISCONSIN,  
5 PLAINTIFF, JUDGE'S DECISION  
6 vs. Case No. 05 CF 381  
7 STEVEN A. AVERY,  
8 DEFENDANT.

9 **DATE:** AUGUST 22, 2006

10 **BEFORE:** Hon. Patrick L. Willis  
11 Circuit Court Judge

12 **APPEARANCES :**

13 KENNETH R. KRATZ  
14 Special Prosecutor  
15 On behalf of the State of Wisconsin.

16 THOMAS J. FALLON  
17 Special Prosecutor  
18 On behalf of the State of Wisconsin.

19 DEAN A. STRANG  
20 Attorney at Law  
21 On behalf of the Defendant.

22 JEROME F. BUTING  
23 Attorney at Law  
24 On behalf of the Defendant.

25 STEVEN A. AVERY  
Defendant  
Appeared in person.

\* \* \* \* \*  
**TRANSCRIPT OF PROCEEDINGS**

Reported by Diane Tesheneck, RPR  
Official Court Reporter

1 THE COURT: At this time the Court calls  
2 State of Wisconsin vs. Steven Avery, Case No. 05 CF  
3 381. Will the parties present state their  
4 appearances for the record, please.

5 ATTORNEY KRATZ: State of Wisconsin appears  
6 by Calumet County District Attorney Ken Kratz,  
7 appearing as Special Prosecutor. Also appearing as  
8 Special Prosecutor is Tom Fallon, from the  
9 Department of Justice.

10 ATTORNEY STRANG: Steven Avery is here in  
11 person and he's represented by Jerry Buting of  
12 Buting and Williams. And Dean Strang of Hurley,  
13 Burish and Stanton. Good morning.

14 THE COURT: All right. We're here this  
15 morning for the Court to issue its decision on a  
16 number of motions that have been filed. Following  
17 the decisions on those motions, the Court will take  
18 a summary of the motions that are still outstanding,  
19 just to make sure that they are all being dealt  
20 with.

21 Court will first issue its decision on  
22 the defendant's motion to dismiss on the grounds  
23 that the State has made a trial in Manitowoc  
24 County impossible. The basis for this motion is  
25 alleged that the State has taken actions to make

1 a fair trial in Manitowoc County impossible.

2 Specifically, the defendant refers to  
3 eight press conferences that were conducted  
4 primarily by the Calumet County District Attorney  
5 and Sheriff. Four of these press conferences  
6 occurred after the defendant's arrest in this  
7 case. The defendant also cites comments made in  
8 a two-part news story in May of this year by the  
9 Manitowoc County Sheriff.

10 The defendant asserts that his  
11 constitutional rights under Article 1, Section 7  
12 of the Wisconsin Constitution, as well as his due  
13 process rights under the 14th amendment to the  
14 United States Constitution, and Article 1,  
15 Section 8 of the Wisconsin Constitution were  
16 violated by the State's participation in pretrial  
17 publicity.

18 The defense brief concludes on Page 11,  
19 that, taken together, the State's actions  
20 effectively have destroyed Avery's opportunity to  
21 obtain an impartial jury in Manitowoc County.  
22 That is, the basis for requesting dismissal as a  
23 sanction is the claim that participation by  
24 agents of the State in pretrial publicity has  
25 precluded the defendant from receiving a fair

1 trial in front of Manitowoc County jurors. The  
2 Court has reviewed the media account -- accounts  
3 referenced by the motion.

4 The defendant cites no Wisconsin case  
5 which has ever granted the remedy he requests;  
6 that is, no Wisconsin case has ever found that a  
7 defendant is entitled to dismissal of a criminal  
8 charge because of the State's participation in  
9 pretrial publicity.

10 The defendant does cite two Wisconsin  
11 cases as being relevant: ***State ex rel. Schulter***  
12 ***v. Roraff***, a 1968 Wisconsin Supreme Court case,  
13 and ***Briggs vs. State***, a 1977 Wisconsin Supreme  
14 Court case.

15 In neither of these cases did the Court  
16 order that the criminal charges involved be  
17 dismissed. In fact, the Court specifically  
18 rejected the remedy in ***Schulter***, the one case in  
19 which the defendant actually requested dismissal.  
20 Continuance and change of venue have been the  
21 only remedies approved, to date, where  
22 prejudicial pretrial publicity threatens the  
23 defendant's right to a fair trial.

24 The Court is not prepared to say that  
25 the State's participation in pretrial publicity

1           could never justify dismissal of criminal  
2           charges; indeed, there's language from the  
3           *Schulter* decision which suggests that the Court  
4           did not rule out the possibility entirely.  
5           There's a sentence that reads as follows: In  
6           *State vs. Woodington*, we considered the problem  
7           of pretrial publicity and concluded that the  
8           remedy was not necessarily the dismissal of  
9           charges, but a change of venue, or continuance of  
10          the trial, and the careful selection of the jury  
11          on voir dire.

12                         So it may be possible that, in an  
13          appropriate case, the Supreme Court could justify  
14          dismissal as a sanction. However, since no  
15          reported decision ever -- ever sanctioned the  
16          remedy of dismissal, this Court concludes that a  
17          remedy as drastic as dismissal could only be  
18          justified by very egregious behavior on the part  
19          of the State.

20                         The Court concludes in this case that  
21          the State's role in pretrial publicity was not  
22          egregious, or designed to jeopardize the  
23          defendant's right to a fair trial. The Court has  
24          reviewed the participation of the State  
25          complained of by the defendant and makes the

1 following observations:

2 The first four of the eight cited press  
3 conferences were more informational in nature and  
4 also related more to the missing person report,  
5 not to the involvement of the defendant in the  
6 crimes that have been alleged in this case. The  
7 last four press conferences did involve a  
8 detailing of the accusations made against the  
9 defendant, in some cases with more detail than  
10 the Court believes was necessary.

11 But the content was largely confined to  
12 information contained in the Complaints against  
13 Mr. Avery, and the co-defendant in this case,  
14 Brendan Dassey. While the content was somewhat  
15 inflammatory in nature by virtue of the very  
16 allegations of fact, similar to the situation  
17 described in the *Briggs* decision, the information  
18 was largely available to the press and the public  
19 anyway, from the Complaints, which already were,  
20 or were soon to become, public information.

21 The Court notes that the press in this  
22 case has given publicity to a number of pleadings  
23 and motions that have been filed, even before the  
24 court proceedings dealing with those pleadings.  
25 So, it is unlikely that the news conferences

1           resulted in the disclosure of any meaningful  
2           information that would not have been publicized  
3           in any event.

4                     The Court also notes that, especially  
5           early in these proceedings, there were media  
6           reports that the defendant and members of the  
7           defendant's family believed the police were  
8           unfairly picking on him and suggested that the  
9           defendant was being framed; indeed, the defense  
10          in this case has filed motions indicating that  
11          such a defense may be pursued at trial.

12                    Supreme Court Rule 20:3.6(d) permits a  
13          district attorney to make a statement reasonably  
14          required to protect the State from the adverse  
15          effects of publicity not initiated by the State.  
16          Early in these proceedings, such adverse  
17          publicity existed. The State was reasonably  
18          entitled to respond to public allegations that it  
19          was basing its decisions on bias rather than the  
20          evidence obtained.

21                    With respect to the two-part news story  
22          involving the Manitowoc County Sheriff, the Court  
23          notes that that took place in May, a number of  
24          months before the scheduled trial date. At the  
25          outset, the Court does conclude that a number of

1 the comments made by the Sheriff were ill-advised  
2 and the Sheriff should not have participated in  
3 the interview, even in the absence of a  
4 prohibition order issued by the Court. The Court  
5 does conclude, however, that his participation  
6 was not so egregious or prejudicial as to justify  
7 dismissal of the charges.

8 First, it had been previously reported,  
9 and the May reports reiterated, that the Sheriff  
10 was involved in the wrongful prosecution of  
11 Mr. Avery back in 1985. The Sheriff's testimony  
12 at the July 5 hearing in this case suggested he  
13 may still not be convinced that Gregory Allen is  
14 guilty and Steven Avery is innocent in the 1985  
15 sex assault. But the Sheriff appears to be  
16 largely alone in that belief.

17 As has been widely reported for some  
18 time, the State has not only conceded that  
19 Mr. Avery did not commit the 1985 crime, but the  
20 State has concluded that another man, Gregory  
21 Allen, did. Thus, any viewer of this report  
22 would have serious reason to question the  
23 Sheriff's objectivity.

24 To further balance the report, it  
25 included prior statements from members of the



1 defendant's family that law enforcement  
2 representatives were unfairly picking on the  
3 defendant's family.

4 Sheriff's explanation as to why his  
5 department would have had no reason to frame the  
6 defendant may have been unfortunately worded, but  
7 the Court is satisfied that the Sheriff was  
8 trying to explain, in an admittedly awkward way,  
9 why the allegation that his department was trying  
10 to frame Steven Avery should not be believed. As  
11 the Court has already noted, while the Sheriff  
12 should not have granted the interview, his  
13 participation is somewhat mitigated by a  
14 perceived need to respond to publicized frame-up  
15 allegations on the part of the defendant and his  
16 family.

17 A person viewing the report may well  
18 have come away with the impression that the  
19 Sheriff believed the defendant is guilty of the  
20 crimes charged in this case. That should not be  
21 any more surprising than that the defendant's  
22 family, friends, and his attorney in a civil  
23 case, Stephen Glynn, publicly expressed their  
24 belief in his innocence in the same report.

