STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
NOV 7 2006
CLERK OF CIRCUIT COURT

DEFENDANT'S REPLY SUPPORTING EXCLUSION OF JAIL STATEMENTS AND TAPES

I.

INTRODUCTION

The state expends most of its effort persuading the Court on a point that Steven Avery conceded. It expends but spare effort addressing the point that Avery made. That point is simple and remains sound: Poverty is not an acceptable criterion on which to justify grossly unequal and intrusive evidence-gathering. As a matter of equal protection, then, the state's program of taping the conversations of presumptively innocent pretrial detainees must remain limited to its justifying purpose, jail security.

II.

REPLY

While the state went to some trouble to secure a copy of the Calumet County Jail rules and Avery's written acknowledgment that he received them, the state's failure to find something else is more telling. The state did not find one wealthy man in the Calumet County Jail awaiting trial. It will not find one.

And that, not the sheriff's taping for security reasons, is the factual crux of the constitutional problem. The state may be right when it contends that "the inmate jail tapes are simply a collateral consequence of not posting bail." STATE'S BRIEF ON THE ADMISSIBILITY OF JAIL RECORDINGS at 9 (October 27, 2006). But that begs the question. Avery is not a person who chose to forego posting bail (whatever that person's equal protection claim might be); he is a person who by reason of insufficient money cannot post bail. The question then is whether the equal protection guaranties of both state and federal constitutions permit the state an evidentiary advantage against the poor man – and only against the poor man – as a "collateral consequence" of his poverty. Neither equal protection clause permits that. But Avery replies first to the state's arguments, which in the main do not confront the right question.

A. *Privacy Concerns are Not Equal Protection Concerns.* Initially, the state asserts implicitly that the conceded legality of taping for one purpose (jail security) as measured by one constitutional guaranty (against unreasonable search and seizure) necessarily allows the use of tapes for other purposes (evidence of past wrongs) when the gauge is a different constitutional guaranty (equal protection). The state focuses on the Fourth Amendment and privacy and assumes that equal protection adds nothing more. Every case the state cites either is but a statutory interpretation of Wisconsin's electronic surveillance law, *see State v. Riley*, 287 Wis. 2d 244, 704 N.W.2d 635 (Ct. App. 2005), or a similar interpretation of the federal electronic surveillance statute, *see Amati v. City of Woodstock*, 176 F.3d 952 (7th Cir. 1999) (civil action by police department employees); *United States v. Gomez*, 900 F.2d 43, 44-45 (5th Cir. 1990) (holding that the government failed to prove consent to police monitoring of cooperator's phone call); *United States v. Feekes*, 879 F.2d 1562, 1565-66 (7th Cir. 1989); *Griggs-Ryan v. Smith*, 904 F.2d 112 (1st Cir. 1990), or a Fourth Amendment decision. *State v. Rewolinski*, 159 Wis. 2d 1, 16-23, 464 N.W.2d 401, 407-10 (1990); *In the Interest of J.A.L.*, 162 Wis. 2d 940, 971 n.8, 471 N.W.2d 493, 506 n.8 (1991) (dictum); *United States v. Sababu*, 891 F.2d 1308, 1328-30 (7th Cir. 1989); *United States v. Amen*, 831 F.2d 373, 379-80 (2d Cir. 1987) (also interpreting Title III exception). Each of these cases the state cites at 4-8 of its brief.

Yet Avery tendered no Fourth Amendment claim as to taping for purposes of jail security. He raised no claim under Wisconsin's electronic surveillance statute, either. The state's discussion is beside the point, then.

With the state's misplaced interest in the Fourth Amendment comes, as a natural corollary, its assessment that the exclusionary rule ought not apply here. True, the exclusionary rule does not apply, but again that is beside the point. Courts developed the exclusionary rule to reduce the incidence of extrajudicial Fourth Amendment (and later Fifth Amendment and Sixth Amendment right to counsel) violations by providing law enforcement officers an incentive not to violate constitutional rules. *See generally Elkins v. United States*, 364 U.S. 206, 217 (1960); *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 796 (1949); Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-89 & nn. 48 & 49 (1964).

