STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No.: 05-CF-381
Judge: Patrick L. Willis

STEVEN A. AVERY,

Defendant.

STATE'S BRIEF ON THE ADMISSIBILITY OF JAIL RECORDINGS

The defendant has moved in limine to suppress the state's use of inmate jail recordings. The defendant alleges primarily that he is poor and as a result it would be a violation of the Wisconsin and United States Constitutions if the state uses these recordings to convict him of murder. He curiously states: "The motion does not challenge the legality of such recordings, provided the state limits their use to jail security and safety interests that justify making the recordings in the first instance." The defendant does not challenge the legality of the recordings because there is no basis to do so. *See* argument *infra*.

In essence, the defendant is asking the court to protect him from himself. As long as the statements were obtained through valid, lawful means, they are admissible. *State v. Riley*, 2005 WI App 203, 287 Wis. 2d 244, 704 N.W.2d 635. There is nothing to be gained and no societal interest furthered by suppressing evidence; especially on the theory that he is poor and poor people cannot make bail. The suppression of lawfully obtained

evidence on a theory of economics is a novel absurdity. Most, if not all, who are accused of murder, rape, and mutilation fail to make bail. While it is true that few millionaires are charged with murder, many, if not most, do not make bail; especially when they have the criminal history of Steven Avery. The recordings were lawfully obtained; and there is no policy furthered, no evil to punish, and nothing to be gained by suppressing the use of evidence lawfully obtained. There is no basis in law or common sense to grant this motion.

Equally important, the defendant fails to establish that a wrong was committed by law enforcement and that the evidence sought to be suppressed (jail recordings) was derived there from such that suppression of the evidence and testimony related to the evidence is appropriate. Without a wrong and without a connection, suppression is not appropriate. *Hudson v. Michigan,* 547 U.S. ___, 126 S. Ct. 2159, 165 L.Ed.2d 56 (2006).

In *Hudson*, the Supreme Court observed: "exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence. Our cases show that *but-for causality is only a necessary*, not a sufficient, condition for suppression. *Hudson,* 126 S. Ct. at 2164 (emphasis added). Suppression is a remedy that is applied cautiously and with restraint. For example, in *State v. Ward*, 2003 WI 3, 231 Wis. 2d. 723, 604 N.W.2d 517, the Wisconsin Supreme Court in discussing the use of the Exclusionary Rule in the context of the fourth amendment observed:

> ¶ 48 Whether the purpose of the exclusionary rule is solely remedial or also a matter of judicial integrity, the Supreme Court has made clear that for Fourth Amendment purposes "the policies behind the exclusionary rule are not absolute. Rather, they must be evaluated in light of

competing policies." *Stone v. Powell*, 428 U.S. 465, 488 (1976). In *Powell* the Supreme Court said:

> Although our decisions often have alluded to the `imperative of judicial integrity,' they demonstrate the limited role of this justification in the determination whether to apply the rule in a particular context. . . . While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence.

Id. at 485 (internal citation and footnotes omitted).

Ward, 231 Wis. 2d 723, ¶ 48.

If such restraint is urged in cases where there is at best a perceived constitutional wrong, suppression cannot be an appropriate remedy in this case where there is no wrong, especially where the defendant concedes the evidence was lawfully obtained.

I. THE JAIL RECORDINGS ARE NOT AN "INTERCEPTION" OF TELEPHONE CALLS WITHOUT COURT ORDER AND THUS ARE NOT ILLEGAL OR UNLAWFUL UNDER 18 U.S.C. § 2510 (1970), *ET SEQ.* AND WIS. STAT. § 968.27(9).

For purposes of this discussion and the court's determination of the issue, the federal and Wisconsin wire tap laws are identical. Generally speaking, an "interception" encompasses both the monitoring and recording of telephone calls. However, the conduct of the Calumet County Sheriff's Department in monitoring and recording inmate calls does not constitute an interception and, thus, is not prohibited under federal or state law.

An "interception" is predicated upon the use of an "electronic, mechanical, or other device." Generally speaking, a phone system used by a law enforcement agency in the ordinary course of its duties does not constitute an "electronic, mechanical, or other device," an interception does not occur when the agency or its employees use it to

intercept telephone calls on the agency's telephone lines. *See, e.g., In re State Police Litigation,* 888 F. Supp. 1235, 1265 (D. Conn. 1995), *aff'd* 88 F.3d 111 (2nd Cir. 1996) (noting that the recording equipment need not be an integral part of the telephone equipment as long as it is permanently attached to the telephone lines that are designed to operate automatically).

