

1 STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY  
2 BRANCH 1

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3 STATE OF WISCONSIN,

4 PLAINTIFF, MOTION HEARING - ARGUMENTS

5 vs. Case No. 05 CF 381

6 STEVEN A. AVERY,

7 DEFENDANT.

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9 **DATE:** AUGUST 10, 2006

10 **BEFORE:** Hon. Patrick L. Willis  
11 Circuit Court Judge

12 **APPEARANCES :**

13 KENNETH R. KRATZ  
14 Special Prosecutor  
15 On behalf of the State of Wisconsin.

16 THOMAS J. FALLON  
17 Special Prosecutor  
18 On behalf of the State of Wisconsin.

19 DEAN A. STRANG  
20 Attorney at Law  
21 On behalf of the Defendant.

22 JEROME F. BUTING  
23 Attorney at Law  
24 On behalf of the Defendant.

25 STEVEN A. AVERY  
26 Defendant  
27 Appeared in person.

28 **TRANSCRIPT OF PROCEEDINGS**

29 Reported by Diane Tesheneck, RPR

30 Official Court Reporter

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ARGUMENTS OF COUNSEL

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ATTORNEY BUTING

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1                   THE COURT: At this time the Court will go  
2 back on the record. Before we hear oral argument  
3 from the parties on the **Franks** motion, there's a  
4 couple of other things to address. First of all,  
5 it's my understanding from discussions with counsel,  
6 that the parties have agreement on the media  
7 statements motion that was filed by the defense, and  
8 for which testimony has been taken; is that correct,  
9 counsel?

10                   ATTORNEY FALLON: Yes, that is correct. It  
11 is my understanding, and I think Counsel would  
12 agree, that neither side is conceding the merits of  
13 the other side's argument, but in acknowledgment of  
14 the overall circumstances of this case and the  
15 number of statements at issue, we have reached this  
16 following resolution:

17                   And that is, that the State would agree  
18 not to use any of the interview statements  
19 obtained by News Reporter Kolbusz, which I  
20 believe, if memory serves me, were November 18th  
21 and December 14th. And in exchange for which the  
22 defense is withdrawing their request to prohibit  
23 our use of any of the statements, either  
24 telephonically, or in person, obtained by  
25 Investigative Reporter Matesic.

1                   Again, neither side is conceding the  
2 merits of the other side's argument; it's just a  
3 concession due to the overall circumstances of  
4 the case.

5                   THE COURT: Mr. Strang.

6                   ATTORNEY STRANG: There's nothing about  
7 that with which I disagree. I will add a little bit  
8 I think that matters and I believe we're also in  
9 agreement on. The Emily Matesic interview was  
10 November 12th, as I recall, the in jail televised  
11 interview. And we are withdrawing our  
12 constitutional objection to that, withdrawing the  
13 motion in so far as that interview goes.

14                   And as to the one later, telephonic  
15 interview with Ms Matesic, and I will say that it  
16 was -- that was a straddler, that was sort of  
17 midway in between. Because the motion never was  
18 intended to cover interviews or statements of  
19 Mr. Avery where he initiated the telephone call.

20                   And as I say, that one straddled a  
21 little bit, because Ms Matesic initiated in one  
22 sense by writing a letter asking Mr. Avery to  
23 call, he initiated in another sense by making the  
24 collect call. But in any event, no  
25 constitutional objection and the motion is

1           withdrawn as to those two interviews.

2                       At this time, I believe that the State  
3           has not obtained the raw footage of the  
4           November 12 interview, or any full tape, or raw  
5           tape, so to speak, of the later telephonic  
6           interview with Ms Matesic.

7                       I know the defense doesn't have those  
8           materials. And I think what we have agreed to do  
9           at this point is just to table, until later,  
10          questions of completeness, if in fact the State  
11          is able to obtain raw footage, or the full  
12          interview, on either of those occasions.

13                      Assuming the State is not, we will not  
14          object to introduction of the little two minute  
15          or two minute plus segments of those interviews  
16          that were actually aired in the Matesic  
17          interviews.

18                      And then I also agree, it's simpler as  
19          to the Channel 5, or Jennifer Kolbusz interviews,  
20          both in the jail, both televised or filmed,  
21          November 18 and December 14, those the State will  
22          make no use of at all at trial. And, again,  
23          here, each of the two sides is utterly secure in  
24          its conviction that the other side is completely  
25          wrong on the legal merits, so.