25 If law enforcement officials did not

1 believe the defendant was guilty, this Court  
2 would certainly expect the State to move to  
3 dismiss the charges against the defendant. The  
4 Court gives the public more credit than to be too  
5 unduly influenced by comments from either side.  
6 The report was balanced and not so inflammatory  
7 that persons who viewed it months ago could still  
8 not provide the defendant a fair trial if  
9 selected as jurors.

10 Finally, the Court notes that while the  
11 defense is requesting dismissal because he  
12 asserts the State's participation in pretrial  
13 publicity has made a trial in Manitowoc County  
14 impossible, the defendant acknowledges in another  
15 motion that if the Court grants an adjournment of  
16 the trial date to early next year, a fair jury  
17 composed of Manitowoc County citizens could be  
18 selected. At least, the Court believes that's a  
19 fair inference for the Court to draw from the  
20 defendant's contingent change of venue request.

21 The bottom line is that while there may  
22 be a set of facts which would warrant the relief  
23 the defendant seeks, there are no such facts  
24 present here. The complained of publicity  
25 occurred many months before the scheduled trial.

1 Early news conferences focused on the search for  
2 Teresa Halbach, not the charges against the  
3 defendant.

4 Later press conferences with the Calumet  
5 County District Attorney and Sheriff were mainly  
6 confined to information available in public  
7 records. The Manitowoc County Sheriff's  
8 participation in the May interview was  
9 ill-advised, but not so prejudicial as to justify  
10 the remedy the defendant seeks.

11 The defendant's own contingent change of  
12 venue request demonstrates his belief that, with  
13 adequate precautions, a fair jury can be selected  
14 in Manitowoc County. For all these reasons, the  
15 defendant's motion to dismiss is denied by the  
16 Court.

17 Before I proceed to other motions, I  
18 will note that there have been motions filed  
19 relating to change of venue and scheduling of the  
20 trial date. And it's my understanding that the  
21 parties have a stipulation on those issues to  
22 propose to the Court this morning; in fact, I  
23 have been handed a written stipulation. Counsel,  
24 does one of you care to put it on the record for  
25 the Court?

1                   ATTORNEY KRATZ: I certainly can, Judge. I  
2                   don't know how much in detail the Court wants me to  
3                   go. We have provided the Court a two-page  
4                   stipulation. That stipulation attempts to deal with  
5                   the issues of change of venue, as well as trial  
6                   schedule. The stipulation, and I will read at least  
7                   the part of the stipulation that is being proposed  
8                   towards the bottom of Page one.

9                   The parties, that is, the defense and  
10                  the State, have agreed to the following: Number  
11                  one, that the jury trial in this case will  
12                  commence on or about February 5, 2007. The  
13                  parties continue to believe that the trial itself  
14                  will last approximately six weeks. I note for  
15                  the record that I'm paraphrasing, when  
16                  appropriate, in parts of the stipulation.

17                  Number two, that the jury trial will  
18                  physically be held in the Calumet County  
19                  Courthouse.

20                  Number three, that the Court has agreed  
21                  upon the county in which the jury will be  
22                  selected. The parties have identified and have  
23                  agreed upon that jury pool, and the Court may  
24                  wish to comment on that thereafter.

25                  The stipulation is proposed by myself

1 and Mr. Strang, both as lead counsel for the  
2 relative parties. The stipulation includes  
3 acquiescence by Mr. Avery, and a statement as to  
4 waiver of right to be tried physically here in  
5 Calumet County. And also includes the agreement  
6 of the Halbach family, by Tim Halbach, a  
7 representative of the Halbach family.

8 I should note that the purpose of the  
9 stipulation, or at least in part, as well as the  
10 Halbach's acquiescence, is based upon the Halbach  
11 family's ability to now fully participate, if  
12 they choose, in all aspects of the jury trial, as  
13 the physical location would be within Calumet  
14 County.

15 Attached to the stipulation includes  
16 proposals from Sheriff Pagel, with the agreement  
17 of the Manitowoc County Sheriff's Department.  
18 This sets forth reasons why Calumet County is a  
19 preferred venue, or preferred place of trial in  
20 this case, as to issues of security, transport,  
21 and the physical evidence which is being held in  
22 the Calumet County Courthouse.

23 Lastly, there is correspondence from  
24 Mr. Rollins, who is Corporation Counsel, acting  
25 on behalf of Manitowoc County. This county, that

1 is, Manitowoc County, has requested this Court  
2 adopt the stipulation, based upon the physical  
3 amenities that the Calumet County Courthouse may  
4 have, Mr. Avery's location, the physical  
5 evidence, again, and the participation of the  
6 Halbach family.

7 For all of those reasons, and reasons  
8 previously provided in more detail to the Court,  
9 including this proposal having been made by me  
10 back in, I believe it was February of this year,  
11 the parties jointly, that is, Mr. Avery, his  
12 lawyers, and the State, is asking the Court adopt  
13 the stipulation.

14 THE COURT: Mr. Strang.

15 ATTORNEY BUTING: Counsel recited the  
16 stipulation's terms, in their essence. He did it  
17 fairly. He did it accurately, but for one small  
18 item on which he misspoke, innocently, and that is  
19 simply that Mr. Avery has agreed in writing here,  
20 not to be tried in Manitowoc County, physically.  
21 The trial will take place in Calumet County, but it  
22 would be Manitowoc County in which he had a right to  
23 insist upon the physical location of the trial. And  
24 he's agreed instead to try the case in the Calumet  
25 County Courthouse, just as counsel explained.

1 THE COURT: All right. I will note there  
2 were some written modifications to the third  
3 paragraph in the stipulation, that after the parties  
4 approached the Court, I indicated I had a concern  
5 with. At one point, it was my understanding the  
6 parties wished the county from which the jury would  
7 be selected to not be disclosed at this time. But I  
8 understand the parties do not have an objection to  
9 disclosure as of today.

10 ATTORNEY KRATZ: That's correct, Judge.

11 THE COURT: Mr. Strang.

12 ATTORNEY STRANG: That's true.

13 THE COURT: And I think that is important,  
14 for the Court to make sure that Mr. Avery -- and I'm  
15 going to conduct a brief colloquy with him on the  
16 record today -- that everybody understands and  
17 agrees what is being proposed here and,  
18 specifically, that the parties both agree that the  
19 jurors are to be selected from Manitowoc County. Is  
20 that correct?

21 ATTORNEY STRANG: Yes.

22 ATTORNEY KRATZ: Yes.

23 THE COURT: Mr. Avery, is that your  
24 understanding of the recommendation that the parties  
25 are proposing to the Court today, and that you have

1           agreed to?

2                   MR. AVERY:   Yes.

3                   THE COURT:   Okay.  I do have some questions  
4           to ask of you, to make sure that you understand it,  
5           and I want to make sure that you are knowingly  
6           agreeing to this proposal.

7                   First of all, do you understand that you  
8           have a constitutional and statutory right to keep  
9           venue in Manitowoc County, if you wish; that is,  
10          a right to be tried not only by a jury of  
11          Manitowoc County residents, but also, at least  
12          arguably, to a trial physically held in Manitowoc  
13          County.  Do you understand that?

14                   MR. AVERY:   Yes, I do.

15                   THE COURT:   Do you also understand that the  
16          venue statute, Section 971.225, only permits the  
17          Court to order the trial to be held in another  
18          county if I make a determination that an impartial  
19          trial could not be held in Manitowoc County?  That  
20          is, if you were not requesting it, the Court would  
21          not be ordering that this trial be held in Calumet  
22          County; do you understand that?

23                   MR. AVERY:   Yes.

24                   THE COURT:   Is it your wish to be tried in  
25          Calumet County in this case, with a jury composed of



1           Manitowoc County residents?

2                   MR. AVERY:    Yes.

3                   THE COURT:   Has anyone made any promises or  
4                   threats to you, to get you to request this  
5                   provision?

6                   MR. AVERY:    No.

7                   THE COURT:   Have you had adequate time to  
8                   discuss this decision with your attorneys?

9                   MR. AVERY:    Yes.

10                  THE COURT:   And do you have any questions  
11                  at this time?  If you do, I would go off the record  
12                  and permit you to discuss the matter further with  
13                  your attorneys.  Do you have any such questions?

14                  MR. AVERY:    No, I don't.

15                  THE COURT:   Very well.  The parties had  
16                  alerted the Court a few days ago that this  
17                  stipulation would be being presented today, so I  
18                  have had some time to give it some thought.  I also  
19                  took the opportunity, a few days ago, to travel to  
20                  Calumet County in order to tour the courthouse  
21                  facilities.

22                           I agree that there are some advantages  
23                           to holding the trial in Calumet County, in terms  
24                           of security relating to both the defendant and to  
25                           the jurors.  There also appears to be more space

1 at the courthouse for the media.

2 And the Court has been informed that  
3 Manitowoc County officials believe it would be  
4 more economical to hold the case in Calumet  
5 County. That is not a major request, obviously,  
6 in the Court's decision, but the Court is aware  
7 that Manitowoc County officials concur in the  
8 move. And I also understand that the victim's  
9 family has joined in this request; in fact,  
10 Calumet County, I believe, is closer to their  
11 home than Manitowoc.

