STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S MOTION CONCERNING COURTROOM SECURITY

Steven A. Avery, by counsel, now moves the Court for an order governing courtroom security. In the end that is the Court's province, not a sheriff's. Mr. Avery asks that the Court's order address the following:

1. *Stun Belt.* In recent court appearances, Mr. Avery has been fitted with a security device known colloquially as a "stun belt." It is a leather or elastic strap that fits around the midsection, loosely in the manner of a belt, and that delivers a 50,000 volt shock for eight seconds when activated by a remote, hand-held device in the possession of a sheriff's deputy. *Gonzalez v. Pliler*, 341 F.3d 897, 899 (9th Cir. 2003); *Caraig v. Yates*, No. CIV 01-2066 slip op. at 3, 8 (E.D. Cal. May 17, 2006) (2006 WL 1350348). When activated, by electrocution the device immobilizes the

person wearing the belt and creates the risk that the person will defecate or urinate on himself. *United States v. Durham*, 287 F.3d 1297, 1305 (11th Cir. 2002); *Gonzalez v. Pliler*, 341 F.3d at 899; *Caraig v. Yates*, slip op. at 3, 8. The term immobilizes may put it too mildly. As the Indiana Supreme Court wrote, "The belt's electrical emission knocks down most of its victims, causing them to shake uncontrollably and remain incapacitated for up to forty-five minutes." *Wrinkles v. State*, 749 N.E.2d 1179, 1194 (Ind. 2001). The belt also obviously presents the same risk to anyone in physical contact with that person who is not separately grounded. Cases report accidental activation of such devices. *Gonzalez v. Pliler*, 341 F.3d 897, 899 (9th Cir. 2003); *see also Chavez v. Cockrell*, 310 F.3d 805, 807 (5th Cir. 2002); *State v. Filiaggi*, 86 Ohio St.3d 230, 233, 714 N.E.2d 867, 872 (1999) (both detailing inadvertent activations). Stun belts also are potentially lethal: a similar device has killed at least one person, *see* Shelley A. Nieto Dahlberg, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups*, 30 ST. MARY'S L.J. 239, 251-52, 276 (1998), and the stun belt can cause fibrillation or an irregular heartbeat. *Id.* at 251-52; *Gonzalez v. Pliler*, 341 F.3d at 899. Given the risk of electrocution to a person having incidental physical contact with the defendant, such as defense counsel or a deputy, the belt is a danger not just to the defendant. And activation of a stun belt in the jury's presence would necessitate a mistrial, in all likelihood.

Activation of the stun belt also impairs a defendant's ability to participate in his defense and consult with counsel, and well may chill the effective assistance of counsel and affect other Sixth and Fourteenth Amendment rights (such as the right to testify) to the extent that a defendant fears a shock. *Hymon v. State*, 121 Nev. 200, 111 P.3d 1092, 1098-99 (2005); *Wrinkles v. State*, 749 N.E.2d at 1194. For these reasons in part, the Indiana Supreme Court has adopted a blanket ban on stun belts in Indiana courtrooms. *Wrinkles*, 749 N.E.2d at 1194-95.

This Court need not necessarily go that far. Still, a court controls the use of a stun belt in a courtroom, not a sheriff or United States Marshal. *Durham*, 287 F.3d at 1303-04. As with any other restraint, such as manacles or shackles, unnecessary use of a stun belt denies the accused due process. *People v. Allen*, 222 Ill. 2d 340, 305 Ill. Dec. 544, 549, 856 N.E.2d 349, 354 (2006); *see also Illinois v. Allen*, 397 U.S. 337 (1970) (seminal case on use of restraints in courtroom).

Before permitting the use of such a device, a court must make factual findings specific to an individual case. At a hearing, the state must show "manifest need for the restraint." *People v. Allen*, 305 Ill. Dec. at 548, 856 N.E.2d at 353. Although Wisconsin has not addressed stun belts in specific, this state endorses the same basic framework for a decision on the use of any physical restraint during a jury trial. First, the "presiding judge must perform an independent evaluation of the need to

restrain the party for purposes of maintaining security and order in the courtroom." *State v. Russ*, 289 Wis. 2d 65, 80, 709 N.W.2d 483, 490 (Ct. App. 2005). Second, where the judge concludes restraints are necessary, he must "take steps to limit their prejudicial effect, including a consideration of less restrictive alternatives." *Russ*, 289 Wis. 2d at 80, 709 N.W.2d at 490.