1           THE COURT: All right. In light of the  
2 detail involved in your agreement here, I'm going to  
3 ask you to provide that to the Court in the form of  
4 a written stipulation and then I will accept it.  
5 Mr. Strang, I will have you draft it. And --

6           ATTORNEY STRANG: I would be happy to.

7           THE COURT: -- when the Court receives it,  
8 then, I will deal with it.

9           With respect to some of the other  
10 motions that are pending, because of the lateness  
11 of today, and I'm still going to be hearing oral  
12 arguments, what I am going to do is set a date  
13 for August 22nd, that is a Tuesday, at 9:00 in  
14 the morning.

15           And on that date, the Court will issue a  
16 decision, or issue decisions, addressing the  
17 issues of venue and the trial date, among other  
18 things, but also, on most of the other motions  
19 that have been heard, and that is, either heard  
20 or for which briefs have been filed.

21           I understand that some of the motions  
22 that were heard over the last couple days will be  
23 dependent on the filing of written briefs and the  
24 court reporter generating a transcript. So we  
25 may not be in a position to deal with everything

1 on August 22, but certainly the venue and trial  
2 date motions, and some of the other motions as  
3 well.

4 With respect to the concerns raised by  
5 the State just before we entered into the break,  
6 Counsel, it's my understanding that defense  
7 counsel has discussed more fully than even  
8 before, with the defendant, his right to have  
9 provided testimony at these motion hearings over  
10 the last couple days, and that it's still the  
11 defendant's decision, in consultation with  
12 counsel, to elect not to testify. Mr. Strang, is  
13 that correct?

14 ATTORNEY STRANG: We had -- Mr. Buting and  
15 I had a meeting with Steven Avery in the Manitowoc  
16 County Jail, during break. I'm going to guess, I  
17 didn't time it, but I'm going to guess the meeting  
18 was about 10 or 15 minutes long, something in that  
19 neighborhood. It was a private meeting, law  
20 enforcement was not in the room. We were within the  
21 secure envelope in the jail.

22 And we -- we had a two-way discussion  
23 about Mr. Avery's opportunity, if he chose, to  
24 testify at the motions hearings, and his right to  
25 maintain his silence as well, and choose not to

1           testify. Explained -- Mr. Buting and I explained  
2           that these pretrial motions and their strategic  
3           questions are at least predominantly issues  
4           committed to a lawyer's judgment. And we  
5           explained to him what our judgment was, and is,  
6           on the presentation of evidence on those motions.

7                         But this was a two-way discussion and  
8           Mr. Avery, as always, is really a very, very  
9           cooperative client, someone who's engaged in  
10          discussions and cares about his case. And I  
11          think he certainly treats us as if he respects us  
12          as the two lawyers he chose to defend him in this  
13          case.

14                        THE COURT: Mr. Avery, do you concur with  
15          that summary of your discussion, just placed on the  
16          record, with Mr. Strang?

17                        MR. AVERY: Yes.

18                        THE COURT: You understand you have the  
19          right, if you wanted to, to testify at these  
20          hearings, but do I take it that you have made the  
21          decision, in consultation with your attorneys, that  
22          you elect not to testify at these hearings?

23                        MR. AVERY: Yes.

24                        THE COURT: Very well. The Court is  
25          satisfied that the defendant has been adequately



1 informed by defense counsel of his right to testify  
2 at these hearings and has made the decision, in  
3 consultation with his attorney, not to testify.

4 With respect to the motions that the  
5 Court has heard the last few days, first of all,  
6 on the issue of the admissibility of the  
7 statements made to the Marinette County Sheriff's  
8 Department, it's my understanding that the  
9 testimony that we have heard was fairly limited  
10 on those, and that the court reporter expects to  
11 get it out in short order, and the parties could  
12 submit simultaneous written briefs by a week from  
13 tomorrow.

14 ATTORNEY STRANG: Yes.

15 THE COURT: Both parties in agreement?

16 ATTORNEY FALLON: That's correct, Judge.  
17 Although the record should reflect, that the  
18 preference of the State was to argue it now. But  
19 acknowledging the decision of the Court, we'll have  
20 a brief for you the end of next week.