12 Based on those considerations, the  
13 request that's been made by the parties, I'm  
14 going to grant the joint request that's been made  
15 here. I will also note the request calls for a  
16 delay in the trial date, that will further  
17 alleviate any prejudicial effects of any pretrial  
18 publicity, avoid any potential conflicts with the  
19 Thanksgiving holiday that might have occurred had  
20 the trial started in mid-October, and allow the  
21 defense more time to evaluate the evidence in  
22 this case, which is somewhat voluminous. The  
23 Court has been informed of such requests on the  
24 defense in the past. So I will grant the  
25 request.

1                   The trial date here will be scheduled  
2                   for February 5, of 2007. I cannot foresee  
3                   anything at this time that would result in a  
4                   further continuance of that trial date, and the  
5                   Court will agree to hold the trial in the Calumet  
6                   County Courthouse.

7                   The jury will be selected, composed of  
8                   Manitowoc's residents. Jury selection, I think,  
9                   will take place here. It will be more convenient  
10                  for everyone. But once the trial begins, it will  
11                  take place in Calumet County. Is there anything  
12                  further from either party on that matter?

13                  ATTORNEY KRATZ: No, Judge.

14                  THE COURT: If not, then the Court will  
15                  move on to the defense motion to exclude members of  
16                  the Manitowoc County Sheriff's Department from  
17                  testifying in this case. That motion initially  
18                  included a request, also, to prevent members of the  
19                  Sheriff's Department from overseeing the jury in  
20                  this case. But, Mr. Strang, it's my understanding  
21                  that with the move of the physical site of the trial  
22                  to Calumet County, that portion of the defense  
23                  motion is being withdrawn.

24                  ATTORNEY STRANG: It is in the sense that I  
25                  think it's mooted. There are a number of logistical

1 details attending the stipulation just presented to  
2 the Court, and adopted by the Court, that we have  
3 not laid out here today, but on which the parties  
4 are in accord. And one of those, in sum, is that  
5 with a trial conducted in the Calumet County  
6 Courthouse, the Calumet County Sheriff's Department,  
7 in the ordinary course, would take charge of jury  
8 assembly, jury management, the role of bailiff,  
9 custody of Mr. Avery, if in fact he's in custody at  
10 the time of trial.

11 And we see that as mooted the request  
12 for relief as to a role with the Manitowoc County  
13 Sheriff's Department, in prospective or actual  
14 jurors, because under this proposal the Manitowoc  
15 County Sheriff's Department will have no role  
16 with, or contact with, actual or prospective  
17 jurors.

18 THE COURT: Okay. All right. As the Court  
19 noted, the defense has filed a motion to exclude all  
20 members of the Manitowoc County Sheriff's Department  
21 from testifying on behalf of the State, as part of  
22 the State's case in chief.

23 The sole basis for the defense motion  
24 arises out of comments made in an interview  
25 Sheriff Kenneth Peterson provided to FOX 11 News

1 in Green Bay, portions of which were aired in a  
2 two-part report on May 11 and 12 of this year.  
3 The Court is not going to detail the Sheriff's  
4 comments further here, other than to note that  
5 they related to the Sheriff's involvement with  
6 Mr. Avery in the past, including the Sheriff's  
7 role in the prosecution of Mr. Avery back in  
8 1985, relating to a sex assault charge, for which  
9 he was subsequently exonerated. The Sheriff also  
10 relayed in the report some of his own opinions  
11 concerning the defendant's personality.

12 The defendant contends that he is  
13 entitled to the remedy he seeks because the  
14 Sheriff's's comments were calculated to interfere  
15 with the defendant's right to a fair trial in  
16 Manitowoc County, before a Manitowoc County jury.

17 The Court has reviewed the two-part news  
18 report in it's entirety and I have also read and  
19 heard the party's arguments; that is, the written  
20 argument submitted by Mr. Strang, with his  
21 motion; the written response submitted by  
22 Mr. Fallon; as well as the arguments made at the  
23 July 5, 2006 hearing. The Court makes the  
24 following observations:

25 The Court has accepted, today, the

1 stipulation of the parties that the trial will be  
2 held in Calumet County, with a Manitowoc County  
3 jury. So the defendant has not lost his  
4 constitutional right to a trial in the county  
5 where the crimes are alleged to have been  
6 committed. The place of the trial is being moved  
7 at the joint request of the defendant and the  
8 State.

9 Earlier in these proceedings, the  
10 parties agreed, informally, to eliminate out of  
11 court comments to the press; the State, through  
12 the attorneys or representatives of the Calumet  
13 County Sheriff's Department, and the defense  
14 through defense counsel or the defendant himself.  
15 There was, and is, no order at this time to  
16 support this agreement. But it came about as a  
17 result of the Court's reluctance to issue a gag  
18 order, which the Court regarded as an extreme  
19 remedy. The Court felt that this agreement,  
20 along with the admonition to the parties to  
21 comply with Supreme Court Rule 20:3.6 would  
22 address the concerns initially raised by the  
23 defense.

24 The informal agreement has proven  
25 largely effective with respect to the parties

1 involved. No party mentioned any concern at the  
2 time with comments originating from the Manitowoc  
3 County Sheriff's Department. The Court did not  
4 issue any type of gag order, and the Sheriff's  
5 comments in this case did not violate any such  
6 order.

7 There is no evidence that the Sheriff  
8 initiated contact with FOX 11 News.  
9 Representatives of that organization apparently  
10 contacted him for the interview.

11 Nevertheless, the Court does believe  
12 that the comments were inappropriate coming in  
13 the context of these court proceedings. And the  
14 Sheriff should not have -- should have used his  
15 own discretion to avoid such comments. Those  
16 comments fell within the scope of the type of  
17 publicity the parties had agreed to stop and had  
18 the potential to jeopardize the defendant's right  
19 to a jury of Manitowoc County jurors.

20 Whatever the Court's decision is on the  
21 defense motion, the Court believes that care  
22 should be taken to make sure such comments do not  
23 occur again before the trial in this case. The  
24 Court notes that the comments involved were those  
25 of the Sheriff alone.

1                   His department does not have control of  
2                   this investigation. And the Court has not been  
3                   presented with any evidence to suggest that any  
4                   other member of the Manitowoc County Sheriff's  
5                   Department who participated in the investigation  
6                   in this case has been directly, or indirectly,  
7                   influenced in any way by the Sheriff. The Court  
8                   notes that the Sheriff has announced his  
9                   intention to retire at the expiration of his term  
10                  in early January of next year.

11                  The Court makes the following  
12                  conclusions: The Court is unaware of any  
13                  precedent for granting the remedies the defendant  
14                  seeks where no court order was violated. The  
15                  cases cited by the defense, which sustain the  
16                  drastic remedy of exclusion of evidence, involve  
17                  violation of either a court order or a discovery  
18                  statute.

19                  Participation by representatives of the  
20                  State in pretrial publicity has only been used in  
21                  reported cases as a grounds for change of venue  
22                  or a continuance. There is even less reason in  
23                  this case to exclude evidence from members of the  
24                  Sheriff's Department who did not themselves  
25                  participate in any allegedly improper comments.



1           The Court further notes that the report  
2 was a one time, in two-part, news item on one  
3 television station in May, approximately nine  
4 months before what will now be the scheduled  
5 start of the trial.

6           The Court agrees that the comments made  
7 were inappropriate in the context of these court  
8 proceedings and did constitute a threat to the  
9 defendant's right to fair trial before a  
10 Manitowoc County jury; although, the Court has  
11 earlier today accepted a stipulation of the  
12 parties to have this case heard by a Manitowoc  
13 County jury.

14           While the attorney's did not cite  
15 concern over comments from the County Sheriff's  
16 Department, that is, the Manitowoc County  
17 Sheriff's Department, at the time they reached  
18 their informal agreement to refrain from public  
19 comment in this case, the comments should not  
20 have been made.

21           To make sure there are no further  
22 problems of this nature, the Court is going to  
23 issue an order prohibiting members of either the  
24 Manitowoc County Sheriff's Department, or the  
25 Calumet County Sheriff's Department, from making

1 any further public comment concerning this case,  
2 or the defendant, Steven Avery, until the trial  
3 is concluded.

4 The Court is satisfied that adherence to  
5 the attorneys to Supreme Court Rule 20:3.6  
6 precludes the need for any such order to apply to  
7 counsel. I'm directing the counsel for the  
8 defense to draft the order and submit it to  
9 counsel for the State before submitting it to the  
10 Court for signature.

11 Because the Court concludes that the  
12 other remedy sought by the defense, that is, the  
13 exclusion of testimony by members of the  
14 Sheriff's Department of Manitowoc County is not  
15 warranted, that portion of the defense motion is  
16 denied.

17 ATTORNEY STRANG: As a matter of  
18 clarification, your Honor -- and I'm happy to draft  
19 the proposed order -- I will intend to include  
20 proceedings related to Brendan Dassey within the  
21 Court's definition of this case, even though,  
22 technically, the Dassey proceedings are under a case  
23 number different than the Avery proceedings.

24 THE COURT: Any objection from the State?

25 ATTORNEY KRATZ: I'm not sure you have

1 authority over the Brendan Dassey case, Judge.

2 THE COURT: I don't have authority over the  
3 case, but -- and the Court's order would have no  
4 affect in his case -- but I think it could extend to  
5 comments relating to his role in this case. I  
6 will -- I will do this, I will let it up to the  
7 parties, in the form of your proposed order, to  
8 attempt to resolve that matter. If it still winds  
9 up being contested and the parties have alternative  
10 versions of the proposed order to submit, I will  
11 review them, give the parties a chance to be heard,  
12 before I issue the Court's order.

