

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

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3 STATE OF WISCONSIN,  
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5 PLAINIFF, MOTION HEARING  
6 vs. Case No. 05 CF 381  
7 STEVEN A. AVERY,  
8 DEFENDANT.

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10 **DATE:** APRIL 13, 2006

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

13 **APPEARANCES :**

14 KENNETH R. KRATZ & THOMAS J. FALLON  
15 Special Prosecutors  
16 On behalf of the State of Wisconsin.

17 DEAN A. STRANG & JEROME F. BUTING  
18 ATTORNEYS AT LAW  
19 On behalf of the Defendant.

20 STEVEN A. AVERY  
21 Defendant  
22 Appeared in person.

23 \* \* \* \* \*

24 **TRANSCRIPT OF PROCEEDINGS**

25 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. This matter is scheduled this morning for a  
4 Court decision on a motion that's been filed by the  
5 defense. Will the parties state their appearances  
6 for the record, please.

7 ATTORNEY KRATZ: Your Honor, the State of  
8 Wisconsin appears by Calumet County District  
9 Attorney Ken Kratz, having been appointed as special  
10 prosecutor in this case. The State also appears  
11 this morning by Tom Fallon. Tom is with the  
12 Department of Justice, also having been assigned  
13 special prosecutor in this matter.

14 ATTORNEY STRANG: Good morning. Steven  
15 Avery, second to my right, he's in custody. Dean  
16 Strang appearing on his behalf and Jerome Buting,  
17 also as counsel for Mr. Avery.

18 THE COURT: All right. I will indicate for  
19 the record that the motion that's the subject of the  
20 hearing today is a motion that was filed by the  
21 defense, renewing a previous motion that the new  
22 charges in the Amended Complaint should be  
23 dismissed, or in the alternative, if the Court  
24 permits the filing of the charges, that the  
25 defendant be entitled to a preliminary examination

1 on the new charges.

2 I will also indicate for the record that  
3 I met with counsel in chambers, briefly, before  
4 we began this morning. And as I understand it,  
5 the defense would like the opportunity to  
6 supplement it's written argument, which the Court  
7 has already received and reviewed, and the  
8 prosecution would like a chance to respond. Is  
9 that correct, Mr. Strang?

10 ATTORNEY STRANG: It is.

11 THE COURT: All right. I will hear you at  
12 this time.

13 ATTORNEY STRANG: I will not belabor the  
14 written arguments nor repeat arguments made at the  
15 initial oral motion to dismiss the Complaint.  
16 Leaving, in summary, my argument on the motion to  
17 dismiss the Complaint, that when the United States  
18 Supreme Court, probably close to half a dozen times  
19 since 1968, has explained that statements against a  
20 declarant's interest, that then go on to inculcate  
21 another person, are unreliable, that those sorts of  
22 unreliable statements fail Wisconsin's reliability  
23 requirement for the factual assertions in a Criminal  
24 Complaint. The Court already has ruled adversely to  
25 me on that. I have renewed the motion in writing

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and I will leave argument there on that point.

As to the question of a preliminary hearing, if the Amended Complaint is allowed to stand, I confess that I had been -- become occupied, if not preoccupied, with **Burke** and **Bailey** and the profusion of case law, criminally, from the Wisconsin Supreme Court that make very thick, I think, intellectually interesting, very complicated, the law in an area in which the underlying statutes, at least to my eye, look fairly straight forward, but now have been construed, or rather with such gloss that there's nothing at all straight forward about the area of the law. And I became very interested in that, and that case law, and what it all means, where it sorts out and applies here, as the focus of my briefs, I think also the focus of the State's written submissions.

And so I have written arguments that suggest to the Court why it should grant a preliminary hearing here and I think over looked a statutory command that the Court shall order a preliminary hearing in the unusual procedural posture in which we find ourselves here today.

We step back to early in mid-March. The

1 State's request was for leave to file an Amended  
2 Complaint and leave to file and Amended  
3 Information. We took issue with the first of  
4 those requests, to file an Amended Complaint.  
5 That was the briefing, our opposition to an  
6 Amended Complaint, or to the request that he be  
7 granted to file an Amended Complaint, was the  
8 thrust of the briefing that brought us here the  
9 last time before your Honor.

10 The Court overruled my position and did  
11 grant the State's request to leave to file an  
12 Amended Complaint, that occasioned by oral motion  
13 to dismiss the Complaint for want of probable  
14 cause. And we covered that ground already.