21 THE COURT: All right. The testimony taken  
22 on the issue of the effective multiple executions of  
23 the search warrant and the motion related to that, I  
24 understand there is a good deal more testimony there  
25 and the parties would like additional time in which

1 to brief that issue.

2 I have spoken to the court reporter, she  
3 indicates she can have a transcript ready in  
4 about three weeks. So I'm asking the parties at  
5 this time, how much time would you like to submit  
6 simultaneous briefs on that issue? So,  
7 essentially, the transcript will be ready at  
8 about the end of the month.

9 ATTORNEY BUTING: I could probably do it in  
10 10 days after that.

11 THE COURT: Okay. How about  
12 September 13th, it's a Wednesday?

13 ATTORNEY BUTING: Sure.

14 ATTORNEY FALLON: September 13th, I will  
15 check my calendar, please. Right now, my written  
16 calendar shows that that would be doable. I haven't  
17 checked my computer calendar back at the office.  
18 So, assuming I don't have anything else going on, I  
19 think that's doable.

20 THE COURT: All right. We'll say briefs  
21 due 9/13 on the multiple executions issue.

22 And the last matter is the **Franks**  
23 motion. I will hear oral argument at this time  
24 on that issue. Since there is an initial burden  
25 there on the defense, I will hear from the

1 defense first.

2 ATTORNEY BUTING: Thank you, Judge.

3 Perhaps, before we -- before I argue that, though,  
4 we did have some discussion off the record with  
5 counsel for the State, that maybe crystallizes the  
6 issue on standing a little bit better. I don't know  
7 if you would like to state what your position is on  
8 where Mr. Avery does or does not have standing?

9 ATTORNEY FALLON: The only thing I would  
10 say is that the State hasn't challenged his  
11 standing, or haven't contested his standing to  
12 challenge a search of the house and the garage, and  
13 the rest we're prepared to argue.

14 THE COURT: Okay.

15 ATTORNEY BUTING: Including the -- the burn  
16 barrel and burn pit in the area of his house and  
17 garage? That was something that wasn't clear to me.

18 ATTORNEY FALLON: It was clear in our  
19 pleadings. And, again, the arguments and  
20 discussions are relative to this particular motion,  
21 exclusively.

22 ATTORNEY BUTING: All right. Judge, as we  
23 pointed out in the motion that we filed, the --  
24 although -- Let me talk about **Franks** first, and then  
25 I will talk a little bit about standing. And in

1 order to complete my argument on **Franks**, I want to  
2 play for the Court the second phone call that  
3 Detective Remiker had with Investigator Wiegert on  
4 the morning of November 5th, regarding the use of --  
5 or the discussion about whether there was an intent  
6 to use volunteers to search the Avery property or  
7 not. And if I could play that, briefly, and then I  
8 will argue from there. I have set up -- I have my  
9 copy in there, I could put the original in if you  
10 like.

11 THE COURT: All right. And this was, if I  
12 remember correctly, the part of Detective Remiker's  
13 testimony where the jail had tapes, the attorneys  
14 went over and listened to them, so there's no  
15 question that this is the tape; both parties agree?

16 ATTORNEY FALLON: I believe so. I believe  
17 so, depending on what we hear, if it is as  
18 represented by counsel, yes, it's a conversation  
19 between Detective Remiker and Investigator Wiegert.

20 THE COURT: All right. Mr. Buting.

21 ATTORNEY BUTING: There were two phone  
22 calls, the first one is more lengthy. It is the  
23 second one that is very brief and is more of issue  
24 in this.

25 THE COURT: Is it set up for the second

1 one?

2 ATTORNEY BUTING: It is set up and ready  
3 for the second one.

4 THE COURT: Very well.

5 (CD played, Exhibit 20.)

6 DETECTIVE REMIKER: Remiker.

7 INVESTIGATOR WIEGERT: Yeah. Is it 323 or  
8 373?

9 DETECTIVE REMIKER: 323.

10 ATTORNEY STRANG: I can't remember fuckin'  
11 reading.

12 DETECTIVE REMIKER: 32319 -- the year you  
13 were born, 1929.

14 INVESTIGATOR WIEGERT: You got 'er. Hey, I  
15 have a change of plans here.

16 DETECTIVE REMIKER: Okay.

17 INVESTIGATOR WIEGERT: The boss has got  
18 something he wants us to do.

19 DETECTIVE REMIKER: Okay.

20 INVESTIGATOR WIEGERT: He wants us to go  
21 back over and reinterview Avery and Zipperer, again.  
22 And as long as the search party is out there, he  
23 wants us to ask them if they would allow us to have  
24 the search party come on their property and go  
25 through the junkyard. The search party.

