STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

STEVEN A. AVERY,

Defendant.

Case No. 2005-CF-381

DEFENDANT'S MEMORANDUM ON JURY VIEW

I.

INTRODUCTION

With more explanation, the state's motion for a jury view may be well taken. However, at this point the state has not provided enough detail and possible alternatives to allow the Court to assess whether a jury view is the best option or proper at all. Even if it is, Steven Avery believes that a jury view should not include areas of the Avery property that law enforcement officers have altered substantially since October 2005. The state also has offered no good reason to require Avery to wear a stun belt, shackles, or bulletproof vest at any time. Neither has the state offered any reason to surround Avery with a security retinue at a jury view.

II.

DISCUSSION

A. *Jury View.*

The state suggests that a view of parts of the Avery property will assist the jury in understanding other evidence. That may be true. In and of itself, this jury view need not unfairly prejudice, either.

As often, though, the devil is in the details. At this point, the state has not explained in what it wishes the jury to see, and why videotape and photographs are not a superior alternative. Much of the property was altered substantially by law enforcement during the week or more that the state controlled the property. Before this Court rules at all, then, it should ask the state to offer more details and to submit the videotapes and photographs that might serve the jury better.

If the Court allows a view, the jury ought not see areas that law enforcement officers altered substantially. These include, at a minimum, the former burn pit area, the burn barrel and its vicinity, and the detached garage.

The Court should defer ruling on the state's motion, pending further submissions from the state: what portions exactly the jury should see, why is a view an accurate way to assist the jury, and why are videotapes and photographs not a better way to accomplish any legitimate end.

B. *Steven Avery's Participation and Security.*

The state's proposal on security measures, restraints, and protective clothing for Avery are another matter altogether. These Avery opposes.

Restraints on a defendant, particularly if jurors might see them, require the state to make a detailed and significant showing. The logic is very simple. Every person accused enjoys under the Fourteenth Amendment to a presumption of innocence at trial. Innocent people are not led around in chains by armed deputies like Marley's ghost. Jurors know that.[1] Therefore, shackling interferes with a fair trial and due process if it comes to jurors' attention, barring a very good reason specific to an individual's defendant's conduct. Even jail garb alone may imperil a fair trial. *See Estelle v. Williams*, 425 U.S. 501, 503 (1976).

While the Wisconsin appellate courts have said strikingly little of substance about shackling during trial, the United States Supreme Court has spoken more clearly — and more recently. As a federal constitutional matter, "The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." *Deck v. Missouri*, 544 U.S. 622, 626 (2005).

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[1] *See, e.g., State v. Knighten*, 212 Wis. 2d 833, 843, 569 N.W.2d 770, 774 (Ct. App. 1997) (during voir dire, potential juror who had seen restrained defendant asked why the defendant was in custody if he were innocent until proven guilty; presumption of innocence "seems funny," juror said, where he had seen shackles).

Mere jail garb, let alone shackling, is "inherently prejudicial." *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986). For that reason, "due process does not permit the use of visible restraints if the court has not taken account of the circumstances of the particular case." *Deck*, 544 U.S. at 632. If, "without adequate justification," a trial court orders a defendant to wear shackles that a jury will see, "the defendant need not demonstrate actual prejudice to make out a due process violation." *Id.* at 635.

Wisconsin courts earlier had acknowledged that a trial court must make a record of reasons for manacling a defendant or even posting a deputy over him. A judge "should not order a defendant restrained unless he has in fact exercised his discretion and set forth his reasons in the record." *Flowers v. State*, 43 Wis. 2d 352, 363, 168 N.W.2d 843, 849 (1969). *Flowers* involved no more than the trial judge ordering a deputy to sit behind the defendant at all times. *Flowers*, 43 Wis. 2d at 362, 168 N.W.2d at 848. Even that limited step invoked the concern.