13 ATTORNEY KRATZ: That's fine. Thank you.

14 THE COURT: The Court will next move on to  
15 the State's motion in this case to admit statements  
16 of Teresa Halbach to co-workers. The State seeks to  
17 admit certain statements which Teresa Halbach  
18 allegedly made to co-workers in October of 2005,  
19 relating to her observations during an earlier visit  
20 to the defendant's property and her state of mind  
21 based on those observations.

22 The defense opposes the admission of  
23 these statements. The admissibility of evidence  
24 which the State seeks to introduce involves  
25 issues relating to hearsay, relevance, and the

1 defendant's right to confront his accusers. The  
2 Court will address each of these issues  
3 independently, as they relate to the statements  
4 which the State seeks to introduce.

5 First of all, with respect to hearsay,  
6 the State asserts that Teresa Halbach's  
7 statements relating to both her perceived  
8 observations and to her state of mind fall under  
9 the hearsay exception contained in Section  
10 908.045 (2). That statute provides in relevant  
11 part as follows:

12 The following are not excluded by the  
13 hearsay rule, if the declarant is unavailable as  
14 a witness. A statement which describes an event  
15 or condition recently perceived by the declarant,  
16 not in contemplation of pending or anticipated  
17 litigation and while the declarant's recollection  
18 was clear.

19 The statements which Teresa Halbach may  
20 have made to her co-workers describing  
21 observations from her earlier visit to the  
22 defendant's home could fit within this hearsay  
23 exception, subject to adequate foundation. At  
24 this point, the State has not provided the Court  
25 with a date the observations were allegedly made

1 by Ms Halbach, nor when the observations were  
2 relayed to her co-workers.

3 However, it appears that any statement  
4 relating to her observations may well constitute  
5 a statement which describes an event she recently  
6 perceived. Indeed, the defense does not  
7 seriously dispute, that with proper foundation,  
8 the hearsay exception in Section 908.045 (2)  
9 could apply to statements relating to Ms  
10 Halbach's observations.

11 The statements relating to her state of  
12 mind, as opposed to her observations, do not fall  
13 within the exception of Section 908.045 (2). A  
14 statement of recent perception is exactly that,  
15 it is a statement of something which the  
16 declarant has perceived. It does not include  
17 opinions of the declarant relating to her  
18 perceptions or her state of mind.

19 Now, there is a hearsay exception not  
20 advanced by the State which could arguably apply  
21 to the defendant's state of mind; that is,  
22 Section 908.03 (1), which reads, in relevant  
23 part, as follows. The following are not excluded  
24 by the hearsay rule: A statement explaining an  
25 event or condition made while the declarant was

1           perceiving the event or condition, or immediately  
2           thereafter. While the statements made by Ms  
3           Halbach relating to her then existing state of  
4           mind could arguably fall within this exception,  
5           they would still have to be relevant before they  
6           could be admitted.

7                         In order for a statement of Teresa  
8           Halbach relating to her state of mind to be  
9           relevant, the statement would have to relate to  
10          an element of the crimes which the State seeks to  
11          prove. A similar issue was addressed by the  
12          Court of Appeals in the case of ***State vs. Kutz***, a  
13          2003 Court of Appeals case.

14                        The defendant in that case was charged  
15          with first-degree intentional homicide, hiding a  
16          corpse, and stalking, arising out of the  
17          disappearance of his wife. The State sought to  
18          introduce a number of statements attributed to  
19          the wife in the time leading up to her  
20          disappearance involving threats which the  
21          defendant made to her. The State sought  
22          introduction of the of statements as evidence of  
23          her fearful state of mind at the time she made  
24          the statements, shortly before her disappearance.

25                        The Court of Appeals ruled that the

1 statements were not admissible, because while  
2 they were evidence of the declarant's state of  
3 mind, her state of mind was not relevant to the  
4 charges in that case. The Court recognized that  
5 the primary purpose of introducing the evidence  
6 was to demonstrate that the threats were actually  
7 made to the wife, not that she was in fear  
8 because of the statements.

9 That is similar to the situation here.  
10 While any statement of Teresa Halbach involving  
11 her state of mind made a few weeks before her  
12 disappearance would certainly be relevance as  
13 evidence of her state of mind, her state of mind  
14 is not really at issue in this case.

15 The State has suggested that her state  
16 of mind has a relationship to the elements which  
17 the State must prove on the kidnapping charge.  
18 However, the Court views the probative value of  
19 her sate of mind weeks before the crime as very  
20 marginal. The Court does not believe that her  
21 state of mind has sufficient probative value or  
22 relevance to justify admission of the evidence.

23 The State asserts that the personal  
24 observations of Theresa Halbach, as opposed to  
25 her state of mind, have relevance as to the

1 defendant's intent and plan to sexually assault  
2 her in the future. The Court has heard  
3 references in prior arguments of the parties to  
4 allegations that Mr. Avery specifically requested  
5 Teresa Halbach to return to his residence.

6 Depending on what other facts are  
7 introduced her observations, which were relayed  
8 to her co-workers, may have probative value which  
9 could justify their admission. However, the  
10 Court is unable, based on the current state of  
11 the record, to resolve that issue at this time.

12 Should the observations of Teresa  
13 Halbach fall within the hearsay exception of  
14 Section 908.045 (2) and have sufficient probative  
15 value to justify their admission, the question  
16 remains as to whether the admission of such  
17 statements would violate the defendant's  
18 constitutional rights under the confrontation  
19 clause of the constitution.

20 The United States Supreme Court expanded  
21 the scope of the confrontation clause in **Crawford**  
22 **vs. Washington**, a 2004 case. The Court ruled in  
23 **Crawford** that where testimonial statements are  
24 involved, the defendant is entitled to confront  
25 his accusers, regardless of the reliability of



1 the statements or whether they fall in firmly  
2 rooted hearsay exceptions.

3 For purposes of the State's motion, the  
4 key question is whether the statements offered  
5 for admission are testimonial in nature. The  
6 issue of what is a testimonial statement was  
7 recently addressed by the United States Supreme  
8 Court in *Davis vs. Washington*, a case decided on  
9 June 19th of this year. The case involved the  
10 question of whether statements made by an  
11 emergency 911 caller were testimonial in nature.

12 The Court ruled that some of the  
13 statements made in the course of a 911 call were  
14 testimonial, while others were not.  
15 Specifically, the Court ruled as follows:

16 Statements are non-testimonial when made  
17 in the course of police interrogation, under  
18 circumstances objectively indicating that the  
19 primary purpose of the interrogation is to enable  
20 police assistance to meet an ongoing emergency.

21 They are testimonial when the  
22 circumstances objectively indicate that there is  
23 no such ongoing emergency and that the primary  
24 purpose of the interrogation is to establish or  
25 prove past events potentially relevant to later

1 criminal prosecution.

2 Of particular significance to our case  
3 is the following language, which the *Davis*  
4 opinion quoted from the *Crawford* case: An  
5 accuser who makes a formal statement to  
6 government officers bears testimony, in a sense  
7 that a person who makes a casual remark to an  
8 acquaintance does not.

9 With this example the Supreme Court  
10 comes very close to describing the statements  
11 Teresa Halbach purportedly made to her co-workers  
12 as a textbook example of what is not testimonial.  
13 The observational statements which the State  
14 seeks to admit were not made to the police and  
15 were certainly not made in the context of any  
16 investigation by anyone. They are much more in  
17 the nature of a casual remark to an acquaintance,  
18 which is not testimonial.

19 The Court concludes that the statements  
20 by Teresa Halbach of her earlier observations of  
21 Mr. Avery are not testimonial in nature and their  
22 admission would not implicate confrontation  
23 clause concerns.

24 In conclusion, any statement made by  
25 Teresa Halbach to her co-workers concerning her

1 state of mind at an earlier point in time are not  
2 admissible. Subject to proper foundation  
3 establishing relevance and probative value,  
4 statements that she made involving prior  
5 observations may be admissible under the hearsay  
6 exception contained in Section 908.045 (2).

7 Finally, for today's hearing, the Court  
8 will address the defendant's motion challenging  
9 the search of November 5, on the basis that it  
10 violated the rule in *Franks vs. Delaware*. I'm  
11 not addressing, today, the additional challenge  
12 to the search based on alleged multiple  
13 executions of the search warrant, because the  
14 Court has not yet received from the briefs of the  
15 parties on that issue.

16 As part of his challenge to obtaining --  
17 to the obtaining and execution of the search  
18 warrants, the defendant challenges the  
19 November 5, 2005 search warrant on the basis that  
20 it was obtained as a result of false statements,  
21 knowingly and intentionally made, or with  
22 reckless disregard for the truth, that were  
23 included in the affidavit supporting the search  
24 warrant request.

25 Under the rule of *Franks vs. Delaware*, a

1           1978 United States Supreme Court decision, if the  
2           defendant makes a substantial preliminary  
3           showing, and proves that such false statements  
4           were made, and that they are necessary to the  
5           finding of probable cause, a search warrant can  
6           be voided and the fruits of the search  
7           suppressed.