1                   DETECTIVE REMIKER:   Okay.

2                   INVESTIGATOR WIEGERT:   So, if it's okay

3 with you, we'll meet you over at your Sheriff's

4 Department.

5                   DETECTIVE REMIKER:   Okay.

6                   INVESTIGATOR WIEGERT:   Talk about it a

7 little bit, and if you're not too busy.

8                   DETECTIVE REMIKER:   Okay.  Man, Zipperer is

9 not going to be real happy.

10                  INVESTIGATOR WIEGERT:   I'm sure he is not.

11 If he tells us no, he tells us no.

12                  DETECTIVE REMIKER:   All right.

13                  INVESTIGATOR WIEGERT:   Later.

14                  DETECTIVE REMIKER:   Okay.

15                  INVESTIGATOR WIEGERT:   If you don't mind.

16                  DETECTIVE REMIKER:   Yup, that's fine.

17                  INVESTIGATOR WIEGERT:   We'll stop over.

18 Okay.  We'll probably be there, I would say, within

19 the hour.

20                  DETECTIVE REMIKER:   Okay.  Give me a call

21 before you get here, I will meet you.

22                  INVESTIGATOR WIEGERT:   Will do.

23                  DETECTIVE REMIKER:   Okay.

24                  INVESTIGATOR WIEGERT:   Thanks.

25                  DETECTIVE REMIKER:   Bye.

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(Transcribed to the best of my ability.)

ATTORNEY BUTING: That's it, Judge. And I told your court reporter beforehand, that it's a little hard sometimes for her to be able to take down what's being said in the CD like that, but I wouldn't have any objection to her listening to -- if she prepares a transcript on it, have her listening to the Court's exhibit, which is Exhibit No. -- I'm sorry -- 20, for accuracy on the transcription.

THE COURT: Okay.

ATTORNEY BUTING: The case of *Franks vs. Delaware* says that if an individual who applies for a search warrant, that is, the affiant, in this case, Investigator Wiegert, provides false information intentionally or with reckless disregard for the truth, and that information was necessary to establish probable cause, then the Fourth Amendment requires that a hearing be conducted.

If, at the hearing, it's proved that the false information was presented intentionally, or with reckless disregard for the truth, then what the Court does is set aside that portion of the affidavit and looks to the remainder of the affidavit, to see whether probable cause exists.

1           If, having struck that portion of the  
2 affidavit, probable cause does not anymore exist,  
3 then the warrant is -- the search must be voided,  
4 the warrant is improper. It's our contention, in  
5 the motion that we filed, that Investigator  
6 Wiegert, either deliberately, intentionally, or  
7 certainly with reckless disregard for the truth,  
8 did just that.

9           In Paragraph 5 of the search warrant  
10 affidavit, that's dated November 5th, 2005 --  
11 it's been made part of the record -- in  
12 particular, Investigator Wiegert stated in that  
13 affidavit, that officers had received  
14 information, from volunteer searchers, that they  
15 had located a vehicle matching the description of  
16 the vehicle owned by Teresa Halbach.

17           That is the first statement that is --  
18 is inaccurate, that is incorrect. As I believe  
19 also was made part of the record, the transcript  
20 of the call from Pamela Sturm makes clear that  
21 she did not say that the vehicle matched. In  
22 fact, that she indicated that the vehicle color  
23 did not appear to be correct, or did not appear  
24 to be with the same that she had seen described  
25 or had seen on the fliers that she was following.



1                   And that it was, in fact, because of  
2                   that, and she hesitated to say that she thought  
3                   it was the matching vehicle because she wanted to  
4                   see the VIN number. And she was calling and  
5                   asking, do you know the VIN number.

6                   Secondly, we also argued that the term  
7                   "volunteer searchers" was a bit of a stretch in  
8                   that we believe the officers used volunteers in  
9                   such a way, or citizens in such a way, as to  
10                  essentially make them part of a police search, by  
11                  trying to engage them in a Fourth Amendment  
12                  search.