Federal courts have interpreted the prohibition against the unauthorized interception of communications in 18 U.S.C. § 2510(5)(a)(ii) (1993) to be inapplicable to law enforcement's interception of inmate calls at correctional institutions in the ordinary course of their duties. The Seventh Circuit has held that the recording and monitoring of telephone calls utilizing a phone system similar to the system employed by the Calumet County Sheriff's Department fell within the ordinary course of the law enforcement exception. *Amati v. City of Woodstock,* 176 F.3d 952 (7th Cir. 1999). In *Amati*, employees of a municipal police department, along with their friends and families, sued supervisors and the municipality for recording phone calls with the department phone system. The court upheld the appropriateness of this conduct despite the fact that the police chief had begun monitoring and recording telephone calls on a line that had previously been designated as an unrecorded or unmonitored phone line. *Amati*, 176 F.3d at 956. The Wisconsin Supreme Court is in accord, albeit in dictum.

> Police departments routinely record all incoming and outgoing calls in order to make sure their dispatches are accurate, to verify information, and to keep a log of emergency and nonemergency calls, and this practice is not considered illegal interception or electronic surveillance. . . .
>
> The police have a legitimate need to keep records of calls, and to retain them long enough to log the calls, make notes, and to do whatever

> else is necessary to preserve important information and to serve the public. . . . The processing of such information is important because, among other things, it tells the department where and how to allocate scarce resources with which to serve and protect the public.

State v. Rewolinski, 159 Wis. 2d 1, 25 n.9, 464 N.W.2d 401 (1990) (dictum) (citations omitted). *See also, Amati,* 176 F.3d at 954 (recordings may be vital evidence leading to other evidence and also assist law enforcement in evaluating the speed and accuracy of the response to tips, complaints, and call for both emergency and nonemergency assistance.)

The *Amati* decision is consistent with previous Seventh Circuit decisions that have upheld the monitoring of inmate telephone calls by prison authorities when they are conducted as part of an institutionalized, ongoing policy at the prison. *See, e.g., United State v. Feeks,* 879 F.2d 1562 (7th Cir. 1989); and *United States v. Sababu,* 891 F.2d 1308 (7th Cir. 1989). *See also* dictum in support *In re the Interest of J.A.L.,* 162 Wis. 2d 940, 971 n.8, 471 N.W.2d 493 (1991) (noting case law and other jurisdictions that have held monitoring of telephone calls in the jailhouse setting).

II. THE INMATE JAIL RECORDINGS ARE ALSO ADMISSIBLE BECAUSE THE DEFENDANT IMPLIEDLY CONSENTED TO THE MONITORING AND RECORDING OF HIS CALLS.

The federal and state wiretap statutes note that there is no violation of federal or state wiretap provisions when one party has given prior consent to the interception. Although the state contends that these are not "interceptions," the theory of one-party consent recordings is, nonetheless, useful and applicable. One-party consent recordings,

as conceded by the defense in its brief, are admissible in Wisconsin. Wis. Stat. § 968.31(2)(b).

In the case at bar, the defendant has impliedly, if not explicitly, granted consent for the monitoring and recording of his telephone calls. Consent is recognized in Wisconsin as a lawful basis for the admissibility of these recordings. *State v. Riley*, 2005 WI App 203, 287 Wis. 2d 244, 704 N.W.2d 635.

In *Riley*, the court held:

> that so long as an inmate is given meaningful notice that his or her telephone calls over institutional phones are subject to surveillance, his or her decision to engage in conversations over those phones constitutes implied consent to such surveillance. Meaningful notice may include a signed acknowledgement form, an informational handbook or orientation session, a monitoring notice posted by the outbound telephone, or a recorded warning that is heard by the inmate through the telephone receiver, prior to his or her making the outbound telephone call.

Id. at ¶ 13.

