

MANITOWOC COUNTY  
STATE OF WISCONSIN  
**FILED**

JAN 18 2007

**CLERK OF CIRCUIT COURT**

**HURLEY, BURISH & STANTON, S.C.**  
ATTORNEYS AT LAW

PO Box 1528  
MADISON, WI 53701-1528

**UNDER SEAL**  
*STATE OF WISCONSIN v. STEVEN AVERY*  
Case No. 05-CF-381

Defendant's Motion to Exclude Computer-  
Generated Animations

Unsealed per  
order dated 03-23-07



As grounds for this motion, Mr. Avery explains:

1. There are two computer-generated animations at issue, both of which Mr. Avery believes the state wishes to offer as “virtual tours” of the areas they depict. One such animation Mr. Avery’s lawyers have seen, the other they have not. That second animation (the FBI animation) should be excluded for the additional reason, then, that its late production violates the December 15, 2006 general discovery deadline that this Court’s pretrial scheduling order set, without good cause. Indeed, the first animation (the Wisconsin State Patrol animation) also was tardy: prosecutors first gave the defense slides of the presentation on January 4, 2007, and the defense still has not seen the entire animated presentation.

2. The two animations are –

A. An animated, computer-generated depiction of Steven Avery’s trailer home, the surrounding property (including garage, burn pit, burn barrels, and driveway) and much of the Avery Auto Salvage property generally. On information and belief, the Wisconsin State Police produced this animation. The state has showed this to Mr. Avery’s counsel, and provided paper copies of the “slides,” photographs, and GPS data that contributed to its production. For ease, Mr. Avery refers to this animation as the “Avery property” animation.

B. An animated, computer-generated depiction of Teresa Halbach's Toyota RAV-4. On information and belief, the FBI is producing this animation. To date, the state has not offered Mr. Avery's counsel a chance to see any part of this project or the product which, for ease, Mr. Avery describes here as the "Toyota" animation.

3. The Toyota RAV-4 has been in exclusive state custody, of course, since November 5, 2005. The state also has had photographic and video depictions of the Toyota *in situ* at the Avery property since November 5, 2005, including aerial video. So there is no good cause for failing to produce an intended animation of that Toyota until well after the general discovery deadline that the Court set has passed. Likewise, the state took the photographs, measurements, and GPS locations for the Avery property in November 2005, at least in the main. The tardiness of producing slides for that animation, too, does not appear to have good cause.

4. The Wisconsin State Police animation of the Avery property is materially misleading because of the essential details it omits, and some that it adds. In effect, that animation materially alters the site of the "virtual tour," to the state's advantage and Mr. Avery's disadvantage. Those alterations, omissions and additions include, by way of illustration, but are not limited to —

A. The rear door on Mr. Avery's trailer, to the west, in fact was damaged by someone's unexplained entry at least by November 5, 2005. It no longer could be locked closed in the conventional way.

B. The clutter and objects other than furniture as a rule do not appear in the animation. A violent crime could not have happened in the confined spaces in Mr. Avery's trailer with the actual number of objects and clutter as easily as the clean animation suggests, if at all, so it is unfairly prejudicial to Mr. Avery.

C. The immaculate look of the detached garage near Mr. Avery's home again is in stark contrast to the highly cluttered reality, again to his particular prejudice. Old parts to cars and other equipment, tools, and assorted junk in fact filled much of that garage. It was for that reason not a likely place to take Teresa Halbach or to complete aspects of the charged crimes. The animation misleads, to Mr. Avery's unfair detriment.

D. The animation of the Avery property does not accurately depict the three-dimensional quality of the landscape and burn pit, especially on or about October 31, 2005. Depth, rises, and obstruction may be important factors for the jury to consider when weighing evidence of cremation and bone fragment recovery. The animation would mislead jurors on those important factors of dimension.

E. The Avery property animation already has editorial additions, marking where certain items of evidence allegedly were discovered. For example, Avery's trailer is labeled. More disturbingly, slides include labels and arrows pointing out where the state alleges items such as a cellular telephone and digital camera were found. Another arrow points to a computer-generated box with the words "Duct Tape Location (approximate)." On a slide with even more detailed added arrows and descriptions, the person who entered the data that allowed the computer to imagine the scene for animation purposes confessed, "the vehicle bench seat, mallet, tire cords (immediate burn area) and rake were not measured by the author. Their placement is to be deemed as being approximate, and is based on photographs taken by" a Wisconsin state trooper. These additions of course are not based on any witness testimony in the jury's presence, and are highly and improperly suggestive to a witness. In Fig. 44, the state has caused blue coloring to be added to garage trusses in a general area in which it contends there were "marks." Those marks may mean nothing at all here, but the animation highlights them in a highly suggestive and argumentative way. Finally, although again only as an illustration of the misleading additions to this computer-generated animation, computer-generated skeletal figures are entirely imaginary and highlight in blue the bones from which the state claims that bone fragments were recovered. Because the

animation colors in blue the entire bone, it grossly over-represents the actual amount of skeletal material and bone that even the state alleges it recovered.