13                  Now, in that regard, the motion was  
14                  based upon statements made in the official  
15                  Manitowoc County Police -- Sheriff's Department's  
16                  report of this investigation, which I went over  
17                  with both Detective Remiker and Investigator  
18                  Wiegert. Investigator Wiegert denied making the  
19                  statement that was in Detective Remiker's report,  
20                  that Detective Remiker attributed to him, in  
21                  which stated, Wiegert indicated that several  
22                  searchers were willing to go to the Avery  
23                  property, on Avery road, to search the junkyard  
24                  and salvage area.

25                  When I put the question to Investigator

1           Wiegert, he said that Detective Remiker just got  
2           it wrong, I didn't say anything about that. I  
3           think he said he didn't say anything about  
4           volunteers coming to search the junkyard at all.  
5           And here's where his credibility, in this court,  
6           at this hearing, it is at issue. Because he  
7           didn't know at the time, as neither did we when  
8           he testified, that Manitowoc County had actually  
9           recorded that phone conversation.

10                   And I played that portion of it right  
11           now, in which it's clear he did talk to Detective  
12           Remiker about using these volunteer search party,  
13           is what he calls it, to search the Avery  
14           junkyard. And that if, in fact, he was using --  
15           using volunteers to conduct a search, that  
16           obviously by that time, Mr. Avery was also a  
17           person of interest at a minimum.

18                   Using them to get consent to try and get  
19           in and search, would be a way to get around  
20           Mr. Avery's Fourth Amendment rights with regard  
21           to privacy and expectations on the search of the  
22           Avery family property, and that that was  
23           recklessly, if not intentionally, misstated in  
24           the affidavit, again, Paragraph 5 of the  
25           affidavit.

1           The other part of that paragraph that is  
2 completely wrong, or nearly completely wrong,  
3 Detective Remiker himself acknowledged, he puts  
4 in the affidavit that -- I mean Wiegert, that  
5 Wiegert acknowledged he, in fact, put false  
6 information, or incorrect information, in here,  
7 because he says in his affidavit, that the  
8 searchers provided the entire VIN number.

9           And when pressed on that in court he had  
10 to admit that that's not true, in fact, only a  
11 part -- a portion of that VIN number, about half,  
12 10 of the 17 numbers, could be provided by the  
13 volunteers, that they evidently were unable to  
14 read the rest of it.

15           Now, the State will probably argue, oh,  
16 that's just a semantics, that's just a mistake,  
17 negligence at most, it's not any kind of reckless  
18 disregard for the truth. But we have got to  
19 think about the timing of this as well. Wiegert  
20 talks to Pamela Sturm on the phone at about  
21 10:30, 11:00 in the morning.

22           This is only a matter of a couple hours  
23 later he's -- at most, he's preparing this  
24 affidavit. It's facts are obviously fresh in his  
25 mind. It's clear from the transcript that there

1 was an extensive discussion -- extensive  
2 discussion with Pamela Sturm about how many  
3 numbers she could read in the -- on the VIN.

4 And it's very clear, as you look at the  
5 transcript of that 911 call, or whatever you want  
6 to call it, that there's back and forth, can you  
7 read this, well, I'm not sure about that number,  
8 might be a T, might be a 1. Very clear that she  
9 did not have the full VIN number.

10 And yet here, within a couple of hours  
11 or so, he's saying, in this affidavit to the  
12 Court, that the searchers not only found a  
13 vehicle that matched the description, but that  
14 had a VIN number, complete VIN number that  
15 matched. And that's a very big difference in my  
16 mind, and in the Court's mind, I'm sure it is.

17 Because if -- if you are trying to get  
18 probable cause for a warrant, it's much, much  
19 easier to do so if you mislead the Court and tell  
20 them, hey, there's a vehicle that these searchers  
21 found, and it matches the description that was  
22 given for Teresa Halbach's vehicle. And not only  
23 that, they checked the VIN number and it's  
24 completely a match, all 17 numbers.

25 Very easy to get probable cause with

1 something like that. It's another matter if they  
2 point out the truth, if Wiegert was to point out  
3 the truth to the Court, which is that, well, we  
4 only have a partial VIN number. And there is  
5 some hesitation on the part of the caller, the  
6 searcher, as to whether this really matches or  
7 not.