15 But we are not here today on a request  
16 for leave to file an Amended Information only.  
17 We're here with an Amended Complaint now having  
18 been filed on leave of the Court, no initial  
19 appearance having been made on that Amended  
20 Criminal Complaint. And I think, therefore,  
21 we're within the field covered by Wisconsin  
22 Statute Section 970.02, and for our purposes  
23 here, narrowly 970.02 (5), which governs the  
24 initial appearance and what's to happen and -- at  
25 and after the initial appearance.

1                   And the question is, or the statutory  
2                   command is, that if the defendant does not waive  
3                   the preliminary examination, the Judge shall,  
4                   forthwith, set the action for a preliminary  
5                   examination under Section 970.03. That's the  
6                   preliminary examination we seek. We're certainly  
7                   not waiving it.

8                   The question becomes somewhat circular  
9                   because, if we don't have a right to preliminary  
10                  examination for some reason in the first place,  
11                  then there's nothing that we would be asked to  
12                  waive or, properly, could resist waiving. I  
13                  don't have any case law construing 970.02 (5) in  
14                  this setting, or anything that I can offer today  
15                  from which the Court might draw guidance, other  
16                  than statutory language.

17                  But the procedural posture, I think, is  
18                  indisputable. We are here with the Court having  
19                  granted leave to file an Amended Complaint, which  
20                  is what the State had requested. We are here on  
21                  an Amended Complaint. There has not been an  
22                  initial appearance on that Amended Complaint.  
23                  The Amended Complaint adds three new charges, not  
24                  before seen in the course of this case to date.

25                  We, of course, have disputed whether

1           those are transactionally related to and derived  
2           from the evidence at the earlier preliminary  
3           hearing. We think they aren't, the State thinks  
4           they are. But the fact is, this is a new  
5           Complaint and it is a Complaint on which the  
6           case, as to the three new charges, presently is  
7           founded.

8                         We don't waive the preliminary hearing.  
9           We think we have a right to it. And we think the  
10          statutory command is clear, that the Court shall  
11          schedule a preliminary hearing forthwith on the  
12          three new counts.

13                        THE COURT: All right. Mr. Kratz, or Mr.  
14          Fallon?

15                        ATTORNEY KRATZ: Judge, Mr. Fallon wrote  
16          the brief on this issue. And with leave of the  
17          Court, I would like him to argue this today.

18                        THE COURT: Very well. Mr. Fallon.

19                        ATTORNEY FALLON: Yes. Thank you, Judge.  
20          Good morning. I think I feel compelled to address  
21          counsel's concern regarding the posture of the case  
22          and whether or not an additional preliminary  
23          examination is needed at this time.

24                        We're firmly convinced that no such  
25          examination is needed for both a practical reason

1 and a legal reason. The legal reason being,  
2 quite frankly, is he's not entitled to one. And  
3 I say that because, interestingly enough, the  
4 defendant has received a benefit to the fact that  
5 the State sought and did, in fact, file an  
6 Amended Complaint, which was jurisdictionally  
7 unnecessary.

8 The defendant has been provided far more  
9 information relative to the additional charges  
10 than the law in Wisconsin normally permits. So  
11 he has received a benefit already, one to which  
12 he was not entitled, one in which, as a result of  
13 which, no preliminary examination is required  
14 under the law.

15 Once the original charges are filed,  
16 once a Court finds probable cause at a  
17 preliminary examination and binds the matter over  
18 for trial, the Information becomes the governing  
19 procedural document. The document upon which  
20 this Court may exercise its authority and power  
21 to determine the course of action for the  
22 parties.

23 In this particular case, additional  
24 information came to pass, which ethically permits  
25 the prosecutor, and also based on the transaction



1 related law that each side has briefed rather  
2 thoroughly, to add additional charges. Assume,  
3 for the sake of argument, this Court had granted  
4 the defense motion to dismiss the Complaint.  
5 Would the state be precluded from being in the  
6 exact posture we're in right now? Absolutely  
7 not.

8 As the Court is aware, and the parties  
9 are aware, the cases of **State vs. Bailey**, **State**  
10 **vs. Burke**, **State vs. Richer**, **State vs. Williams**,  
11 **State vs. Akers** (sic) **State vs. Bury**, all  
12 occurred and were litigated in the context of  
13 post-probable cause, based upon the original  
14 Complaint and a subsequent preliminary  
15 examination and no additional or Amended  
16 Complaints after bindover.

