STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S MEMORANDUM SUPPORTING EXCLUSION OF JAIL STATEMENTS AND TAPES

I.

INTRODUCTION

Because he and his family have not the financial means to post bail, Steven Avery remains in jail pending trial. He is no less presumed innocent than the rich man who would have posted bail and secured his conditional liberty under otherwise identical circumstances.

Yet Avery's every word to friends and family, to any visitor other than counsel, is taped and analyzed by the state for use at trial. The rich man would suffer no such intrusion into his privacy, and no such evidentiary risk. The Court

faces a stark example of unequal protection of two men equally situated, but for wealth.

This memorandum explains why the state may continue to tape in the Calumet County Jail for purposes of jail security as the sheriff deems necessary, but may not make evidentiary use of its tapes and surveillance without offending both federal and state equal protection guaranties. In other words, jail taping must be limited to its legitimate purpose. It cannot provide the state an evidentiary bonanza against the poor man, when the identically placed rich man suffers no such harm.

II.

FACTS

Steven Avery is, and has been since November 9, 2005, an inmate of the Calumet County Jail. He resides there not because of any sentence, probation or parole hold, conviction, or adjudication of guilt. Rather, at all relevant times he has been incarcerated in that jail only because he is financially unable to post the cash bail that the Court has set. Avery is presumed innocent of all crimes with which the state has charged him. He has no sentence to serve.

The Calumet County Jail tape records every telephone call that Steven Avery or any other inmate makes.[1] It also records every visit with an inmate, other than lawyer-client contact visits.[2] In Avery's case, the state even tapes at least some meetings with his pastor.[3]

Avery assumes that the Calumet County Sheriff claims a jail security justification for the practice of taping inmate telephone calls and visits. That security interest is not in dispute here. Avery makes no request that the Court order the state to discontinue taping, surveillance, or monitoring of inmates' conversations in the Calumet County Jail. Rather, this motion asks the Court only to limit such surveillance to its purpose, and to forbid evidentiary use of taped or monitored statements at trial on crimes not committed in the Calumet County Jail.[4]

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[1] Calls that Avery places to one of his lawyers are a possible exception. The status of those calls is unclear. It is possible that the software in use at the jail operates to suspend taping when Avery dials a telephone number that the software recognizes as his lawyer's. It also is possible that the state simply chooses not to listen to recorded calls to Avery's lawyers. At this point, counsel have no information that the state actually is listening to these privileged communications. Counsel afford the state the benefit of the doubt and assume the state is not surveilling Avery's calls to his lawyers.

[2] Taping of visits appears to depend upon where the visit occurs. If the visit takes place in the general inmate visitation area in the Calumet County Jail, through security glass and with assistance of a telephone, the visit is taped. If the visit occurs instead in a contact visit room, counsel believes it is not taped. Only Avery's lawyers are allowed to meet with him in a contact visit room.

[3] The surveillance and monitoring of Avery's conversations with his clergywoman will be the subject of a separate motion. *See* WIS. STAT. § 905.06.

[4] Were Avery or another inmate to commit a crime in the jail, taped statements properly might serve to prove that crime. Indeed, under some circumstances, a crime largely might consist of the taped statements. But the charges against Avery all arose before his incarceration, so the Court need not address the question of admissibility of jail tapes for crimes committed in the jail.

III.

ARGUMENT

A. *Overview.* The Fourteenth Amendment, which applies specifically to the states, provides in pertinent part:

> nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Similarly, the Wisconsin Constitution asserts that:

> All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

WIS. CONST. Art. I, § 1. While the terms of the Wisconsin Constitution differ notably from the terms of the Fourteenth Amendment, the two constitutions provide identical equal protection safeguards. *County of Kenosha v. C & S Management, Inc.*, 223 Wis. 2d 373, 393-94, 588 N.W.2d 236, 246-47 (1999); *State v. Lindsey*, 203 Wis. 2d 423, 443, 554 N.W.2d 215, 223 (Ct. App. 1996).