A Wisconsin judge may not simply defer to the security wishes of the Sheriff's Department, either. In *State v. Grinder*, 190 Wis. 2d 541, 527 N.W.2d 326 (1995), the Wisconsin Supreme Court concluded that a trial judge erred (albeit harmlessly) when he did exactly that. "Here, the circuit court erroneously exercised its discretion when it did not consider factors beyond the sheriff's department policy on shackling defendants as a basis for placing restraints," the court explained. *Grinder*, 190 Wis. 2d at 552, 527 N.W.2d at 330. The trial court should have

considered other factors, such as the nature of the charges, the background of the defendant, and possible security risks in the courtroom, as well as defense counsel's offer of proof. *Id.*

The state here has offered no reason specific to Steven Avery's case that would warrant either restraining him or allowing armed officers to hover over him. Avery has no history of acting disrespectfully in court. He has not expressed hostility or acted in a menacing way. He has no history of escape. For that matter, so far as counsel know, over the last 20-plus years Avery has no history of jumping bail or even missing court inadvertently. He is not a member of a gang or affiliated with other people who might threaten a break-out from court. He is not physically imposing. Alone on trial, he would not be lost in a courtroom by deputies unfamiliar with his appearance or distracted in trying to corral many defendants.

This case is serious, sure, and the allegations violent. But many cases are, and all intentional homicide cases share that quality. With respect to other persons in attendance, nothing has hinted at a volatile courtroom mood. Halbach family members and friends are an apparently law-abiding, courteous group. They have made no threats of violence or anything remotely close to that. Surprisingly, defense counsel themselves have received little hate mail from the general public, just a few letters, and no threats of harm to date from anyone in the broader community. Avery and his lawyers are unaware of any threat to Avery from the outside.

The Court has no proper basis on which to restrain Avery with a stun belt, manacles, or shackles in court, then. The Court certainly has no basis for doing that in a jury's presence, even assuming that jurors could not see the restraints.[2] And the prospect of restraining Avery during a jury view, whether by a stun belt or a bulky vest visible under clothing or by a coterie of armed deputies,[3] would make such measures plain to jurors. The Court would do that to the specific detriment of Avery's right to a fair trial, and to the general disadvantage of justice and its appearance.

III.

CONCLUSION

With the limitations he requests, Steven Avery does not oppose the jury view that the state seeks. Avery also wishes to make clear his opinion that the location

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[2] Avery appreciates that the Court bears in mind the fact that jurors' observations are not the only reason that American and English courts long have discouraged shackling. "Shackles can interfere with the accused's 'ability to communicate' with his lawyer." *Deck*, 544 U.S. at 631. They also "can interfere with a defendant's ability to participate in his own defense, say by freely choosing whether to take the witness stand on his own behalf." *Id.* They even may affect the "courtroom's formal dignity, which includes the respectful treatment of defendants." *Id.*

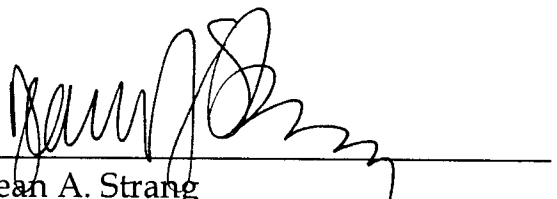
[3] The United States Supreme Court has tolerated uniformed troopers in the first row of spectator seats in a courtroom, in a trial of six defendants. *Holbrook*, 475 U.S. at 562-63, 567-72. But the *Holbrook* court explained that, "The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence." *Id.* at 569. At a jury view, that room for jurors to conclude that "the officers are there to guard against disruptions emanating from outside the courtroom," *id.*, no longer is available. At a jury view, jurors only could conclude that the deputies were there to protect jurors from Avery or to prevent Avery's flight. Given Avery's conduct, both conclusions would be unfair and unwarranted.

of the trial, regardless where it is in the end, should have no bearing on the Court's resolution of the state's motion for a jury view. But Avery ought not be shackled, restrained, fitted with a stun belt or bulletproof vest, or otherwise surrounded by armed law enforcement officers as if he presents a threat of violence or escape. He has done nothing to warrant those measures. And other circumstances of the case no more justify them.

Dated at Madison, Wisconsin, July 13, 2006.

Respectfully submitted,

HURLEY, BURISH & STANTON, S.C.



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