17 So, in effect, the defendant has  
18 received a benefit, based on a local custom and  
19 practice, to provide additional information  
20 should, in the average felony case, the result, a  
21 change of plea. The parties would have a factual  
22 basis upon which to make a determination to  
23 accept a plea, to refer the matter for further  
24 presentence investigations, what have you. A  
25 current local custom and practice, but one which

1 is not jurisdictionally required and nor should  
2 it be.

3 So, even if the Court had granted the  
4 motion to say, no, I'm not going to let the State  
5 file an Amended Complaint with these additional  
6 counts, the State would not be precluded from  
7 seeking leave to amend the Information for the  
8 reasons stated in the State's brief, that the  
9 additional charges are transactionally related,  
10 or to borrow the phrase, not wholly unrelated to  
11 the transaction which was the subject of the  
12 preliminary examination, that is, the murder and  
13 mutilation of Teresa Halbach.

14 I would also note, parenthetically, that  
15 even if we were to get it wrong, so to speak, any  
16 error relative to preliminary examination is  
17 cured by a fair, impartial jury trial. And  
18 that's ***State vs. Webb***. And I see that  
19 possibility of no error because he is not  
20 entitled to a preliminary examination and, thus,  
21 looking at the law as just cited in ***Bailey***,  
22 ***Burke, Richer, Williams, Akins, Bury***, the case  
23 that followed ***Bailey***, I'm not going to reiterate  
24 the points of my brief, I think they are very  
25 clear.

1                   The State is entitled to add the  
2                   additional charges because they are  
3                   transactionally related and whether we have --  
4                   there's no legal requirement, there's no  
5                   jurisdictional imperative to have a preliminary  
6                   examination ordered on those Complaints because  
7                   those Complaints were not required by law. They  
8                   were not jurisdictionally mandated. They were  
9                   not necessary. They were provided as a courtesy.

10                   And I would note that 99 percent of the  
11                   defendants in Wisconsin law find themselves  
12                   wondering, well, jeez, how did that prosecutor  
13                   add these additional counts. None of them had  
14                   the benefit of the additional information being  
15                   provided in the Complaints, because they are not  
16                   necessary. They are not required. They do not  
17                   provide the jurisdictional predicate that the  
18                   defense seems to suggest that they do.

19                   So, he has received the benefit. He has  
20                   received notice. He has received the  
21                   information. He is, in effect, better off at  
22                   this early stage in the proceedings than all the  
23                   other defendants who may find themselves in this  
24                   posture. So, that's the equitable argument. The  
25                   legal argument is there's no jurisdictional

1 basis. They are not required and they are  
2 unnecessary.

3 So, we ask the Court to decide this  
4 strictly in the context of whether or not a  
5 prosecutor may seek leave and amend the  
6 Information, based on the theory that the  
7 additional counts are either: One, directly flow  
8 from evidence adduced at preliminary examination  
9 or, as we theoretically and actually posit in our  
10 brief, the additional charges are transactionally  
11 related to the information, to the subject matter  
12 which was testified to at preliminary  
13 examination. We thank the Court.

14 THE COURT: Thank you. Mr. Strang.

15 ATTORNEY STRANG: I'm very pleased to hear  
16 my colleague, a very skilled lawyer, concede here  
17 that the Complaint was unnecessary, the Amended  
18 Complaint was unnecessary. I don't know that I  
19 fully can accept his gracious concession to the  
20 extent that he qualifies it by saying  
21 jurisdictionally unnecessary, but it is gratifying  
22 to hear the concession that this Amended Complaint  
23 was unnecessary.

24 Only lawyers, though -- I think only  
25 lawyers could imagine that that unnecessary

1 Complaint conferred a benefit on Steve Avery.  
2 The benefit is then that he has been pilloried in  
3 the press on the basis of unreliable,  
4 inadmissible, hearsay accusations in the  
5 Complaint. Repeatedly pilloried in the press.

6 The benefit has been that this Court  
7 explicitly cited that information in the  
8 Complaint as part of the reason for raising his  
9 bail from a half million dollars to three quarter  
10 of a million dollars cash. The benefit is that  
11 we are here today fighting simply to have the  
12 State stand beside and submit to the minimal  
13 testing of a preliminary hearing, the information  
14 that it has spread before the public in this  
15 Amended Complaint and by comments to the news  
16 media that tracked some of the allegations of the  
17 Criminal Complaint. And the State resists the  
18 minimal testing that occurs at a preliminary  
19 hearing in this State where it is required only  
20 to establish probable cause.