In the case at bar, the defendant received written notice of the policy to record his telephone calls when he received the *Calumet County Rules and Regulations Handbook*, and every time he used the phone he received a recorded announcement warning him that call was actually being recorded.[1]

On page 10 under the section of *Handbook* entitled **Telephone Calls,** ¶2 states: "All calls will be made from the telephone inside the Huber dorm or secure cell block. **All phone lines are recorded!**" A copy of the inmate rules and regulations is attached.

---

[1] In *Riley,* the defendant was only advised the calls might be recorded and that was sufficient to permit the use of the recordings.

In addition, the defendant signed an acknowledgement that he received a copy of the *Handbook*. A copy of the acknowledgement is attached. Furthermore, each time the defendant makes a call, he is advised by recorded message that the call is subject to monitoring and recording. Each time the defendant makes a call he hears:

> This is a Public Communications Services collect call from <inmate name>, an inmate in the Calumet County Jail. The use of 3 way or call waiting will disconnect the call. This call will be monitored and recorded. To accept this call dial 5 now. To hear the cost of this call dial 8 now. To block any future collect calls dial 77. To decline this call hang up.

Every nine minutes during a conversation[2] this message is heard: "This call is from Calumet County Jail. This call may be monitored or recorded." There can be no question that the defendant was fully apprised and aware the calls were being recorded. Although there is some split of authority on the admissibility of the tapes under the applied consent theory, the greater weight of federal case law supports this theory as well.

The general rule in the federal courts appears to be that "consent to interception of a telephone call may be inferred from knowledge that the call is being monitored." *United States v. Gomez,* 900 F.2d 43, 44 (5th Cir. 1990). This reasoning has been applied in a variety of situations. For instance, in *Griggs-Ryan v. Smith,* 904 F.2d 112 (1st Cir. 1990), the court inferred that the defendant knowingly agreed to the tape recording of his telephone call based upon evidence that he had repeatedly been advised that all incoming telephone calls were recorded. In the words of the court, "his consent, albeit not explicit, was manifest. No more was required." *Id.* at 118.

---

[2] Per October 16, 2006, e-mail communication between Toni Long, Value Added Communications Service Manager, and Investigator Wiegert.

In *United States v. Amen,* 831 F.2d 373 (2nd Cir. 1987), the court addressed the issue within the context of the monitoring of prison inmates' telephone calls. In *Amen,* the court found that inmates impliedly consented to the monitoring and taping of their telephone calls. In doing so, the court relied upon the following facts:

a) notice of the monitoring policy was published in the Code of Federal Regulations;

b) upon first arriving at the penitentiary, and after absences of nine or more months, all inmates had to attend a lecture in which the monitoring and taping policy was discussed;

c) every inmate received a handbook which explained the monitoring and taping procedures, and

d) every telephone had placed on it, in English and Spanish, a notice of monitoring and taping procedures.

Thus, the court had no trouble finding that the defendants consented to the taping.

On the other hand, some courts have been somewhat reticent in accepting the implied consent theory. In *United States v. Feeks*, 879 F.2d 1562 (7th Cir. 1989), the court found the rule in *Amen* "troubling." *Id.* at 1565. However, the court did not reach the issue of whether consent occurred in *Feeks*, but nonetheless permitted the use of the recordings under the theory that no interception had occurred. At least one other federal district court has agreed and found the "implied consent" theory troubling. *Crooker v. U.S. Dept. of Justice,* 497 F. Supp. 500 (D. Conn. 1980).

It is important to note, however, the cases are nearly unanimous in deciding that the recording of inmate telephone calls when done pursuant to an institutionalized ongoing policy fall under the 18 U.S.C. § 2510(5)(a)(ii) exception.

Moreover, the Legislature has modified the one-party consent provision of the statute on at least three occasions in the last twenty years; and on each occasion permitted greater use of one-party consent recordings. Such recordings are admissible in virtually all felony cases. This court should determine that the jail recordings are admissible under either theory or both.

III. THE INMATE JAIL RECORDINGS ARE ADMISSIBLE BECAUSE NO CONSTITUTIONAL RIGHT WAS VIOLATED. THERE IS NO APPLICABLE EQUAL PROTECTION RIGHT BASED ON INDIGENCY IN THIS CONTEXT.

