

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

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STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 05-CF-381

MANITOWOC COUNTY  
STATE OF WISCONSIN  
FILED

AUG 21 2006

STEVEN A. AVERY,

CLERK OF CIRCUIT COURT

Defendant.

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STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS STATEMENT  
TO MARINETTE COUNTY SHERIFF

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**INTRODUCTION**

The defendant seeks to suppress a statement he made to Detective Anthony O'Neil of the Marinette County Sheriff's Department that occurred on November 5, 2005. The interview occurred during the afternoon hours in Detective O'Neil's unmarked Marinette County Sheriff's vehicle. The automobile was parked in the driveway of the Avery family's vacation property located at N9493 Highline Road in Marinette County. The defendant complains that the statements obtained by Detective O'Neil that afternoon occurred after Mr. Avery "expressly and unequivocally invoked his fifth and fourteenth amendment right to counsel and his corresponding right to counsel under art. 1, § 8 of the Wisconsin Constitution." Defendant's motion, p. 1.<sup>1</sup>

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<sup>1</sup> We understand the defense to make no challenge based on an alleged violation of the defendant's sixth amendment right to counsel, so no argument is presented on that issue.

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(1)

## APPLICABLE LAW

In the landmark case of *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that if a person is in custody and subjected to police interrogation, he must first be advised of what is now known as his Miranda rights. *Id.* at 478-79. Additionally, the Court determined that there is no requirement that police stop a person who wishes to confess to a crime or any person who makes an otherwise volunteered statement because volunteered statements are not barred by the fifth amendment and their admissibility is not affected by the decision in *Miranda*. *Id.* Thus, it is clear that the fifth amendment rights to counsel and silence espoused in *Miranda* exists only when a suspect is in custody and subject to police interrogation.

Equally relevant to the issue at hand is the fact that the fifth amendment rights to silence and counsel are personal to the accused. *State v. Coerper*, 199 Wis. 2d 216, 224-25, 544 N.W.2d 423 (1996); *State v. Hanson*, 136 Wis. 2d 195, 213, 401 N.W.2d 771 (1987).

Also, any assertion of the right to counsel must be “unambiguous.” *State v. Jennings*, 2002 WI 44, ¶36, 252 Wis. 2d 228, 647 N.W.2d 142; *Davis v. United States*, 512 U.S. 452, 459 (1994). Similarly, any assertion of the fifth amendment right to remain silent must be unambiguous as well. *State v. Ross*, 203 Wis. 2d 66, 75, 552 N.W.2d 428 (Ct. App. 1996).

Finally, the defendant’s fifth amendment right to counsel under the United States Constitution and his corresponding right to counsel under art. 1, § 8 of the Wisconsin Constitution are governed by the same principles and are interpreted in the same way; and as such the state constitution does not provide greater protections such that the police must clarify ambiguous requests for counsel or silence for instance. *State v. Jennings*, 252 Wis. 2d 228, ¶¶ 42-43; *State v. Hanson*, 136 Wis. 2d at 213.

## ARGUMENT

First, the defendant did not have a fifth amendment right to counsel when he was interviewed by Detective O'Neil on November 5, 2005. Second, the defendant did not have a fifth amendment right to remain silent when he was interviewed by Detective O'Neil on November 5, 2005. Third, even if the defendant had a fifth amendment right to counsel, he never invoked that right. Fourth, even if the defendant had a fifth amendment right to remain silent, he never "unambiguously" invoked that right as well. Fifth, any attempt by Attorney Stephen Glynn to invoke a fifth amendment right to remain silent or a fifth amendment right to counsel was meaningless under the facts of this particular case. Sixth, even if the defendant were in custody and had a fifth amendment right to remain silent, any attempt by Attorney Glynn to invoke that right on behalf of his client was meaningless and Detective O'Neil was free to ignore the request. *State v. Hanson*, 136 Wis. 2d 195.

The case law regarding when one's fifth amendment rights to counsel or silence attach is quite clear. Since the defendant was not in custody when he was interviewed by O'Neil, neither right existed. The defendant was not placed under arrest until November 9<sup>2</sup>; there was no warrant outstanding for his arrest on any other matter; he was not even a suspect in the mind of Detective O'Neil.<sup>3</sup> Further, the defendant was allowed to leave the presence of Detective O'Neil on at least two occasions during their contact, if not three. Additionally, the defendant took two phone calls from Attorney Stephen Glynn. He was free to do so. Detective O'Neil did not interrupt or otherwise impede the discussions between Attorney Glynn and the defendant. Finally, it is clear that the defendant was not in custody, for he was allowed to rejoin his family

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<sup>2</sup> Tr. 62.