21 So, I don't share the sense that any  
22 benefit has been conferred on Mr. Avery by this  
23 Amended Complaint. I do have the sense that it  
24 introduces altogether something new in this case.  
25 And I think everybody watching, or listening, or

1 sitting behind me today, understands that there  
2 are altogether new things that the State has been  
3 alleging since early March, against Mr. Avery.  
4 And those ought to be tested by preliminary  
5 hearing.

6 THE COURT: All right. By way of  
7 background, the Court notes first that the initial  
8 charges in the initial Complaint in this case  
9 charged the defendant with first-degree intentional  
10 homicide, mutilation of a corpse, and a felon in  
11 possession of a firearm. The State sought  
12 permission, and the Court granted permission, for  
13 the State to file an Amended Complaint adding the  
14 charges of first-degree sexual assault, kidnapping,  
15 and false imprisonment.

16 The defendant's motion before the Court  
17 today raises two separate issues. First, the  
18 defense renews its argument that the Amended  
19 Complaint should be dismissed on its face, or in  
20 the alternative, the defense also argues that if  
21 the Court permits the filing of an Amended  
22 Complaint, the defendant is entitled to a  
23 preliminary examination on the new charges.

24 The Court will first, briefly, readdress  
25 the argument regarding the sufficiency of the

1 Complaint. The Court has already ruled that the  
2 State is permitted to add the new charges in the  
3 Amended Complaint, and I don't believe there's a  
4 reason for the Court to reconsider that ruling at  
5 this time.

6 There is no claim of prejudice on the  
7 part of the defense, based on the lack of time to  
8 answer the new charges. The defense alleges that  
9 there is no reliable information in the Amended  
10 Complaint to support the new charges. However,  
11 the statements of the alleged co-defendant can,  
12 in this Court's opinion, be used to support the  
13 charges in the Amended Complaint under the law in  
14 the case of **Ruff vs. State**, which I cited at the  
15 last hearing. And the Court still believes that  
16 case to be the law in the State.

17 With respect to the reliability of  
18 statements of the alleged co-defendant that form  
19 the basis of the new allegations, the Court  
20 cannot presume that that witness won't be  
21 available to testify. The development of the law  
22 in the area of confrontation certainly suggests  
23 that if he doesn't testify, the State will have a  
24 difficult time supporting the allegations, based  
25 on the statements attributable to the

1 co-defendant.

2 But the Court is not aware of any law  
3 that wouldn't find that the co-defendant's  
4 statements would not be relevant if he did  
5 testify. And I believe they still can form the  
6 basis of the charges in the Amended Complaint.  
7 Therefore, the Court does not find a basis for  
8 denying the State's request to file and Amended  
9 Complaint.

10 The next logical issue to take up here  
11 is the new argument raised by the defense today.  
12 And that is, whether or not the defense is  
13 entitled to a preliminary examination upon the  
14 filing of new charges in the anticipated new  
15 Information, is the defendant entitled to a  
16 preliminary examination under Section 970.02  
17 based on the filing of an Amended Complaint.

18 The parties did not brief that issue in  
19 written form, but both parties have informed the  
20 Court today that they are not aware of any  
21 relevant case law. So we're left with the  
22 language of Section 970.02 itself.

23 Significant in the Court's mind is the  
24 title of that statute. It is the duty of the  
25 judge at the initial appearance. I don't believe



1           that the filing of an Amended Complaint triggers  
2           a new initial appearance in this case. It can  
3           result in the defendant responding to the  
4           charges, but I don't believe that a second  
5           initial appearance is contemplated within the  
6           meaning of the statute; 970.02 (5) says, if the  
7           defendant does not waive preliminary examination  
8           the judge shall forthwith set the action for a  
9           preliminary examination understand 970.03.

10                   Implicit in the statute is that there's  
11           a right of a preliminary examination to waive.  
12           And I think that merely postpones the question to  
13           the one that the parties have addressed in -- at  
14           length in their written briefs, and that is, is  
15           the defendant entitled to a preliminary  
16           examination upon the filing of additional  
17           charges, after the bindover.