When a governmental classification interferes with a fundamental right or rests on a suspect criterion, it gets strict scrutiny. *Vincent v. Voight*, 236 Wis. 2d 588, 637, 614 N.W.2d 388, 413 (2000); *Doering v. WEA Insurance Group*, 193 Wis. 2d 118,

130, 532 N.W.2d 432, 436 (1995). Courts evaluate all other classifications under the rational basis test. *Doering*, 193 Wis. 2d at 131, 532 N.W.2d at 437; *Vincent*, 236 Wis. 2d at 637, 614 N.W.2d at 413. In other words, a distinction must be "rationally related to a legitimate government purpose," *Doering*, 193 Wis. 2d at 131, 532 N.W.2d at 437, and persons similarly situated must not face classification "in an irrational or arbitrary manner." *State v. Avila*, 192 Wis. 2d 870, 880, 532 N.W.2d 423, 426 (1995).

Neither Wisconsin courts nor the United States Supreme Court ever have held wealth (or indigency) a suspect classification warranting strict scrutiny in all circumstances. However, "the [United States] Supreme Court has held that differences in treatment by the criminal justice system based on wealth require strict judicial scrutiny." *Will v. State*, 84 Wis. 2d 397, 402, 267 N.W.2d 357, 359 (1978); *but see also Community Newspapers, Inc. v. City of West Allis*, 156 Wis. 2d 350, 359 n.7, 456 N.W.2d 646, 650 n.7 (1990) ("We also note that the Supreme Court has never held that wealth discrimination alone provides a basis for application of the strict scrutiny test;" citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29 (1973)).

Some ambiguity remains in the treatment of wealth distinctions, then, even though this case clearly concerns the criminal justice system and therefore invokes

Will. Avery will assume first for the sake of argument that the disadvantageous treatment he receives on the basis of wealth warrants only rational basis review. If the distinction cannot withstand even that level of scrutiny, then *a fortiori* it fails strict scrutiny. That higher standard requires the state to prove that "the classification is necessary to promote a compelling government interest." *In re Commitment of Burgess*, 258 Wis. 2d 548, 570, 654 N.W.2d 81, 92 (Ct. App. 2002), *aff'd*, 262 Wis. 2d 354, 665 N.W.2d 124 (2003), *cert. denied*, 541 U.S. 961 (2004).

B. ***A Narrow Issue.*** The relief Avery seeks is precise. He asks this Court to rule only that jail recordings of his conversations with visitors are inadmissible at a trial on alleged crimes completed before the state jailed Avery, and that the state may not make indirect evidentiary use of them, either. That ruling will assure that jail recordings continue to serve their justifying purpose, jail security. By limiting the recordings to that purpose, the Court also will assure that Avery's right to equal protection is balanced and preserved.

The pinpoint quality of Avery's motion means that he does not challenge the general legality of Calumet County's program of recording all inmate telephone conversations. In general, that is legal. WIS. STAT. § 968.31(2)(b); *State v. Riley*, 287 Wis. 2d 244, 249-53, 704 N.W.2d 635, 638-40 (Ct. App. 2005). Avery does not quarrel with a jail's "need for safety and security" as the justifying purpose of taping

telephone conversations. *Riley*, 287 Wis. 2d at 252, 704 N.W.2d at 640, citing *J.A.L. v. State*, 162 Wis. 2d 940, 471 N.W.2d 493 (1991). Avery further assumes, for sake of argument, that the same justification and statutory exception would apply in general to taping personal visits between an inmate and his family and friends. He next assumes the general admissibility of jail recordings at a felony trial, as a purely statutory matter – all constitutional considerations aside. WIS. STAT. § 968.29(3)(b).

Avery is willing to assume, too, that a *convicted* inmate in a county jail, serving a sentence there, might have a lesser expectation of privacy than a presumptively innocent pretrial detainee like Avery.[5] If so, the ruling Avery seeks might not benefit the convicted inmate. For that matter, Avery assumes for purposes of this motion the admissibility of unrecorded statements he might make to other inmates of the Calumet County Jail or to jail staff. This motion addresses only recorded statements Avery makes during telephone calls and visits with close family members, friends, and other important human supports like his pastor. In short, the motion concerns only those persons as to whom Avery's reasonable privacy expectation is highest.

Finally, the Court has no cause here to decide whether the state could make evidentiary use at trial of jail recordings if Avery's alleged crimes had occurred in

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[5] Recall that Avery is in jail only because he is unable to post the bail that this Court set. He would be at home, not in jail, on conditional liberty if his financial circumstances were different. Nothing else keeps him in jail.

the jail. Here, the state alleges instead that Avery completed each of the charged crimes before his sojourn in the Calumet County Jail.