8                         Initially, the defendant's motion  
9           alleged that three separate knowingly false  
10          statements were made in the affidavit of  
11          Detective Mark Wiegert supporting the request for  
12          the November 5, 2005 warrant. First, the  
13          defendant alleged that Pamela Sturm and her  
14          daughter, the two citizens who initially located  
15          Teresa Halbach's vehicle on the Avery property,  
16          were incorrectly characterized as volunteer  
17          searchers, when in fact they were acting on  
18          behalf of law enforcement.

19                        Following the evidentiary hearing,  
20          defense counsel acknowledged that the evidence  
21          did not demonstrate that Ms Sturm and her  
22          daughter were anything but volunteer searchers.  
23          The motion goes on to allege, however, that the  
24          affidavit falsely claimed that the volunteer  
25          searchers located a vehicle matching the

1 description of the vehicle owned by Teresa  
2 Halbach, at the Avery auto salvage.

3 Further the defendant alleges that the  
4 affidavit falsely represented that the searchers  
5 provided a complete VIN from the vehicle, when in  
6 fact the searchers were only able to identify 10  
7 of the 17 characters of the vehicle  
8 identification number.

9 While acknowledging that Detective  
10 Remiker was able to obtain the full VIN of the  
11 vehicle when he responded to the scene, the  
12 defendant's motion further alleges that Detective  
13 Remiker did not have a search warrant, or consent  
14 to be on the property, and his complete  
15 identification of the VIN can, therefore, not be  
16 considered because it was illegally obtained.  
17 The defendant concludes that if the false  
18 information and Detective Remiker's  
19 identification are excised from the affidavit, it  
20 lacks the required level of probable cause to  
21 justify the issuance of the November 5 warrant.

22 The State asks the Court to deny the  
23 motion for the following reasons: First, the  
24 allegations made in the defendant's motion do not  
25 constitute a substantial preliminary showing

1           justifying an evidentiary hearing under the  
2           holding of the *Franks* case.

3                       Second, that Steven Avery lacks standing  
4           to challenge the searches of any portions of the  
5           Avery Auto Salvage Yard, other than his trailer  
6           residence and the detached garage, because he has  
7           not demonstrated a reasonable expectation of  
8           privacy in the other portions of the Avery  
9           Salvage property.

10                      Third, that no intentional  
11           misrepresentations were made in the affidavit.

12                      Fourth, even if the challenged  
13           information is excised from the affidavit, it  
14           still contains sufficient probable cause to  
15           justify the issuance of the November 5 warrant.

16                      And, finally, that Steven Avery lacks  
17           standing to challenge the information gathered by  
18           Detective Remiker when the detective responded to  
19           the scene on November 5, because whether or not  
20           Detective Remiker was legally on the premises,  
21           Mr. Avery had no reasonable expectation of  
22           privacy, either in Teresa Halbach's vehicle, or  
23           the portion of the Avery Salvage property on  
24           which Detective Remiker was present.

25                      The Court will first address the State's

1 claim that the defendant has not made a  
2 substantial preliminary showing entitling him to  
3 a hearing on the alleged **Franks** violations. When  
4 a defendant alleges that a search warrant is  
5 based on knowingly false information, the United  
6 States Supreme Court held in **Franks vs. Delaware**  
7 that the following procedure governs:

8 Where the defendant makes a substantial  
9 preliminary showing that a false statement  
10 knowingly and intentionally, or with reckless  
11 disregard for the truth, was included by the  
12 affiant in the warrant affidavit, and if the  
13 allegedly false statement is necessary to the  
14 finding of probable cause, the Fourth Amendment  
15 requires that a hearing be held at the  
16 defendant's request.

17 In the event that at the hearing the  
18 allegation of perjury, or reckless disregard, is  
19 established by the defendant, by a preponderance  
20 of the evidence, and with the evidence -- with  
21 the affidavits false material set to one side,  
22 the affidavit's remaining content is insufficient  
23 to establish probable cause, the search warrant  
24 must be voided and the fruits of the search  
25 excluded to the same extent as if probable cause

1 was lacking on the face of the affidavit.

2 In this case the defendant's motion  
3 alleged, first, that the two citizens who found  
4 the RAV-4 were not truly volunteer searches, but  
5 persons who Detective Wiegert told Detective  
6 Remiker were willing to go to the Avery property  
7 on Avery road to search the junkyard salvage  
8 area.

9 The quoted language presumably was  
10 obtained by the defendant as part of a discovery  
11 from a police report. One possible inference  
12 from the language could have been that the  
13 volunteer searchers had in fact met with  
14 Detective Wiegert and expressed their willingness  
15 to assist the police in searching the Avery  
16 property.

17 While neither party has argued the point  
18 at any length, it is at least arguable that if  
19 they had been enlisted to assist law enforcement,  
20 the searchers may have had to disclose that fact  
21 to Earl Avery when they obtained his consent to  
22 enter the property, in order to conduct the  
23 search. The State has not argued otherwise as a  
24 reason for which the motion should be denied.

25 The defense also characterizes as an



1 intentional false statement, or one made with  
2 reckless disregard for the truth, the assertion  
3 in the affidavit that the searchers claimed they  
4 had located a vehicle matching the description of  
5 the vehicle owned by Teresa Halbach. The basis  
6 for this assertion is that Pamela Sturm was told  
7 to be looking for a green vehicle, but she  
8 informed police that the vehicle was, quote,  
9 "bluish green, though it's more blue than green",  
10 end quote.

11 In addition, while the affidavit  
12 indicates that Sturm provided the entire 17  
13 character VIN, Sturm was actually able to report  
14 only 9 or 10 of the 17 VIN characters. She was  
15 not in a position to see the remaining  
16 characters.

17 Detective Wiegert acknowledged in his  
18 testimony that the portion of his affidavit  
19 indicating that Patricia Sturm provided the  
20 entire VIN was incorrect. He acknowledged that  
21 while he obtained the full VIN from Detective  
22 Remiker, Ms Sturm was only able to make out 10 of  
23 the 17 characters.

24 In addition to the inconsistencies  
25 listed in the defendant's motion, the defendant

1           also asserts that the State was not assisted by  
2           Detective Remiker's ability to read the full VIN  
3           because he did not have authorization or consent  
4           to be on the property.

5                       The Court was initially inclined to  
6           conclude that the defendant's motion did  
7           constitute a substantial preliminary showing that  
8           false statements had been intentionally included  
9           in the search warrant which called into question  
10          the level of probable cause needed for the  
11          issuance of a warrant. Had Patricia Sturm -- or  
12          I believe it's Pamela Sturm -- and her daughter  
13          been acting as agents of the State, their  
14          discovery of the RAV-4 and it's identifying  
15          information, which formed an important basis for  
16          the issuance of the warrant, may have been  
17          subject to suppression.

18                      As the State correctly points out,  
19          however, a close reading of the defendant's  
20          motion reveals no substantial preliminary showing  
21          that the Sturms were acting as agents of law  
22          enforcement. The motion does refer to a  
23          scheduled meeting of volunteers, which apparently  
24          never took place.

25                      But there is no assertion that the

1 Sturms had any specific relationship with any  
2 member of law enforcement. Indeed, the defense  
3 conceded at the conclusion of the hearing that no  
4 evidence introduced added anything to the  
5 allegations in the original motion.

6 In addition, while the motion describes  
7 Detective Remiker's entry on the property as  
8 unauthorized and non-consensual, which apparently  
9 it was, there's no assertion in the motion that  
10 Steven Avery had any legitimate expectation of  
11 privacy over either Teresa Halbach's vehicle or  
12 the portion of the Avery salvage property on  
13 which the vehicle was located.

14 If Detective Remiker's presence on the  
15 property had violated Steven Avery's reasonable  
16 expectation of privacy, it could perhaps be  
17 argued that the failure of the affidavit to  
18 disclose his unlawful presence was a material an  
19 intentional omission, which could support a  
20 **Franks** claim under the Wisconsin Supreme Court  
21 decision in **State vs. Mann**.

22 However, since there was no assertion in  
23 the motion that the defendant had a legitimate  
24 expectation of privacy over the area in which the  
25 Halbach vehicle was located, Detective Remiker's

1 lack of permission to be on the property does not  
2 measurably contribute to the substantial  
3 preliminary showing required as a prerequisite  
4 for a hearing on the defendant's **Franks** motion.

5 The Court concludes that the State is  
6 correct, the motion does not make a substantial  
7 preliminary showing entitling the defendant to a  
8 hearing on the **Franks** claim. While the defendant  
9 may not have been entitled to a hearing on his  
10 **Franks** motion, the Court, nevertheless,  
11 conditionally granted one.

12 The evidence introduced at the hearing  
13 further supports the conclusion that there was no  
14 **Franks** violation in this case. The defense  
15 acknowledges that the volunteer searchers  
16 referred to in Detective Wiegert's affidavit  
17 truly were volunteer searchers; thus, there is no  
18 basis upon which to delete their discovery of  
19 Teresa Halbach's vehicle, from the Wiegert  
20 affidavit.

21 While one can argue whether or not  
22 Detective Wiegert was justified in using the term  
23 "matching" in the affidavit, the Sturm's clearly  
24 did discover a vehicle, which was very similar in  
25 appearance to Teresa Halbach's vehicle, and which

1           turned out to be an exact match.

2                         While Detective Remiker's entry on the  
3 property may not have been authorized by an owner  
4 or person in control of the property, there is no  
5 evidence to suggest that the defendant had any  
6 ownership interest or other expectation in the  
7 area upon which the vehicle was located, or the  
8 vehicle itself. Thus, the information provided  
9 by Detective Remiker is also appropriately  
10 included in the affidavit.