18                   I agree with the -- I believe both  
19           parties today, that the case law as it is  
20           developed does not appear to require, nor does  
21           the statutes require, the State to file an  
22           Amended Complaint as a condition precedent to  
23           adding charges in the Information. The fact that  
24           the State has elected to do so and provide the --  
25           everyone with the alleged factual basis for the

1 additional charges, I'm not sure how, absent some  
2 specific wording in the statutes requiring it,  
3 that that fact alone would add anything to the  
4 argument that the defendant should be entitled to  
5 a preliminary examination.

6 It does provide the defendant with  
7 notice of the factual basis for the State's  
8 charges. And I think that that's a benefit to  
9 the defense in the sense that it alerts the  
10 defense as to what the basis for the new charges  
11 are going to be. So, I don't find anything in  
12 Section 970.02 that would independently trigger a  
13 right to an additional preliminary examination in  
14 this case.

15 The Court will move on then to what both  
16 of the parties have focused on in the written  
17 briefs as the primary argument, and that is, when  
18 the State seeks to add charges in an Information,  
19 that were not the subject of the Complaint at the  
20 time of the original preliminary examination, is  
21 the defendant entitled to a second preliminary  
22 examination on the new charges.

23 I will first note that the factual basis  
24 for the defendant's claim of entitlement to an  
25 additional preliminary examination is largely

1 undisputed. The State did not produce any  
2 evidence to support the charges it seeks to add,  
3 at the time of the original preliminary  
4 examination. In fact, the State does not claim  
5 it was in possession of any such evidence to  
6 support those charges at the time of the original  
7 prelim. There is no specific evidence in the  
8 record from the original preliminary examination  
9 that would support the additional charges.

10 As noted by the parties in their briefs,  
11 the question of whether the State can add charges  
12 not included in the original Complaint, after a  
13 defendant has been bound over for trial following  
14 a preliminary examination, has been the subject  
15 of extensive litigation over the years.

16 The governing statutes themselves are  
17 not particularly clear on their face as far as  
18 providing an answer to this question. And the  
19 Supreme Court decisions dealing with the issue  
20 have not always been unanimously decided.

21 The starting point is Section 971.01  
22 (1), which provides that the district attorney  
23 shall exam all the facts and circumstances  
24 connected with any preliminary examination  
25 touching the commission of any crime. If the

1 defendant has been bound over for trial and  
2 subject to Section 970.03 (10), shall file an  
3 Information according to the evidence on such  
4 examination, subscribing his or her name thereto.

5 The statute is somewhat ambiguous on its  
6 face and susceptible to different interpretation.  
7 One interpretation certainly might be that the  
8 district attorney is limited to pursuing only  
9 those charges supported by evidence produced at  
10 the preliminary examination. However, the  
11 Supreme Court has held many times that that is  
12 not the law in this state and the defense in this  
13 case does not argue otherwise.

14 The question then becomes, what is the  
15 test for determining whether the State can add  
16 additional charges. The test was stated in the  
17 case of **State vs. Richer** reported at 174 Wis. 2d,  
18 231, by the Supreme Court as follows:

19 From our discussion in **Leicham** to our  
20 recent decision in **Burke**, we have seen a  
21 broadening of prosecutorial discretion from a  
22 rule limiting charges to those supported strictly  
23 within the confines of the evidence adduced at  
24 the preliminary, to a rule granting prosecutors  
25 the discretion to charge, in the Information, any

1 felony that is, quote, "not wholly unrelated",  
2 end quote, to the initially charged crime.

3 The common denominator in all these  
4 decisions was that the charges must be related to  
5 one another, either from an evidentiary viewpoint  
6 or a transactional one. We conclude that a  
7 felony not charged in the preliminary examination  
8 can be made a count in a subsequently filed  
9 Information if there is evidence, direct or  
10 inferential, in respect to that felony, adduced  
11 at the preliminary, or if a subsequently charged  
12 felony is demonstrated by the State to be  
13 transactionally related, that is, not wholly  
14 unrelated, to one or more of the felonies for  
15 which the defendant has been bound over for  
16 trial.

17 This test has been adhered to in all the  
18 cases cited by each of the parties in their  
19 briefs. The parties differ concerning how they  
20 believe the standards to be applied to this case.  
21 The defense argues that the not wholly unrelated  
22 test applies to evidence introduced at the  
23 preliminary hearing itself, as opposed to the  
24 transaction, which was the subject matter of the  
25 preliminary examination.

1           The Court concludes that while there is  
2           such a distinction, the law is that charges can  
3           be added which do not have to be specifically  
4           related to the evidence introduced at the  
5           preliminary examination. Perhaps the closest  
6           case on the facts, to those in this case, is that  
7           of the ***State vs. Bailey*** reported at 65 Wis. 2d,  
8           331. It's a 1974 Wisconsin Supreme Court  
9           decision.