The defense argument, while novel, is nonetheless baseless. In essence, defendant Avery argues that if he had more money he would have posted bail; and because he is indigent these recordings are inadmissible to any and all past crimes committed by him, especially murder. He makes this argument without legal support. No Wisconsin or federal court has applied the Equal Protection Clause in the manner requested by the defendant. The reasons are at least three fold why no court has ever applied the analysis in the context requested by the defendant: 1) it is not really an equal protection challenge; 2) this defendant is not treated any different than any other person who submitted to the bail process and who did not post bail; and 3) the inmate jail tapes are simply a collateral consequence of not posting bail.

A. This is not really an equal protection challenge.

It is really a challenge to the decision of the court relative to the setting of bail. This is a discretionary decision. The defendant is, in effect, claiming that the court

erroneously exercised its discretion when bail was set in an amount that he could not post. Yet the defendant has not demonstrated the court erroneously exercised that discretion. The defendant would have the court believe that his bail situation is based solely on a lack of resources. On the contrary, his bail was set by the court based on the considerations of ch. 969, namely the severity of the offenses, the need to protect the public, and the risk of flight associated with such significant penalties. *See generally* Wis. Stat. § 969.01(4). The defense argument belies the fact that the defendant has a significant criminal history, thus enhancing the probability that a high bail would be set. It further ignores the fact that the crimes for which he stands accused are among the most heinous in law and nature. Again, defendant's indigency had little to do with his failure to post bail and his incarceration. As this court is well aware, just because someone is wealthy, it does not mean they will have bail set at an amount that they could meet. Wealthy individuals are sometimes held without bail or have bail set beyond their ability to post.

The defendant argues that the recordings should be inadmissible because he is poor and cannot post bail. He argues that a wealthier man would not have been in jail and thus would not have had his conversations recorded. Nothing could be more speculative and further from the truth or common sense. This statement is suspect on numerous grounds. A wealthy man would presumably have more resources available to him and could be considered a greater flight risk than a poor man. Thus a wealthy man may very well have a higher bail set to insure his continued appearance. Moreover as just noted, the wealthy man is not guaranteed bail in our system.

B. This defendant is not treated any different than any other person who submitted to the bail process and who did not post bail.

It is important to point out the defendant concedes that wealth has not been determined to be a "suspect class" and as such the "rational basis" test applies.[3] Next, he says that he "does not quarrel with a jail's 'need for safety and security' as justifying the purpose of taping telephone conversations." Defendant's brief pp. 6-7. Since the defendant concedes there is a rational basis for the taping, he concedes the argument as well for this is all that equal protection under the law requires! The defendant has not been treated differently under the law than anyone else in his shoes.

The defendant was treated like any other person who came before this court for purposes of setting bail, and is being treated like everyone else in the Calumet County Jail, regardless of his economic status. All inmates have their calls recorded. He is not being arbitrarily discriminated against. If the state receives a "windfall," it is because the defendant chooses to speak when other similarly economically disadvantaged inmates do not. Any windfall the state receives is based upon Avery's choice to make inculpatory statements knowing they are being recorded and not because he is poor. Other inmates in the jail will and probably have made the decision not to make statements that might be used against them. The defendant is not forced to make statements; he does so voluntarily.

It bears mentioning that the defendant offers no legal support for this novel interpretation of the Equal Protection Clause he asks the court to accept. The cases he

---

[3] Defendant's brief, p. 6. The state does not believe this is an Equal Protection issue.

cites do not hold that someone detained because of an inability to post bail is denied equal protection of the law when it comes to the admissibility of evidence. Moreover, with respect to the presumption of innocence, the state simply observes that the defendant fails to explain how the presumption is implicated or violated by the introduction of his jail conversations at trial. All defendants are presumed innocent and nothing about being held in the jail and having his calls recorded erodes that presumption given the instructions routinely provided to *petit juries*.

A somewhat similar argument was raised and rejected in *State v. Kubart*, 70 Wis. 2d 94, 233 N.W.2d 404 (1975). In *Kubart*, the defendant claimed an Equal Protection violation because he was held in the county jail for a period of four days prior to transfer to the state reformatory. He claimed this constituted an additional four-day imposition of sentence, because, were he a wealthy defendant, he might have been able to be enlarged on bail until such time as the state reformatory was able to receive him. He contends that a distinction is made between wealthy defendants and indigent ones and, therefore, he was denied equal protection of the law. The court rejected his claim. *Kubart,* 70 Wis. 2d at 104-06. The court should reject this claim as well.