In *Allen*, the Illinois Supreme Court last year enumerated factors a court must consider as to a stun belt. These include: (1) the seriousness of the present charge, (2) the defendant's temperament and character, (3) the defendant's age and physical characteristics, (4) the defendant's past record, (5) any past escapes or attempted escapes by the defendant, (6) evidence of a present plan of escape by the defendant, (7) any threats by the defendant to harm others or create a disturbance, (8) evidence of self-destructive tendencies of the defendant, (9) the risk of mob violence or of attempted revenge by others, (10) the possibility of rescue attempts by other offenders still at large, (11) the size and mood of the audience, (12) the nature and physical security of the courtroom, and (13) the adequacy and availability of alternative remedies. *Id.* at 548, 856 N.E.2d at 353.

Factors that in theory might warrant a stun belt in another case are not present here, in the main. Only one or at most two factors weigh against Mr. Avery: the seriousness of the charge, and perhaps his past record (which includes one felony

that involved a gun). Steven Avery today has a mild temperament and is not excitable. He is 5'6", 43 years old, and not especially muscular. He never has attempted escape and counsel knows of no information that he plans an escape now. At least since the 1990's, he has made no known threats to harm others. He neither has created any courtroom disturbance nor threatened one; at all times in court, he has conducted himself with appropriate decorum. There are no known self-destructive tendencies. Mr. Avery is the sole defendant in this case, so there is no opportunity for collusion with co-defendants in court and no possibility of hostility among co-defendants. His family members also have been well-behaved in court, consistently, and likewise do not belong to any gang or anti-government group; there is no indication they plan a rescue attempt. For their part, the Halbach family members consistently have been well-behaved and respectful in court, of everyone. They, too, appear unaffiliated with any gang or anti-government group. To counsel's knowledge, there have been no confrontations between the Halbach and Avery families or respective supporters. Finally, the Calumet County Sheriff's Department apparently intends to employ a magnetometer and hand-screening of carried items at the courtroom entrance. This is a measure to which Mr. Avery does not object, provided that it is not apparent to jurors and provided further that it does not hinder the coming and going of counsel or allow examination of lawyers' work

product or privileged communications. For that matter, Mr. Avery's seat in court probably is no more than 50 feet from the jail down a secure hallway, so he could be hustled out if he either presented a threat or became the object of a threat.

On balance, then, there is no justification for a stun belt or other restraint while Mr. Avery is in court. The Court would deny him due process and risk interference with his Sixth Amendment rights were it to allow use of such a device during trial.

2. *Number of Deputies.* While Mr. Avery recognizes the need for appropriate courtroom security, for all the same reasons he discusses above, the need is not particularly elevated in this case. The Court therefore should limit uniformed deputies to the normal complement of two, and they should be positioned well away from the defense table in the usual manner of bailiffs. Mr. Avery also reiterates the earlier understanding reached with the state and the Court that members of the Manitowoc County Sheriff's Department will have no role involving contact with members of the jury.

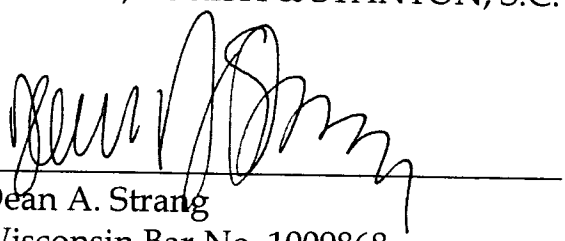
WHEREFOR, Steven Avery asks the Court to enter orders governing courtroom security as described above.

Dated at Madison, Wisconsin, January 25, 2007.

Respectfully submitted,

STEVEN A. AVERY, *Defendant*

HURLEY, BURISH & STANTON, S.C.



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