10           The Complaint in that case charged  
11           Bailey with one crime, first-degree murder. The  
12           Information filed after the preliminary  
13           examination added counts of indecent behavior  
14           with a child, child enticement, and attempted  
15           child enticement. The additional charges related  
16           to the abduction of the child, who was  
17           subsequently murdered by the defendant. In  
18           upholding the prosecutor's authority to add these  
19           charges, the Court ruled as follows:

20           In our view of Section 970.03 (10) does  
21           not prohibit the prosecutor from including in the  
22           Information, once a defendant has been bound  
23           over, charges in addition to those advanced at  
24           the preliminary hearing, so long as they are not  
25           wholly unrelated to the transactions or facts

1 considered or testified to at the preliminary.

2 This view is consistent with the  
3 legislative statement in Section 970.03 (1), that  
4 a preliminary hearing is held, quote, "for the  
5 purpose of determining if there is probable cause  
6 to believe a felony has been committed by the  
7 defendant", end quote. Once it is determined  
8 that the defendant should be bound over for trial  
9 on at least one count, the purpose of the  
10 preliminary has been satisfied and the prosecutor  
11 may, in his discretion, allege such other  
12 offenses as permitted by the limitations stated  
13 above.

14 In this case, assuming there is no  
15 evidence presented as to them at the preliminary,  
16 it is clear that the sex related offenses, Counts  
17 2, 3, and 4, were not wholly unrelated to the  
18 murder count. They are related in terms of  
19 parties involved, witnesses involved, geographic  
20 proximity, time, physical evidence, motive, and  
21 intent.

22 There's a strong parallel between the  
23 facts recited in **Bailey** and those here. The  
24 child enticement counts were related to crimes  
25 that immediately preceded the murder and were

1 part of the motive for the murder.

2 Now, as the defense points out in its  
3 brief, the Court in **Bailey** went on to find that  
4 the facts introduced at the preliminary  
5 examination in that case would have been  
6 sufficient to bind over on the enticement counts  
7 anyway. So the language quoted could be  
8 considered dicta not necessary to the Court's  
9 decision.

10 And I believe that's an entirely valid  
11 distinction on the defense's part. I think the  
12 language could easily have been characterized as  
13 dicta. And, in fact, it was. It wasn't really  
14 necessary to the Court's decision because the  
15 Court found the facts introduced at the prelim by  
16 themselves would have been sufficient to support  
17 the additional counts.

18 However, **Bailey** has been cited in a  
19 number of subsequent Supreme Court decisions and  
20 the Court has never backed away from its  
21 rationale, whether or not that rationale is  
22 characterized as dicta. In fact, the Supreme  
23 Court has accepted the dicta from **Bailey** as the  
24 law.

25 For example, in the case of **State vs.**



1           **Burke**, the Court held as follows: **Fish** and  
2           **Bailey** hold that, in a multiple offense  
3           transaction case, once the defendant has been  
4           bound over for trial on at least one count  
5           related to the transaction, the prosecutor may,  
6           in the Information, charge additional counts not  
7           wholly unrelated. **Bailey** further establishes  
8           that the direct evidence related to the  
9           additional counts may not have been presented at  
10          the preliminary examination.

11                         In the Court's opinion, we are not left  
12          to wonder how additional charges must relate to  
13          the evidence introduced at a preliminary  
14          examination in order to be includable in an  
15          Information. The test has been repeated often.  
16          To meet the test of transactionally related or  
17          not wholly unrelated, the charges must be related  
18          in terms of parties involved, witnesses involved,  
19          geographic proximity, time, physical evidence,  
20          motive and intent. That's the test that the  
21          Court is required to apply and that test can be  
22          applied in this case.

23                         Referring specifically to the facts in  
24          this case, the Court concludes that the new  
25          charges clearly meet the test which the Supreme

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Court has established:

The parties involved in the alleged crime are the same, that is, it's the same defendant and the same victim.

The witnesses, who would be the persons alleged to be present at the time of the crime, are the same in each case.

With respect to geographic proximity, everything is alleged to have happened at the same location.

With respect to time, the new charges are alleged to have immediately preceded the homicide and mutilation of a corpse charge from the original Complaint.

In addition, the physical evidence involved is likely to significantly overlap the charges in the original Complaint and the Amended Complaint.