Other constitutional provisions, though, sometimes require directly that a court admit evidence under given circumstances. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 297-303 (1973) (due process and right to confrontation may override state evidentiary rules and require admission of reliable evidence); *Brooks v. Tennessee*, 406 U.S. 605, 607-13 (1972) (due process and right to remain silent override state rule that accused must testify first or not at all). Or, more importantly in this

case, they require that a court exclude evidence under some circumstances. *See, e.g., Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 126 S. Ct. 2266 (2006) (confrontation clause of Sixth Amendment ordinarily requires exclusion of testimonial hearsay, unless the declarant testifies). Courts never have viewed these latter situations as applications of the exclusionary rule. Rather, they are direct applications of the constitutional provision itself to judicial proceedings.

That is exactly the situation here. Avery's argument concerns not law enforcement actions outside the judiciary's purview, where Fourth Amendment violations arise, but admissibility of certain intercepted statements at trial. The equal protection clause of the Fourteenth Amendment, and its Wisconsin Constitutional analog, bear on that admissibility question. They bear directly on the question, not through medium of a judicially-created exclusionary rule designed to deter state misconduct outside the courtroom. So Avery turns now to the argument he made, leaving behind the arguments he did not make.

B. *An Equal Protection Challenge After All.* To concede that telephone calls may be taped for one purpose is not to concede that they then may be used for every other purpose. And to concede that taping for one specific purpose does not violate the Fourth Amendment is not to concede that it satisfies every other constitutional requirement, especially when the state uses tapes for other

purposes entirely. *Compare City of Indianapolis v. Edmond*, 531 U.S. 32, 40-44 (2000) (roadblocks intended for general crime control interest in stopping drug traffic violated Fourth Amendment; distinguishing allowable roadblocks designed for more specific purposes of highway safety and border policing); *Ferguson v. City of Charleston*, 532 U.S. 67, 74-84 (2001) (distinguishing public hospital's urine screens of pregnant women from permissible "special needs" searches; the hospital searches had general law enforcement purpose and violated Fourth Amendment).

With that understanding, Avery grounds his argument in the equal protection assurances of the Fourteenth Amendment to the United States Constitution and Article I, § 1 of the Wisconsin Constitution, not in the Fourth Amendment. He then challenges only the evidentiary use the state wishes to make of tapes that it purportedly collected for another reason altogether. Under glare not of the Fourth Amendment but of the equal protection guaranties that Avery invokes, the state offers no rational reason for admissibility or evidentiary use of the intercepted statements — let alone a compelling government interest.

Instead, the state scoffs that Avery seeks suppression of evidence "on a theory of economics," STATE'S BRIEF at 2, and then argues that Avery could use "common sense" and "self discipline" (STATE'S BRIEF at 13), apparently by making

no telephone calls and declining all visits from family and friends for the nearly year and one-half that he will await trial in jail. Both state arguments collapse.*

1. An assertion that the criminal justice system ought treat rich and poor alike is neither a "theory of economics" nor "a novel absurdity," as the sovereign suggests. STATE'S BRIEF at 2. The state's argument might have been pitch-perfect in an era of powder wigs and privilege. But in due course the 17th century yielded to the 21st, and American courts today are stubbornly egalitarian at least in their aspirations. Half a century ago, the United States Supreme Court struck down a system that denied a poor man an appeal it permitted his wealthier counterpart. *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956). As the *Griffin* court explained, "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." *Id.* at 17.

Here in Wisconsin, the courts applied that principle three decades ago to end the practice of discriminating in sentencing between the rich man enlarged on bail and the identically situated poor man who could not make bail. Although their sentences might have appeared identical, the poor man in fact served more

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* The state also contends in several places that Avery's motion really is a disguised objection to current bail terms. It is not. Defense counsel know how to request a modification of bail, and have made such a request in this case. This is not such a motion. Recasting the motion as something it is not would be a risky way to avoid the merits of the motion as it is.

time in jail than the rich, because his pretrial incarceration for want of bail money earned him no sentence credit. The Wisconsin Supreme Court stopped that practice as a matter of equal protection. *Klimas v. State*, 75 Wis. 2d 244, 248-49, 249 N.W.2d 285, 287-88 (1977) ("The failure to credit pre-trial or pre-sentence time in custody as the result of indigency means that persons similarly situated except for financial means are subject to different periods of confinement for the same crime"); *Byrd v. State*, 65 Wis. 2d 415, 424-25, 222 N.W.2d 696, 701-02 (1974); *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 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").