C. The inmate jail tapes are simply a collateral consequence of not posting bail.

The real problem with defendant's argument is found in the fact that his economic status has little to do with the predicament in which he now finds himself. The defendant's legal predicament stems from stubbornness, a sense of defiance, and a lack of common sense and self discipline. It is not a matter of economics or even intelligence for

that matter. There are many inmates with less money and less intelligence, who have more common sense and self discipline than defendant Avery. When one knows he is being recorded, the prudent man is considerably more circumspect about the content of his conversations. If the court were to accept defendant's argument, the court might as well accept the fact that there is an equal protection argument available to a defendant because he does not have common sense or is not as smart as some other inmate defendants, or that he is not as disciplined as other inmates and therefore he should not be "punished" by letting the state introduce these recordings. Perhaps a smarter, more disciplined inmate would refrain from providing the state with direct and indirect evidence of his guilt. It is not the court's job nor does the constitution require the court to protect the defendant from himself.

Finally, it is worth mentioning that the defendant's inability to post bail is, in a small degree, a matter of choice. The defendant received a reported $400,000 settlement for his wrongful conviction case against Manitowoc County. Assuming, a 40 percent fee for counsel, that left the defendant with disposable income that could have been applied to the bail rather than attorneys fees. The defendant's family could have mortgaged the business and/or their properties to come up with the cash bail or a significant portion of it. Although this is somewhat speculative,[4] it does demonstrate that this defendant did have access to resources many other inmates did not have. The defendant made a choice on

[4] It is certainly no more speculative than his argument.

how the money was to be spent, just like he made the choice to talk on the phone when he knew he was being recorded.

CONCLUSION

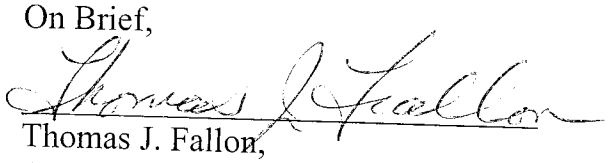
For the above reasons, the state respectfully requests the court to find that the inmate jail recordings are admissible in this case.

Dated this 27th day of October, 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

Calumet County Sheriff's Department

INMATE INFORMATION

✖ Inmate Property Inventory Locker 22

Coins $ None

Cash $ None

Checks $ None

TOTAL $ None

Clothes

- [1] Jacket Size XL Blue/Gray/Tan Plaid Burke Apparel Brand
- [1] Shirt Black T Shirt Size XL Fruit of the Loom Brand
- [1] Trousers Blue Denim Size 36x30 Rustler Brand
- [ ] Sweater
- [ ] Scarf
- [ ] Belt
- [1] Footwear Black Tennis Shoes Athletic Works Brand Size 10W
- [ ] Gloves
- [ ] Headgear
- [ ]
- [ ]

Jewelry

- [ ] Watch
- [ ] Rings
- [ ] Earrings
- [ ] Necklace
- [ ] Bracelette
- [ ]
- [ ]
- [ ]
- [ ]
- [ ]

Miscellaneous Personal Property

- [ ] Comb
- [ ] Billfold
- [ ] Glasses
- [ ] Purse
- [ ] Lighter
- [ ] Keys
- [ ] Cigerettes
- [ ] Cell Phone
- [ ]
- [ ]
- [ ]

✖ IN

The above is a correct listing of my property received by the Calumet County Jail.

Date 1/09/05 Inmate Signature X Steven Avery Correctional Officer Signature

✖ MAIL INFORMATION

I hereby authoirze the Sheriff, his jailers or deputies to open and inspect all mail matter or packages which may be addressed to me as long as I am a prisoner in the Calumet County Jail.

Date 1/09/05 Inmate Signature Steven Avery

✖ JAIL RULES/HUBER/WORK RELEASE RULES

I, Steven Allan Avery certify that I have been given a Calumet County Jail Rules and Regulations Handbook. I understand that I may be disciplined for any violation of them.

Date 1/09/05 Inmate Signature X Steven Avery Correctional Officer Signature

✖ OUT

The hereby acknowledge receipt of the above property minus what monies I authorized taken out.

Date _____ Inmate Signature _____ Correctional Officer Signature _____

40JL10 2/05