With respect to motive and intent, the kidnapping, false imprisonment, and sexual assault charges will form an important basis on the alleged motive for the homicide and mutilation charges.

The Court concludes that it's difficult to imagine how the additional charges could be

1 more closely related to the original charges in  
2 this case, than they are. Thus, the Court  
3 concludes that the State is permitted to add the  
4 new charges and the defendant is not entitled to  
5 a preliminary examination on the other charges.

6 For those reasons, the Court is denying  
7 the motion of the defense to dismiss the -- I  
8 will reiterate the Court's denial of the motion  
9 to dismiss the Amended Complaint. And the Court  
10 also denies the motion requesting an additional  
11 preliminary examination on the additional  
12 charges.

13 Mr. Kratz, I will direct you to prepare  
14 the order in this case. Procedurally, at this  
15 point, I don't know if the State is prepared to  
16 proceed with an Information at this time or not.  
17 Mr. Kratz.

18 ATTORNEY KRATZ: I think probably, Judge,  
19 the Court should schedule an arraignment at which  
20 time the Amended Information can be filed.

21 THE COURT: I know, Mr. Strang, you  
22 indicated previously, in the correspondence, that  
23 the defense may seek a permissive appeal from the  
24 Court's ruling if the Court ruled as it did. I  
25 don't know if the -- if the defense is going to seek

1 to delay with respect to arraignment or not.

2 ATTORNEY STRANG: Well, that's a question,  
3 the Court is right. And I agree with Mr. Fallon's  
4 assessment of **Webb**. I read that case the same way,  
5 in the sense that, if we think the Court erred on  
6 the sufficiency of the Complaint, or on our  
7 entitlement to a preliminary hearing, the only time  
8 we can raise that is now. Because the trial will  
9 certainly cleanse the error, or render it harmless,  
10 if in fact there was error.

11 So, this is not a usual case, the stakes  
12 are very high. Obviously, we understand what  
13 they are for Mr. Avery, for the Halbach family,  
14 for the State, people of the State. I think it  
15 prudent for us to ask the Wisconsin Court of  
16 Appeals for leave to file an appeal here,  
17 permissively, that the Court doesn't have to --  
18 that is, the Court of Appeals doesn't have to  
19 grant leave. But if I don't ask, I'm giving up  
20 my only opportunity to be heard on the  
21 correctness of the Court's ruling and to have  
22 those rulings reviewed. So, I do and will do  
23 that.

24 I have 10 days from the entry of the  
25 written order, I think -- 14 days, I'm sorry,

1 from the entry of the written order memorializing  
2 the Court's rulings. It seemed, although I don't  
3 have an answer on whether an intervening  
4 arraignment would affect the posture of a request  
5 for permissive appeal, I can tell the Court this,  
6 if we're put to an arraignment before we seek  
7 leave to file from this appeal, we will stand  
8 mute and not participate in that, not wanting to  
9 waive or imperil our position on the request for  
10 this interlocutory appeal.

11 So, the better practice may be to  
12 schedule the arraignment after the deadline, at  
13 least, for filing a petition for leave to take  
14 permissive appeal. I think that's probably the  
15 wiser procedural course for the Court to follow.  
16 Although counsel may well view it differently,  
17 that's the view at this table.

18 THE COURT: I did read the **Webb** case and I  
19 understand that, as a result of that case, if you  
20 want to challenge the Court's ruling you -- the  
21 lesson is pretty clear, you have to do it before the  
22 trial. I didn't see anything in there to suggest  
23 that holding an arraignment would prejudice the  
24 defendant in anyway. But on the other hand, the  
25 Court didn't really address the issue in this case.

1 Mr. Kratz.

2 ATTORNEY KRATZ: On the 9th of March I did  
3 file the Amended Information already. That's why,  
4 when I was searching, I couldn't find it, it's  
5 already been filed. If the Court can just recognize  
6 today that it's been filed, however the Court wishes  
7 to address the responsive pleading, you can do that.

8 ATTORNEY STRANG: I did not remember the  
9 date, but I do remember seeing the proposed, at that  
10 point, Amended Information. It was, I suppose,  
11 filed conditionally on the granted leave to file,  
12 which the Court now has granted. And I certainly  
13 have a copy of the proposed Amended Information.

14 THE COURT: All right. Does the State have  
15 any objection to scheduling the arraignment shortly  
16 after the appeal deadline for the defense?