F. As to the accuracy of the Toyota animation, Mr. Avery cannot comment at this point, of course. His lawyers have not seen that animation.

5. The state has suitable and less unfairly prejudicial alternatives. Literally, the state has hundreds (maybe thousands) of photographs of the Avery property, including the areas depicted in the animation, and dozens of photographs of the Toyota. Those photographs are accurate depictions of the scenes at the time. Further, the Toyota is in Chilton, not far from the courthouse, and it is easily transportable. A jury view of the Toyota could be conducted in the sally port of the Calumet County Sheriff's Department attached to the courthouse.

6. There is Wisconsin authority\* concerning admission of demonstrative video exhibits, which are loosely analogous to the computer-generated animations here. In *State v. Peterson*, 222 Wis. 2d 449, 588 N.W.2d 84 (Ct. App. 1998), the Wisconsin Court of Appeals held that a demonstrative videotape requires no expert testimony as foundation, but that the proponent must establish a foundation that "it is a fair and accurate representation of what was seen — and for the

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\* Mr. Avery cites only the one published case he has found that is analogous. There also are at least two unpublished Wisconsin decisions dealing specifically with a computer-generated animated video showing line of sight of a key witness. Although he cannot cite and does not rely on these decisions, they shape Mr. Avery's perception that such animations may mislead a jury.

demonstration — that it was conducted under conditions reasonably similar to conditions existing at the actual event.” *Peterson*, 222 Wis. 2d at 454, 588 N.W.2d at 86, discussing *Maskrey v. Volkswagenwerk Aktiengesellschaft*, 125 Wis. 2d 145, 370 N.W.2d 815 (Ct. App. 1985). “Even if this foundation is established,” the *Peterson* court added, “the trial court may, in its discretion, exclude the videotaped demonstration upon a finding that the probative value of the videotape is outweighed by its prejudicial effect.” *Id.* A court should consider, in determining the admissibility of such demonstrative evidence, the degree of accuracy in the recreation of the actual conditions; the complexity and duration of the demonstration; other available means of proving the same facts; the risk that the demonstration may affect the fairness of the trial; and whether the exhibit will aid the jury or confuse it. *Id.* at 454-55, 588 N.W.2d at 86.

The state’s computer-generated animations flunk the test. At least the Avery property animation is not a “fair and accurate representation” of the places and things in it. The depiction is sanitized, with physical items removed at the state’s choice and for its reasons. It also unavoidably will anticipate, influence, and improperly highlight witness testimony about items and their locations, including when the person producing the animation was working from second-hand or approximate sources. It further departs from accuracy by allowing fanciful views impossible in the real world: zooms, aerial angles, peeling off roofs to peer inside



from above, and so forth.\*\* The recreation is highly complex and potentially of long duration. Jurors for that reason are likely to be unduly influenced by it, and by the apparent technical wizardry of it (irrespective of its misleading quality). There are, as Avery noted, other means of proving the same facts: actual photographs and videotape, rather than a computer-generated animation, and testimony. In the case of the Toyota, a view of the actual object is feasible without trouble or risk.

For all of these reasons, the computer-generated animations will confuse and mislead the jury. They will present a threat to the fairness of Mr. Avery's trial. Unlike the virtual world of computer-generated animations, that threat is very real.

**WHEREFOR**, Steven Avery asks the Court to exclude both computer-generated animations that the state proposes to offer. One is tardily disclosed, without good cause. And both likely are irrelevant because of inaccuracy in their computer-generated depictions of actual scenes, or at least excludable under a proper balancing pursuant to WIS. STAT. § 904.03.

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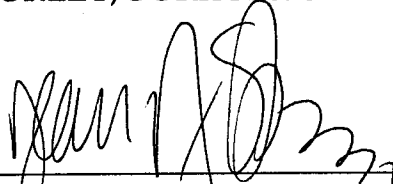
\*\* Mr. Avery is uncertain how many of the computer's capabilities the state intends to use at trial, or what exactly the limits of those capabilities are, because counsel have not seen a complete demonstration even of the one animation that the state has disclosed to date.

Dated at Madison, Wisconsin, January 17, 2007.

Respectfully submitted,

STEVEN A. AVERY, *Defendant*

HURLEY, BURISH & STANTON, S.C.



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