11                        With all of this information included,  
12 there is no question but that the affidavit was  
13 sufficient to justify the issuance of the  
14 November 5, 2005 search warrant.

15                        The State also asserts in it's written  
16 argument that Steven Avery has no standing to  
17 challenge any of the searches that were  
18 subsequently conducted at the Avery Auto Salvage  
19 Yard, including searches of the burn barrel, burn  
20 pit, the RAV-4, or any of the other buildings  
21 located on the property, with the exception of  
22 Mr. Avery's residence and detached garage.

23                        Resolution of this argument is not  
24 necessary to the Court's decision on the **Franks**  
25 issue. The Court concludes that this argument is

1 more appropriately addressed in the portion of  
2 the defense motion challenging the multiple  
3 executions of the original search warrant.

4 For the reasons stated, the defense  
5 motion to suppress the fruits of the November 5,  
6 2005 search warrant on the grounds that it was  
7 issued in violation of *Franks v. Delaware* is  
8 denied.

9 Those are all the decisions on motions  
10 the Court has today. I did want to take a brief  
11 inventory of what I understand to be the  
12 outstanding motions and confirm the status of  
13 those motions at this time.

14 The State has filed a motion concerning  
15 the admissibility of DNA evidence. And it's my  
16 understanding that at least at one point the  
17 parties were working on a stipulation to resolve  
18 that motion. Counsel, where are we on that  
19 motion?

20 ATTORNEY KRATZ: I understood, Judge, if  
21 there was going to be a challenge to whatever it was  
22 that Mr. Gahn had presented, that Mr. Buting was  
23 going to alert us to that.

24 ATTORNEY BUTING: That's correct, Judge,  
25 and Mr. Gahn has been trying to compile some

1 additional requests that I had made regarding those  
2 tests and has not yet complied with that. And once  
3 we receive that, I anticipate we'll either -- we'll  
4 be in a position to either agree or not agree.

5 THE COURT: All right. I would like to  
6 have a date by which the Court will be notified  
7 either that the motion is going to be contested, or  
8 that it's resolved.

9 ATTORNEY KRATZ: Judge, would the Court be  
10 willing to adopt a scheduling plan that Mr. Buting  
11 has 30 days after the receipt of our discovery?  
12 Mr. Gahn is meeting with Mr. Fallon and myself  
13 tomorrow. We should have an idea as to that date,  
14 certainly won't be any later than perhaps  
15 mid-September. Nonetheless, Judge, Mr. Buting  
16 believes that he can have that done within 30 days  
17 after receipt.

18 THE COURT: When you say receipt, is that  
19 what's going to happen in the next couple of days?

20 ATTORNEY KRATZ: No, Mr. Gahn will be  
21 meeting with us. And what I'm suggesting is that we  
22 can -- if you wanted to set a date certain for that,  
23 we can have that to him, let's say by the 15th of  
24 September; Mr. Buting alerting the Court as to any  
25 challenges by the 15th of October. That should give

1 us plenty of time.

2 THE COURT: All right. So, Mr. Buting,  
3 with the understanding that you are going to get the  
4 information by September 15th, the October 15th is  
5 acceptable to the defense?

6 ATTORNEY BUTING: Yes, that's fine.

7 THE COURT: Very well. The State has filed  
8 a number of other acts motions. The Court has  
9 received written arguments and I'm going to be  
10 issuing a written decision on those motions. Do I  
11 have all of the briefs that are going to be filed.

12 ATTORNEY KRATZ: Yes, you have three from  
13 the State, Judge.

14 THE COURT: Mr. Strang.

15 ATTORNEY STRANG: You have everything the  
16 defense anticipates submitting.

17 THE COURT: Okay.

18 ATTORNEY STRANG: I think the most recent  
19 was Friday, August 18. We submitted a brief on one  
20 aspect of Paragraph 6 of the State's motion.

21 THE COURT: All right. And I understand  
22 that each party has filed a motion. The defense has  
23 filed a motion to admit evidence regarding the  
24 defendant's prior wrongful conviction. The State  
25 has filed a motion to exclude it. Where are the



1 parties on those motions?

2 ATTORNEY KRATZ: I note that a stipulation  
3 was proposed, Judge. I think even Mr. Strang may  
4 have provided us with his first suggestion as to  
5 that stipulation. This kind of goes on the same  
6 track as the stipulation regarding evidence of  
7 victim history. That stipulation is to exchanged as  
8 well. Would the Court allow us to exchange and then  
9 perhaps alert the Court by, again, the 15th of  
10 October, if we have a resolution. If we don't, we  
11 can certainly tell the Court before that time.

12 THE COURT: Does that work for both  
13 parties?

14 ATTORNEY STRANG: Yes. I followed the  
15 Court's lead, I submitted a proposed stipulation on  
16 the wrongful conviction evidence that really also  
17 looks like an offer of proof. It's fairly detailed  
18 and I gave the State a written draft of that  
19 document either on August 9 or August 10, when we  
20 were last here in Court. I don't -- I don't see any  
21 difficulty in leaving that issue unresolved until  
22 October 15 on the present schedule.

23 THE COURT: All right. So with respect to  
24 that issue and the issue of the victim's history,  
25 the parties will notify the Court by October 15th

1           either that you have an agreement, or that you  
2           don't, and if it requires Court resolution --

3                    ATTORNEY KRATZ:  I'm sorry, we should  
4           probably be using the 16th, the 15th is a Sunday.

5                    THE COURT:  All right.  The 16th.

6                    ATTORNEY KRATZ:  I don't if it makes that  
7           much difference.  The 16th I think is --

8                    THE COURT:  I will use that for the DNA  
9           evidence issue as well.

10                   ATTORNEY STRANG:  Okay.

11                   THE COURT:  With respect to the suppression  
12           motion regarding Marinette County statements, I have  
13           received briefs from both parties, but it's my  
14           understanding that there may be a related issue the  
15           parties want to alert the Court to.

16                   ATTORNEY FALLON:  Yes, Judge.  After  
17           reviewing counsel's brief on the matter, the thought  
18           occurred to me that I think each counsel would like  
19           to be heard.  If the Court for one reason or another  
20           decides to suppress the statement obtained by the  
21           Marinette County Sheriff on Saturday, November 5th,  
22           from the point on -- from the point of contention,  
23           we would like to be heard as to whether the  
24           subsequent statements obtained on November 6th ought  
25           to be suppressed as well.  And that's because

1           there's a different set of arguments and issues  
2           presented.

3                         Neither party really briefed those this  
4           time around, waiting and preferring to see if  
5           there was a need to. So we -- I think each  
6           counsel would reserve our right, if we may, to  
7           address further those issues if, and only if, the  
8           Court finds anything suppressible on the  
9           November 5th statement.

10                        THE COURT: Mr. Strang, is that a fair  
11           statement?

12                        ATTORNEY STRANG: That's been the defense  
13           intention from the start, both on the motion to  
14           suppress statements after the point of contention,  
15           as Mr. Fallon puts it, on November 5, 2005. And I  
16           might add on the Fourth Amendment suppression  
17           motions, as to which Mr. Buting took the lead role,  
18           I think the Court properly ought to decide on, is  
19           the exclusionary right -- exclusionary role rightly  
20           invoked here? Does it have a role to play? If it  
21           does, we can be heard later, both parties, on the  
22           scope of exclusion, or what potential evidence would  
23           derive from any unconstitutional conduct by law  
24           enforcement.

25                        And I will add, it's not out of the

1 realm of possibility that the State or the  
2 defense might wish to offer some evidence on the  
3 scope of application in the exclusionary rule;  
4 although, it's also quite possible that just  
5 would be a matter of written or oral argument.  
6 So not only am I in agreement with Mr. Fallon on  
7 this point, it's really been my intention from  
8 the start as I think a much more orderly and  
9 measured way to proceed on those issues.

10 THE COURT: All right. So the -- Whether  
11 or not the parties are going to be looking to make  
12 further argument, or possibly even introduce  
13 additional evidence, will depend on the Court's  
14 decision. And the parties are both asking the Court  
15 at this time to only make a decision with respect to  
16 the November 5 statements. Is that a fair summary?

17 ATTORNEY FALLON: Yes.

18 ATTORNEY STRANG: And there -- Yes, it is.  
19 And there, just to endorse the suggestion the Court  
20 made during the August 9 and August 10 evidentiary  
21 proceedings, there's no challenge to the  
22 admissibility of Mr. Avery's statements on  
23 November 5 prior to, again, as Mr. Fallon puts it  
24 elegantly, the point of contention, and we have both  
25 briefed where exactly that arises in the recorded

1 interview.

2 THE COURT: All right. There is a defense  
3 motion, filed some time ago, entitled -- it's  
4 actually not a motion, but a notice concerning  
5 interference with right to counsel. I have been led  
6 to believe a number of times that's been resolved,  
7 but it's still technically hanging out there.

8 ATTORNEY STRANG: Well, it is resolved. It  
9 was not a motion or a request for relief, it was a  
10 notice of a concern. Since I had it -- had the  
11 concern on June 16, I treated that deadline as one  
12 by which I ought to raise the concern in good faith.  
13 I did.