17 ATTORNEY KRATZ: No, Judge, once the Court  
18 accepts, or recognizes the filing of the  
19 Information, an arraignment can be held any time.

20 THE COURT: Well, let's see. All right.  
21 How about 9:00 on -- or Mr. Strang, is life easier  
22 for you -- or, actually, we have Mr. Fallon  
23 traveling as well. Does 9:30 work out better for  
24 you?

25 ATTORNEY STRANG: Well, I assume Mr. Fallon

1 is in the same position. I have to be seated in my  
2 car three hours before the Court starts. So I  
3 wouldn't be seated in my bed at 6:00 a.m., but I  
4 also wouldn't be in my car.

5 THE COURT: What if we do it this way, how  
6 about 10:00 on May 30th. I will tell you, here, for  
7 security purposes, the Sheriff's Department likes to  
8 have your hearing be the first thing done in the  
9 courtroom that day. So, I have pressure on both  
10 sides here.

11 ATTORNEY FALLON: I don't know about Dean,  
12 but it doesn't matter to me, whatever is convenient  
13 for the Court and security purposes. If you want to  
14 hold this at 7:00 a.m., I will be here.

15 ATTORNEY STRANG: Right.

16 ATTORNEY KRATZ: If all we're doing is the  
17 arraignment, I suspect Mr. Fallon is not going to be  
18 here. It should be a 30 second hearing.

19 ATTORNEY STRANG: I will be here any time  
20 the Court sets it. I was being a little bit  
21 flippant. Yes, it's a three hour drive, but I will  
22 be here whenever the Court sets it.

23 ATTORNEY KRATZ: Is there any chance of  
24 doing it just before noon on the 4th of May? The  
25 reason I say that, co-defendant, Mr. Dassey's

1 motions before Judge Fox are scheduled, I have to be  
2 here that morning anyway. And if we could -- if  
3 this is such a short hearing, if we could do it  
4 sometime later that morning on the 4th, that would  
5 sure help my schedule.

6 ATTORNEY STRANG: Both Mr. Buting and I  
7 have a Criminal Law Section Board meeting for the  
8 State Bar at 11:00 on the morning of May 4th.

9 THE COURT: Where is that held?

10 ATTORNEY STRANG: That one is in Madison.

11 ATTORNEY KRATZ: The 3rd is fine, Judge.  
12 That's fine.

13 THE COURT: All right. Let's say 10:00 on  
14 the 3rd then. All right. Is there anything else  
15 that either party wants to bring up on the record  
16 this morning?

17 ATTORNEY KRATZ: Not the State, your Honor.

18 THE COURT: Mr. Strang.

19 ATTORNEY STRANG: No.

20 THE COURT: All right. If not, we're  
21 adjourned for this morning.

22 (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 25th day of April, 2006.

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Diane Tesheneck, RPR  
Official Court Reporter

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<b>9</b>	<b>970.02</b> [7] 5/22 5/23 6/13 16/16 16/22 17/6 18/12 <b>970.03</b> [5] 6/5 17/9 20/2 22/20 23/3 <b>971.01</b> [1] 19/21 <b>99 percent</b> [1] 11/10 <b>9:00 on</b> [1] 30/21 <b>9:30</b> [1] 30/23 <b>9th</b> [1] 30/2		
<b>A</b>	<b>a.m</b> [2] 31/3 31/14 <b>abduction</b> [1] 22/16 <b>ability</b> [1] 33/14 <b>about</b> [4] 4/13 30/21 31/6 31/11 <b>above</b> [1] 23/13 <b>absent</b> [1] 18/1 <b>Absolutely</b> [1] 9/6 <b>accept</b> [2] 9/23 12/19 <b>accepted</b> [1] 24/23 <b>accepts</b> [1] 30/18 <b>according</b> [1] 20/3 <b>accusations</b> [1] 13/4 <b>action</b> [3] 6/4 8/21 17/8 <b>actually</b> [2] 12/9 30/22 <b>add</b> [11] 9/2 11/1 11/13 15/2 18/3 18/18 19/2 19/11 20/15 22/18 27/3 <b>added</b> [2] 22/3 22/13 <b>adding</b> [2] 14/13 17/23 <b>addition</b> [2] 22/23 26/15 <b>additional</b> [27] 7/22 8/9 8/23 9/2 9/15 9/19 10/5 10/9 11/2 11/13 11/14 12/7 12/10 17/16 18/1 18/13 18/25 19/9 20/16 22/15		

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