If the poor man's pretrial incarceration may place him in no worse position at sentencing than the equally culpable rich man, then surely it is no novelty to propose that the poor man's pretrial incarceration may place him in no worse position at the trial itself. That is all Avery suggests. His narrow and modest contention, again, is only that the state may not make *evidentiary* use at trial of his recorded statements where: (a) only the financial inability of a presumptively innocent man to make bail afforded the state an opportunity to monitor his conversations; (b) the state recorded his words for the unrelated purpose of jail security; (c) the man completed his alleged crimes before he went to jail; and (d) the

trial concerns no crime allegedly committed or continued in the jail. Avery meets each condition. He is not in jail pursuant to any conviction, probation or parole hold, or prior sentence; only his indigency keeps him there. Jail security is the only justification for taping him. His alleged crimes all were completed before the state arrested him. And he faces no charge for any act in jail.

2. The state's final argument, that Avery simply could forego all contact with friends and family while he awaits trial as a presumptively innocent man, at one level is correct. Avery could do that, in theory. If his psyche and emotional health permitted, he could endure 15 months caged in a jail without any opportunity to hear the love and encouragement of parents, siblings, and friends.

Such a heavy additional tax the state would lay on poverty, though. The state does not claim here that evidence-gathering provides the justification for taping in jail. To Avery's knowledge, neither the federal government nor any state government ever has made that argument in defending a program of intercepting jail inmates' conversations with friends and family. Always the argument is that jail security justifies the intrusion. Further, the courts that are skeptical of government claims that inmates impliedly consent to such taping are right to be skeptical: inmates have no other way to communicate with family and friends but by the telephones and visitation procedures that a jail provides, so the real choice is either to submit to surveillance or to forego ordinary human communication altogether.

At best, the detainee's decision under those circumstances to call his mother or see his wife seems acquiescence to big brother's habit of listening in, not free and voluntary consent.

Having won the courts' approval for this surveillance on one theory, the state now seeks to exploit its advantage by putting tapes to a use that never justified making them in the first place. And again, the state contends that the defendant has only to give up all succor of family and friends while he sits presumptively innocent in jail, if he objects to the evidentiary use of his conversations with intimates.

This state proposal is less a persuasive argument against an equal protection claim than a concession of that claim. The rich man would post bail under identical circumstances and enjoy the pleasures of his hearth while awaiting trial, free of government surveillance. The poor man not only misses the comforts of home, but he must surrender the very support of family and friends that he needs most during his time of incarceration for a crime he did not commit – exactly what the presumption of innocence dictates we assume in application. Nothing but relative prosperity separates the vastly different demands placed upon the two men. If an equal protection violation does not arise from this deliberately inflicted disadvantage under which the poorer man must suffer in silence and solitude, shunning his closest family and friends, to achieve parity in the state's ability to use

his words against him at trial, it is hard to imagine what burden the state might place on a man, by dint of his poverty, that would violate equal protection.

Indeed, the state's suggestion that isolation from family and friends for over a year is the "common sense" solution threatens the unintended consequence that unattainable bail terms would become punitive, rather than just protective of the public's safety and the court's ability to assure the accused's appearance at trial. Bail conditions may not be punitive. *United States v. Salerno*, 481 U.S. 739, 746-47 (1987); WIS. CONST. Art. I, § 8(2) (monetary conditions of bail allowable only to assure defendant's appearance in court). This is exactly the constitutional violation that the Court would risk were it to grant the state's wish and reject Avery's limited equal protection claim.

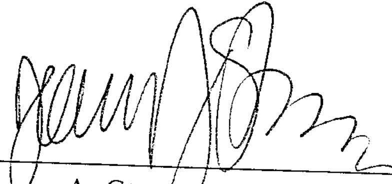
III.

CONCLUSION

At trial, the Court should disallow all recorded statements that Steven Avery has made in the Calumet County Jail, and all evidentiary use of them. Evidentiary use of these statements — as distinct from the taping of them — would deny equal protection of the law. The complete isolation of a presumptively innocent man from family and friends is not a permissible price of poverty in courts consecrated to equal justice.

Dated at Madison, Wisconsin, November 6, 2006.

Respectfully submitted,



Dean A. Strang
Wisconsin Bar No. 1009868
Counsel for Steven A. Avery

HURLEY, BURISH & STANTON, S.C.
10 East Doty Street
Suite 320
Madison, Wisconsin 53703
[608] 257-0945
[608] 257-5764 facsimile

Jerome F. Buting

Jerome F. Buting
Wisconsin Bar No. 1002856
Counsel for Steven A. Avery

BUTING & WILLIAMS, S.C.
400 Executive Drive
Suite 205
Brookfield, Wisconsin 53005
[262] 821-0999
[262] 821-5599

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