C. *No Evidentiary Use of Recorded Jail Statements at Trial on Past Crimes.* Even with all of the limitations that Avery accepts on the relief he seeks, still his motion frames social issues of broad importance, entailing the complex relationship between poverty, privacy, and privilege (in a non-legal sense). These issues have disquieted the United States Supreme Court for fifty years at least, and probably for much longer:

> Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: 'To no one will we sell, to no one will we refuse, or delay, right or justice. * * * No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.' These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system — all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'

Griffin v. Illinois, 351 U.S. 12, 16-17 (1956) (footnotes and citations omitted) (striking down Illinois procedure that denied appeal to convicted defendants who, by reason of indigency, could not afford a trial transcript).

Avery's motion indeed challenges this Court to strike a balance that provides "equal justice for poor and rich, weak and powerful alike." It bids the Court, and the state, "to hope and strive to move closer to that goal," just as Justice Black and the majority aspired in *Griffin*.

1. This much is indisputable. Avery is presumed innocent. He is serving no sentence. Soon, he will pass one year in jail awaiting trial. Through no fault of the Court or of anyone else, more than 15 months after arrest will pass in jail before the state must begin to convince a jury, if it can, that Avery is guilty of anything.[6] Although Avery has lived all his life in Manitowoc County, this Court viewed itself as obliged to set a cash bail condition that Avery cannot meet. Only a very wealthy man could. That wealthy man would enjoy no greater presumption of innocence on the same charges, facing the same evidence, than does Avery.

Avery, like any human being, needs the support of loved ones. An innocent man in jail may need the support of his closest family, his friends, and his pastor even more than men and women who have their liberty. Jail is not a felicitous experience. It is unavoidably unpleasant. And it may not be used to punish the presumptively innocent pretrial detainee, for "the purpose of bail is not to punish a defendant." *In the Interest of Hezzie R.*, 219 Wis. 2d 849, 884, 580 N.W.2d 660, 673 (1998).

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[6] Assuming no change in bail conditions.

The conversations with close family members, friends, and clergy that the state records intrusively are those as to which Avery has a strong privacy interest. Wisconsin, like most if not all jurisdictions, recognizes a legal privilege for statements to clergy members. WIS. STAT. § 905.06. Further, Wisconsin courts recognize the privacy interest a person has in his relationships with family and friends. *See, e.g., State v. Sarlund*, 139 Wis. 2d 386, 393-94, 407 N.W.2d 544, 547 (1987) (upholding harassment injunction against man who followed former girlfriend and contacted her parents, employer and friends; recognizing privacy interests that harassment statute protects and finding intrusion on victim's privacy not insubstantial). Indeed, there is a "'private realm of family life which the state cannot enter.'" *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977), quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Because Avery is not wealthy enough to post bail, and because of that reason only, his every conversation with close family members, friends, and even his pastor is recorded by the state. The prosecution then combs these conversations carefully for evidence it may wish to offer at trial on charges that arose before Avery's arrest. The identically situated wealthy man would suffer no such intrusion. He would have posted bail and secured his release from jail. At liberty because of his financial means, the wealthy man would enjoy the constant opportunity to speak to his mother, father, brothers, sister, fiancee, friends and

pastor without the government listening in and recording every word – or any word. He would enjoy the normal privacy of his kitchen, his bedroom, or his pastor's office. All of this is denied Avery, for no reason other than his comparative poverty.

2. With these indisputable points in place, Avery turns to the rationality of permitting the state to offer as trial evidence the recordings it makes in jail for the very different purpose of maintaining jail security and safety. The state collects such evidence from, and offers it against, only the poor man; the identically situated rich man who posts bail faces no such evidence.[7]

Wisconsin courts long have acknowledged equal protection ramifications of wealth and bail. For example, the state had no justification for denying the poor man credit for time served before trial, where he otherwise would have served more total time in jail than the wealthier man who posted bail but committed the same crime and received the same sentence. *Klimas v. State*, 75 Wis. 2d 244, 249, 249 N.W.2d 285, 287-88 (1977); *see also State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382, 385 (1985) ("It should be remembered that in our decisional

[7] Of course, the rich man's friends or family members may prove unworthy of his trust: they may choose to repeat his statements at trial, assuming the marital communications privilege does not apply. This is a risk that rich and poor alike share. But Avery's motion does not concern this risk. His motion concerns only the state's intended use of recorded statements, not any testimony that Avery's family or friends might offer voluntarily or by subpoena, about which the state learned other than through monitoring.

law the origin of the confinement credit was a matter of equal protection, *i.e.*, a person who could not make bail because of indigency was being denied a liberty right that a wealthy person could exercise"). Likewise, an alternate jail commitment for failure to pay a fine denies equal protection if imposed against a person truly too poor to pay the fine. *State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 289, 295, 201 N.W.2d 778, 780, 783 (1972).