8 And in cross-examination, I believe it  
9 was, Attorney Fallon was having Investigator  
10 Wiegert point out all these other facts that he  
11 knew, such as whether the model matched, whether  
12 there was a sticker on it from Le Mieux Toyota,  
13 all these other facts, but the point is not what  
14 he knew in his mind, the point is what he  
15 provided to the independent reviewer, the Court.

16 And he does not say anything in this  
17 affidavit about the model year, or any comments  
18 that the -- Pamela Sturm said about that, or any  
19 of his subsequent investigation about whether or  
20 not there's -- there were other reasons to  
21 believe that the vehicle might have matched.

22 He skipped over all that. He just  
23 assumed for himself that he could call it a  
24 match, and that he could tell the Court that  
25 these volunteer searchers believed it to be a

1 match, rather than telling the full truth, which  
2 was -- which is something very less than that.

3 If in fact, the information that's left  
4 out, or not -- or deliberately not included, was  
5 reckless, or reckless disregard for the truth,  
6 then the first couple of sentences in Paragraph 5  
7 would be struck, or stricken. The only other --  
8 Frankly, the only other part of that paragraph  
9 that supplies probable cause is, Investigator  
10 Remiker, once he got to the scene, it says  
11 Investigator Remiker was able to confirm that the  
12 VIN number, and then it lists all 17, is the  
13 correct number for Teresa Halbach's Toyota RAV 4.

14 And then he talks about Investigator  
15 Remiker's visual observation. And then here we  
16 get to the point of whether or not Detective  
17 Remiker was in a place where he can make --  
18 lawfully make those observations, such that they  
19 could be considered by the Court, in the search  
20 warrant. If not, then that has to be struck as  
21 well, stricken from this affidavit.

22 And without Paragraph 5, there is not  
23 probable cause. I can spend some time on that  
24 later if there's really a dispute about it. But  
25 there's not probable cause in this affidavit, if

1           you take Paragraph 5 out, plain and simple.

2                       So the question then is, at this point  
3 anyway, did Detective Remiker have a right to be  
4 in the position that he was, to go up to the  
5 vehicle and to read the VIN number on it? Was he  
6 lawfully there? Were his observations lawful?  
7 And that does involve questions of standing, as  
8 to whether Mr. Avery might have a reason to have  
9 an expectation of privacy, as well. So let me  
10 address those two points.

11                      First of all, the testimony said, or  
12 established, that Detective Remiker did not have  
13 consent from anybody on that property, at the  
14 time that he came up to the RAV 4 and, I believe,  
15 shined his flashlight on it, or whatever, in  
16 order to try and read the VIN number.

17                      And the testimony from Pamela Sturm was  
18 that she had gotten consent, holding herself out  
19 to be a volunteer, but not a police officer. And  
20 so that consent would clearly not carry over to  
21 the police as well.

22                      There's also some testimony, that later,  
23 Earl Avery supposedly gave consent to the  
24 officers to be there, but that was, I think the  
25 record was at 11:17. That was a good 5 or 10

1 minutes, or 15 minutes, I think, after Detective  
2 Remiker arrived at the scene.

3 Earl Avery, when he testified, in fact,  
4 denied that he ever gave consent. He said the  
5 officers made him sit around for three hours,  
6 never talked to him until then, they just had  
7 their way with it.

8 I don't think that there can be any  
9 serious argument that -- that there was -- that  
10 that part of the property was simply open to  
11 public access and that -- that none of the  
12 Avery's would have any expectation of privacy in  
13 that area, the southeast quarter quadrant of  
14 their property.

15 Testimony was, from Earl Avery, he  
16 marked on Exhibit 18, where the public is  
17 generally allowed and not allowed, without  
18 permission. And the custom and practice is that  
19 they drive up to the front of the office, they  
20 come in, and they say, do you have a part for  
21 this or that year car, and then they are allowed  
22 to go in, sometimes with supervision, sometimes  
23 without, and go into the yard. But only with  
24 permission that they -- I think Earl's words  
25 were, absolutely not, is the public allowed to



1 just go in there without -- into the pit, or into  
2 the junkyard area, without permission.

3 Other facts which indicate a reasonable  
4 expectation of privacy were testified to today by  
5 Lieutenant Sippel. He talked about how there's  
6 fence lines around the property, on the north and  
7 east -- I'm sorry -- north and east edge, yes.  
8 And that there are berms, one of them very high,  
9 on the east edge, and 15 feet or so, 10 to  
10 15 feet on the south edge, which would clearly  
11 indicate that someone is trying to demark that  
12 property as separate and private from public  
13 access.