14 The State provided me the information it  
15 promised about the inmate at issue, his name is  
16 Orville Jacobs. I'm satisfied at this point with  
17 the information I have gotten from the State. I  
18 don't perceive a Sixth Amendment right to counsel  
19 concern arising with respect to Mr. Jacobs. Of  
20 course, if future information comes to light, or  
21 future events warrant it, I will raise the  
22 concern again, but I don't anticipate either of  
23 those events coming to pass.

24 THE COURT: All right. Since it was  
25 entitled a notice and not a motion, I don't believe

1           there's any need for a formal withdrawal document or  
2           anything like that.

3           ATTORNEY STRANG:   But neither is there any  
4           need for a ruling.

5           THE COURT:   All right.   Then with respect  
6           to the defense motion to suppress the fruits of the  
7           search, or searches, based on multiple executions of  
8           the search warrants, those written briefs are due  
9           September 13.

10          ATTORNEY STRANG:   Yes, it's a simultaneous  
11          exchange, as I understand it, of one round.

12          THE COURT:   For my benefit, and I haven't  
13          seen the written arguments yet, but it appeared to  
14          me possible, based on the way the evidence came in,  
15          that there could be different lines of arguments  
16          relating to different individual searches.   Are the  
17          parties -- Are the briefs going to be structured  
18          such that different searches are addressed  
19          individually?

20          ATTORNEY BUTING:   I suppose we could do it  
21          that way.   I anticipate -- Really, if the Court can  
22          recall from the testimony, I anticipate that the  
23          major point of contention is going to be after that  
24          first three hours or so search was made on the night  
25          of the 5th, Saturday night.   Thereafter, there was a

1 number of entries and -- and I can address each one  
2 of those separately, but I think the primary issue  
3 is going to be on that.

4 THE COURT: Let me just ask this, I don't  
5 want to tell each party -- either party how to argue  
6 their case, but if you have arguments that relate to  
7 some searches and not others, please let those be  
8 differentiated in your briefs so that I know what  
9 you are trying to argue.

10 ATTORNEY BUTING: Okay.

11 THE COURT: And then there's also a State's  
12 motion regarding statements to other inmates. I  
13 believe I have recently received a written brief  
14 from the defense on that. Is there anything more  
15 coming from the State, or do I have everything I'm  
16 going to have on that?

17 ATTORNEY KRATZ: We just talked about that,  
18 Judge. We will discuss that in detail tomorrow and  
19 if the Court would allow us an opportunity, perhaps  
20 to the 13th of September, we can get that to the  
21 Court as well.

22 THE COURT: All right. Any objection from  
23 the defense?

24 ATTORNEY STRANG: I don't. That's an issue  
25 that's under seal, or we have treated it as sealed

1 to date.

2 THE COURT: Very well. I will give the  
3 State until September 13 then to respond.

4 ATTORNEY BUTING: Judge, could we return  
5 for just one moment to the multiple execution of the  
6 search warrant issue. As the Court framed it, I  
7 don't know whether that -- the way these -- the  
8 arguments may come out then might really be more  
9 amenable to a reply by either party as well.

10 In the event that there are -- that the  
11 State has certain arguments on certain searches  
12 and not others, or that I have likewise, it might  
13 be easier to just reply to them, rather than try  
14 and anticipate -- each of us anticipate what the  
15 arguments of the others would be. We have a  
16 little bit more time to do that now and I just  
17 raise that as one way of resolving that.

18 THE COURT: Mr. Fallon.

19 ATTORNEY FALLON: Yes. Thank you. It  
20 seems to me that the way -- excuse me -- the way the  
21 defense pled the issue and proceeded with its  
22 proofs, that the issue has been fairly well narrowed  
23 to complain of the searches occurring to Mr. Avery's  
24 trailer and garage, starting on Sunday, the 6th,  
25 until the second or subsequent warrant was obtained



1 late afternoon, I believe on the 9th.

2 Those were the issues which were the  
3 subject of the testimony and it seems to me that  
4 that's the context in which the case is going to  
5 be argued. So I'm not really sure that we need  
6 to separate out the searches per se other than,  
7 as the testimony reflected, there was, you know,  
8 an entry on Sunday, for instance, and one or two  
9 on Monday, and then one on Tuesday, that type of  
10 itemization or reflection.

11 I'm not sure it's to our benefit to  
12 separate them out any further, because as I  
13 reviewed the case law in preparation for writing  
14 this brief, it's not much -- it's not the issue,  
15 really. And I don't -- I don't know if we really  
16 need to reply, and counter-reply, or what have  
17 you. It seems to me it's been narrowly pled and  
18 the testimony was narrowly produced. So I'm not  
19 sure we have a whole lot of range of other  
20 searches at issue, so to speak.

21 THE COURT: Let's do this, after each party  
22 receives a copy of the other party's brief, if  
23 either party feels there's a need to reply, you can  
24 ask the Court for permission, in writing, just fax  
25 it to me, I will take it up at that time.

1                   ATTORNEY STRANG: Thank you.

2                   THE COURT: I would ask also on that issue,  
3 I think I mentioned it before, I did not have access  
4 in our law library, or my online law library, to all  
5 of the secondary sources that necessarily relate to  
6 that issue. So if you have -- if you're going to be  
7 citing any secondary sources, please give me copies.  
8 I have got ALR and Amger and those types of things,  
9 but I think it was --

10                  ATTORNEY BUTING: La Fave.

11                  THE COURT: -- La Fave I do not have.  
12 Right. I'm not looking to make the file any bigger  
13 than it is, but if you cite to La Fave, give me a  
14 copy. I think I have already gotten one from the  
15 State.

16                  ATTORNEY FALLON: I think you got the copy.  
17 I think, unless counsel disagrees, I think we have  
18 got the relevant portions of La Fave for the Court.

19                  ATTORNEY BUTING: I believe so. If there  
20 are any -- so the Court has access to case law.

21                  THE COURT: Other jurisdiction case law is  
22 fine, I have got Lexus Nexus, but La Fave is not on  
23 there.

24                  ATTORNEY BUTING: So anything like Law  
25 Journals, Law Reviews, things of those nature that

1           might -- you do not have access to?

2           THE COURT:   If you have got access to Lexus  
3           and it's on Lexus, you don't have to send it to me.

4           ATTORNEY BUTING:   I use Lexus.

5           THE COURT:   Right.   So, if it's not on  
6           Lexus, send it, otherwise you don't have to.   I  
7           certainly have access to case law from all other  
8           jurisdictions and a number of secondary sources, but  
9           not La Fave.

10          ATTORNEY FALLON:   Your Honor, may I have  
11          just a moment to talk to Mr. Buting on this.

12          THE COURT:   Go ahead.

13          ATTORNEY FALLON:   I thought we might have  
14          one other point of interest for the Court, but I  
15          guess we'll have to defer comment until we consider  
16          it further.

17          THE COURT:   All right.   Is there anything  
18          further from either party today?

19          ATTORNEY STRANG:   Yes.   One, just a point  
20          of clarification.   This may have been implicit in  
21          the Court's rulings both on the motion to dismiss  
22          and the motion for sanctions to exclude the  
23          Manitowoc County Sheriff's Department, since the  
24          Court referred to having reviewed the eight news  
25          conferences, but I just want to make sure that the

1 record is complete and that, in fact, a viewable,  
2 either VHS tape or DVD arrived from WFRV-TV to the  
3 Court as I had arranged to happen.

4 THE COURT: Yes, the VHS tape arrived and  
5 that's workable.

6 ATTORNEY STRANG: Terrific. Second, I  
7 anticipate some further motions, not just motions in  
8 limine. Conceivably, for example, some discovery  
9 that I received -- was received at my office, I have  
10 lost track of the dates now, but it's more than a  
11 week and less than two weeks ago. Some new  
12 discovery suggests a further non-evidentiary motion.

13 It's also entirely possible, as  
14 Mr. Dassey's case proceeds here, that an issue  
15 may arise under *Samuels* -- under *State vs.*  
16 *Samuels* in this case. We can't know that at this  
17 juncture of the proceedings in Mr. Dassey's  
18 separate case.

19 But what I would propose is that I treat  
20 the October 16 deadline as a good time to file  
21 any other motion, other than an in limine issue  
22 properly addressed much closer to trial, you  
23 know, that has arisen with new discovery, or new  
24 information, or new events since June 16.

25 For that matter, September 13, I also

1           could treat as a date for raising any new issues.  
2           I know there's at least one that I intend to  
3           raise so, that's disclosure. And I guess also  
4           jointly request that the Court set a date, fix a  
5           date for me to do that, or accommodate new issues  
6           that have arisen.

7                         THE COURT: Mr. Kratz.

8                         ATTORNEY KRATZ: We are going to need a  
9           scheduling conference anyway, Judge. We talked  
10          about jury questionnaires. We talked about exchange  
11          of experts and some other more definite scheduling  
12          order from the Court. And whether the Court wants  
13          to do that by a phone conference, to at least  
14          schedule that meeting, or wants to set that meeting,  
15          we're certainly amenable to that.

16                        THE COURT: All right. Because of the  
17          contemplated adjournment of the trial date, I didn't  
18          give that as much attention as I might have before  
19          today. I agree that we're going to need a  
20          scheduling conference at some point to establish  
21          timelines for filing motions in limine, jury  
22          questionnaires, those types of things. Do either of  
23          the parties have any suggestions about when that  
24          could be effectively accomplished?

25                        ATTORNEY STRANG: Well, we'll know where we

1 are on some things on October 16, particularly DNA,  
2 and the wrongful conviction, and victim's history  
3 information.