In pursuing the governmental purpose of assembling evidence for trial, the state has no rational justification for treating the poor man worse than the rich man. Avery's presence in the Calumet County Jail is an accident of his financial means. He is not more probably guilty than the rich man who posts the Court's bail on the same charges. The evidentiary need against the poorer man is not greater. Offering recorded conversations at trial, after making them for a different reason entirely, is an irrational distinction between defendants, classified only by wealth. The state cannot offer as trial evidence taped conversations with family members and friends as to the wealthier man, but it seeks that indulgence as to the poorer man for the sole reason that his poverty leaves him unable to vacate the county jail by posting bail.

As the Wisconsin Supreme Court has explained, "any distinction [must] have some relevance to the purpose for which the classification is made." *Doering*, 193 Wis. 2d at 132, 532 N.W.2d at 437. Here, the *evidentiary* use of jail tapes has no

relevance to the purpose of making the tapes, which is jail security. Again, Avery has no quarrel with that purpose. His quarrel is with a state evidentiary windfall entirely unrelated to that purpose. The legitimate purpose of jail taping is *not* to secure trial evidence preferentially against the poor, to the advantage of the wealthier citizen who gains his release by posting cash. Without any rational relationship between the purpose of the classification here, jail security, and the distinction in trial evidence the state seeks to impose upon Avery, the Court should disallow the evidentiary use of jail recordings at Avery's trial.

Although it is deferential compared to strict scrutiny, "the rational basis test is 'not a toothless one.'" *Doering*, 193 Wis. 2d at 132, 532 N.W.2d at 437. "It allows the court to probe beneath the claims of the government to determine if the constitutional 'requirement of some rationality in the nature of the class singled out' has been met." *Id.* There is no rationality in permitting the state to make evidentiary use of jail recordings in the poor man's trial that it could not make in the rich man's trial, where recording has no evidentiary purpose or justification in the first instance. The evidentiary use of security tapes from the jail would provide the state a trial windfall that arbitrarily and irrationally turns entirely on classification of the presumptively innocent defendant's wealth, as measured by his ability to post bail. As a matter of equal protection, this Court should deny the state that arbitrary evidentiary boon, and limit the use of jail recordings to their legitimate purpose.

3. Because the evidentiary use of jail security recordings cannot pass even the rational basis test, it surely cannot survive strict scrutiny. Distinctions based on relative wealth well may warrant strict scrutiny in criminal justice, although not more generally. *See Will*, 84 Wis. 2d at 402, 267 N.W.2d at 359. If they do, the evidentiary use against the poor man, but not the rich man, of recordings that the state made to assure jail security (not to gather evidence) is not necessary to serve any compelling government interest. In a country that strives for equal treatment of rich and poor alike in its courts, the state has no compelling interest in acquiring and offering evidence against a poor man that it could not acquire or offer against an equally situated rich man.

IV.

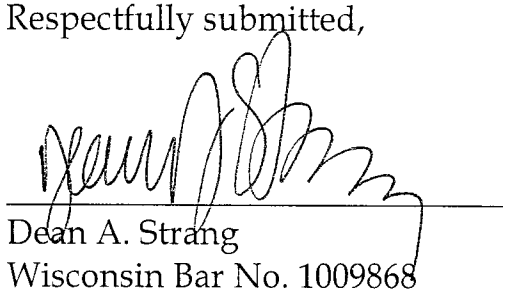
CONCLUSION

The Court should exclude all recorded statements that Steven Avery has made in the Calumet County Jail, and all indirect evidentiary use. Recording may have a security justification in a jail. But here, as a matter of equal protection, surveillance and recording of an inmate's visits and statements must be limited strictly to its justifying purpose. Surveillance and taping may not extend to evidentiary purposes at trial without irrationally – and unconstitutionally – treating the presumptively innocent poor man materially worse than the presumptively innocent rich man who

otherwise is identically situated. Neither federal nor state equal protection guaranties permit the state to enjoy such a marked evidentiary advantage at trial for no reason other than the poverty of the accused.

Dated at Madison, Wisconsin, October 2, 2006.

Respectfully submitted,



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