<sup>3</sup> O'Neil testified he was doing the interview "blind." Tr. -12.

at the conclusion of the interview. There is no doubt the defendant was not under arrest nor in custody, when he was interviewed by Detective O'Neil. Therefore, since there was no custodial interrogation, neither the fifth amendment right to counsel nor the fifth amendment right to remain silent had attached.

The case law is equally clear that Attorney Glynn could not invoke a right that did not exist on behalf of his client. Further, even if the defendant were in custody, Attorney Glynn could not invoke that right on his client's behalf. *State v. Coerper*, 199 Wis. 2d at 225; *State v. Hanson*, 136 Wis. 2d at 211-13. Furthermore, the defendant did not refuse to answer questions and he did not ask for counsel. Lastly, the police are not bound to oblige any request by counsel to "invoke" either of these rights on behalf of a client. The case of *State v. Hanson*, 136 Wis. 2d 195, is most instructive.

In *Hanson*, the defendant was charged and convicted of shooting his wife. Defendant Hanson, prior to being arrested, shot himself. As a result, he was taken to the medical center for treatment. While at the medical center, the defense attorney contacted law enforcement and orally advised them at 2:47 p.m. on the day of Hanson's admittance that he, the defense attorney, did not want anyone to talk to his client, particularly law enforcement officers. Later the same day at 3:37 p.m., the attorney gave the deputy who was guarding the defendant a written request stating that the defendant was not to be interrogated or to talk with or to law enforcement officers or anyone else without the attorney's physical presence. Nevertheless, law enforcement officers from the Barron County Sheriff's Office interviewed Hanson the next day and obtained inculpatory statements from him. The court ruled that since the Miranda rights are personal rights that could not be invoked by the attorney, the officers were free to disregard the attorney's admonishment.

In the case at bar, Detective O'Neil was not duty bound to follow any admonishment by Attorney Glynn that he not speak with Steven Avery. Especially since Steven Avery did not unequivocally say that he did not wish to speak to law enforcement. At best, the defendant "ambiguously" suggested that he did not want to speak to Detective O'Neil anymore. The beginning of Part 4 of Exhibit 21 captures the discussion between the defendant and Detective O'Neil:

Avery: Well, I guess they don't want me to talk no more.

O'Neil: They don't?

Avery: No.

Avery: But here's his number in case – when you want to talk to me you can contact them, they want to be there too.

At best, this is an ambiguous statement by Avery that he did not want to talk to Detective O'Neil. It is a statement for which O'Neil was not duty bound to honor or clarify. Quite frankly, the next minute or so of discussion is an attempt to clarify by Detective O'Neil. O'Neil wanted to know whether it was the defendant's personal wish and desire that the conversation end. Detective O'Neil was simply ascertaining whether it was the defendant's wish that the conversation end. Detective O'Neil's behavior here is nothing short of exemplary, especially in light of the fact that the defendant had neither a fifth amendment right to remain silent nor a fifth amendment right to counsel.

## CONCLUSION

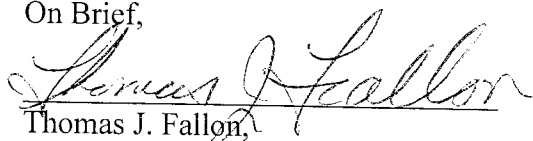
Since the defendant did not have a constitutional right to counsel or silence under the United States Constitution or the Wisconsin Constitution, there is no basis to suppress the statement obtained on November 5, 2005.

Dated this 18<sup>th</sup> day of August, 2006.

Respectfully submitted,

Kenneth R. Kratz  
Calumet County District Attorney  
And Special Prosecutor  
State Bar #1013996

On Brief,



Thomas J. Fallon,  
Assistant Attorney General  
And Special Prosecutor  
State Bar No. 1007736

Attorneys for Plaintiff

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
Phone: (608) 264-9488  
Fax: (608) 267-2778  
E-mail: fallontj@doj.state.wi.us