4 ATTORNEY KRATZ: Perhaps later that week,  
5 Judge, we know it's blocked off our calendar so.

6 THE COURT: I know I have got time that  
7 week. All right. I'm having the clerk get me my  
8 calendar.

9 ATTORNEY KRATZ: Could either be that  
10 Thursday or Friday, those work best for us, Judge.

11 THE COURT: Thursday the 19th, morning or  
12 afternoon?

13 ATTORNEY KRATZ: Morning would be just  
14 fine.

15 THE COURT: Should we say 10:00.

16 ATTORNEY BUTING: That's fine.

17 ATTORNEY KRATZ: That's good, Judge. Thank  
18 you.

19 THE CLERK: What date was that?

20 THE COURT: October 19th.

21 ATTORNEY KRATZ: Will that be on the record  
22 or in chambers, your Honor?

23 THE COURT: I will notify you about that a  
24 little closer to the date, whether it will be on the  
25 record, or simply a scheduling conference, or

1 something that involves going on the record. For  
2 now, it will be an off the record scheduling  
3 conference, but I'm going to hold the time in the  
4 event there is anything to deal with on the record.  
5 Does either party have anything else that needs  
6 addressing?

7 ATTORNEY STRANG: So we'll address  
8 deadlines for further motions and the whole sort of  
9 schedule before trial at that point?

10 THE COURT: Yes.

11 ATTORNEY STRANG: Fine.

12 THE COURT: Anything else today?

13 ATTORNEY KRATZ: No, Judge. Thank you.

14 THE COURT: If not, we're adjourned for  
15 today.

16 (Proceedings concluded.)

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1 STATE OF WISCONSIN )  
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I, Diane Tesheneck, Official Court Reporter for Circuit Court Branch 1 and the State of Wisconsin, do hereby certify that I reported the foregoing matter and that the foregoing transcript has been carefully prepared by me with my computerized stenographic notes as taken by me in machine shorthand, and by computer-assisted transcription thereafter transcribed, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge and ability.

Dated this 29th day of January, 2007.

\_\_\_\_\_  
Diane Tesheneck, RPR  
Official Court Reporter



<b>0</b>	<b>accusers [2]</b> 28/1 32/25 <b>acknowledged [3]</b> 36/20 41/17 41/20 <b>acknowledges [2]</b> 10/14 44/15 <b>acknowledging [1]</b> 37/9 <b>acquaintance [2]</b> 34/8 34/17 <b>acquiescence [2]</b> 13/3 13/10 <b>acting [4]</b> 13/24 36/17 42/13 42/21 <b>actions [2]</b> 2/25 3/19 <b>acts [1]</b> 48/8 <b>actual [2]</b> 20/13 20/16 <b>actually [4]</b> 4/19 31/6 41/13 53/4 <b>add [2]</b> 51/16 51/25 <b>added [1]</b> 43/4 <b>addition [3]</b> 41/11 41/24 43/6 <b>additional [3]</b> 35/11 47/1 52/13 <b>address [7]</b> 22/22 28/2 35/8 38/25 51/7 55/1 63/7 <b>addressed [5]</b> 30/11 33/7 46/1 54/18 60/22 <b>addressing [2]</b> 35/11 63/6 <b>adequate [3]</b> 11/13 17/7 28/23 <b>adherence [1]</b> 26/4 <b>adjourned [1]</b> 63/14 <b>adjournment [2]</b> 10/15 61/17 <b>admissibility [3]</b> 27/23 46/15 52/22 <b>admissible [3]</b> 31/1 35/2 35/5 <b>admission [7]</b> 27/22 31/22 32/9 32/15 32/16 33/5 34/22 <b>admit [4]</b> 27/15 27/17 34/14 48/23 <b>admitted [1]</b> 30/6 <b>admittedly [1]</b> 9/8 <b>admonition [1]</b> 22/20 <b>adopt [3]</b> 14/2 14/12 47/10 <b>adopted [1]</b> 20/2 <b>advanced [1]</b> 29/20 <b>advantages [1]</b> 17/22 <b>adverse [2]</b> 7/14 7/16 <b>advised [2]</b> 8/1 11/9 <b>affect [1]</b> 27/4 <b>affiant [1]</b> 39/12 <b>affidavit [18]</b> 35/23 36/10 36/24 37/4 37/19 38/11 38/13 39/12 40/1 41/3 41/11 41/18 43/17 44/16 44/20 44/23 45/10 45/12 <b>affidavit's [1]</b> 39/22 <b>affidavits [1]</b> 39/21 <b>after [8]</b> 3/6 15/3 47/11 47/17 50/16 51/14 54/23 57/21 <b>afternoon [2]</b> 57/1 62/12 <b>again [5]</b> 14/5 23/23 49/9 52/23 53/22 <b>against [4]</b> 6/8 6/12 10/3 11/2 <b>agents [3]</b> 3/24 42/13 42/21 <b>ago [5]</b> 10/7 17/16 17/19 53/3 60/11 <b>agree [6]</b> 15/18 17/22 19/5 47/4 47/4 61/19 <b>agreed [8]</b> 12/10 12/20 12/23 14/19 14/24 16/1 22/10 23/17 <b>agreeing [1]</b> 16/6 <b>agreement [8]</b> 13/5 13/16 22/16 22/19 22/24 25/18 50/1 52/6 <b>agrees [2]</b> 15/17 25/6 <b>ahead [1]</b> 59/12 <b>aired [1]</b> 21/1 <b>alert [3]</b> 46/23 49/9 50/15 <b>alerted [1]</b> 17/16 <b>alerting [1]</b> 47/24 <b>all [28]</b> 2/14 2/19 11/14 13/12 14/7 15/1 16/7 20/18 20/19 28/5 45/11 46/9 47/5 48/2 48/11 48/21 49/23	50/5 52/10 53/2 53/24 54/5 55/22 58/4 59/7 59/17 61/16 62/7 <b>allegation [2]</b> 9/9 39/18 <b>allegations [6]</b> 6/16 7/18 9/15 32/4 37/24 43/5 <b>allege [1]</b> 36/23 <b>alleged [8]</b> 2/25 6/6 22/5 35/12 36/9 36/13 39/3 40/3 <b>allegedly [4]</b> 24/25 27/18 28/25 39/13 <b>alleges [3]</b> 37/3 37/12 39/4 <b>Allen [2]</b> 8/13 8/21 <b>alleviate [1]</b> 18/17 <b>allow [3]</b> 18/20 49/8 55/19 <b>alone [2]</b> 8/16 23/25 <b>along [1]</b> 22/20 <b>ALR [1]</b> 58/8 <b>already [3]</b> 6/19 9/11 58/14 <b>also [25]</b> 2/7 3/7 6/4 7/4 13/5 16/11 16/15 17/18 17/25 18/8 18/15 19/18 21/9 21/18 40/25 42/1 45/9 45/15 49/16 52/4 55/11 58/2 60/13 60/25 61/3 <b>alternative [1]</b> 27/9 <b>although [2]</b> 25/10 52/4 <b>am [1]</b> 52/6 <b>amenable [2]</b> 56/9 61/15 <b>amendment [4]</b> 3/13 39/14 51/16 53/18 <b>amenities [1]</b> 14/3 <b>Amger [1]</b> 58/8 <b>announced [1]</b> 24/8 <b>another [4]</b> 8/20 10/14 16/17 50/19 <b>anticipate [7]</b> 47/3 53/22 54/21 54/22 56/14 56/14 60/7 <b>anticipated [1]</b> 28/16 <b>anticipates [1]</b> 48/16 <b>any [47]</b> 7/1 7/3 8/21 9/21 17/3 17/10 17/13 18/17 18/17 18/18 23/1 23/4 23/5 24/3 24/3 24/7 24/12 24/25 26/1 26/6 26/24 29/3 31/10 34/15 34/24 38/4 40/18 43/1 43/1 43/10 45/5 45/17 45/20 47/14 47/24 49/20 51/23 54/1 54/3 55/22 57/12 58/7 58/12 58/20 60/21 61/1 61/23 <b>anyone [2]</b> 17/3 34/16 <b>anything [12]</b> 19/3 19/11 36/22 43/4 51/8 54/2 55/14 58/24 59/17 63/4 63/5 63/12 <b>anyway [2]</b> 6/19 61/9 <b>apparently [3]</b> 23/9 42/23 43/8 <b>Appeals [3]</b> 30/12 30/13 30/25 <b>appearance [1]</b> 44/25 <b>appearances [2]</b> 1/11 2/4 <b>appeared [2]</b> 1/21 54/13 <b>appearing [2]</b> 2/7 2/7 <b>appears [4]</b> 2/5 8/15 17/25 29/3 <b>application [1]</b> 52/3 <b>apply [3]</b> 26/6 29/9 29/20 <b>approached [1]</b> 15/4 <b>appropriate [2]</b> 5/13 12/16 <b>appropriately [2]</b> 45/9 46/1 <b>approved [1]</b> 4/21 <b>approximately [2]</b> 12/14 25/3 <b>are [40]</b> 2/18 2/19 10/23 15/19 15/25 16/5 17/22 19/25 20/4 22/5 25/21 26/22 28/12 29/23 32/6 32/23 33/5 33/16 33/21 34/16 34/21 35/1 36/4 37/19 46/9 46/18 48/3 48/11 48/25 52/11 52/14 54/8 54/16 54/17 54/18 55/9
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