14 So the question that the State, then,  
15 has raised is whether or not, I assume this is  
16 the essential argument, is whether or not  
17 Mr. Avery himself had standing. It's conceded  
18 that he had standing in his house, or trailer,  
19 and that he had standing in his garage. But they  
20 contest that he had standing anywhere else. And  
21 presumably that includes the location where the  
22 RAV 4 was found, the so-called burn pit and burn  
23 barrel, located outside of his residence and  
24 garage.

25 The State has -- had filed a brief, or a

1 memo, to the Court, the day before this motion  
2 hearing started yesterday. And I did not have a  
3 chance to file a written response. I apologize  
4 for that, but it was not received until the very  
5 day before this. But I did have a chance to  
6 review some of their cases and some of my own.  
7 And I have some cites, and some references, and  
8 legal authority that I think run counter to their  
9 arguments.

10 First of all, the case of **Rakas vs.**  
11 **Illinois**, which is at 439 U.S., at page 139, I  
12 believe it is. Makes clear that the Fourth  
13 Amendment -- a claim -- a Fourth Amendment claim  
14 does not depend on a property right. It is a  
15 personal right. It's a right, an expectation of  
16 privacy in the invaded place. Fourth Amendment  
17 does not protect property. It protects people  
18 from unreasonable searches and seizures.

19 No single factor is determinative on the  
20 question of standing. That's also from **Rakas**, at  
21 152. And **State vs. Whitrock**, which I believe is  
22 also cited by the State, at 161 Wis. 2d, at page  
23 974, says that the Court must take a totality of  
24 the circumstance approach when determining the  
25 questions of standing.

1                   It is true, defendant does have the  
2                   burden of establishing, however, just by -- just  
3                   by a preponderance of the evidence, that he had a  
4                   reasonable expectation of privacy in the -- the  
5                   things searched. But **Whitrock** and **Arizona vs.**  
6                   **Hicks**, which is the cite, 480 U.S. 321, 1987,  
7                   make clear that a defendant does not need to show  
8                   an ownership interest in the place or thing to be  
9                   seized, and that the thing, in fact, seized need  
10                  not even be his own property.

11                  In both **Whitrock** and **Hicks**, I believe  
12                  stolen property was involved. And in **Hicks**, the  
13                  Court found that there was a reasonable  
14                  expectation of privacy, even in the stolen stereo  
15                  equipment that was found inside of this  
16                  individual's house.

17                  And in that case, the police, in order  
18                  to determine whether or not the item was stolen,  
19                  it was not obviously stolen when they went in  
20                  there, but they moved pieces around, and they  
21                  looked at serial numbers, and they recorded  
22                  those. And they went back later and determined  
23                  that the property appeared to have been stolen,  
24                  or was reported stolen.

25                  And on that basis, they went back with a

1 warrant. And the Court stated, no, no, you can't  
2 do that, that was improper. And that's akin to  
3 Detective Remiker going onto this property, using  
4 a flashlight, in order to read the VIN number on  
5 this vehicle.

6 The case law also shows that people have  
7 a reasonable expectation of privacy in a variety  
8 of areas, a number of different settings. The  
9 **Trecroci** case, I think it's misspelled in the  
10 State's brief, but that's T-r-e-c-r-o-c-i. The  
11 cite for that is 246 Wis. 2d, 261. It's a Court  
12 of Appeals case from 19 -- I'm sorry -- from  
13 2001.

14 That case actually does a fairly good  
15 job of summarizing what some of the factors are  
16 and what some of the various areas where standing  
17 has been found, even when someone doesn't own the  
18 property. And I point out that the State used  
19 Mr. Earl Avery to try and establish that Steven  
20 Avery did not have an ownership interest, or  
21 portion of the property.

22 But that that really is irrelevant on  
23 the question of standing here. The numerous  
24 cases say you don't have to own the property to  
25 have a reasonable expectation of privacy in it.

1 I will get into a little bit more of that in a  
2 minute.

3 Even in a workplace, employees have a  
4 reasonable expectation of privacy, *O'Connor vs.*  
5 *Ortega*, 480 U.S. 709 at 717, 1981, I believe, or  
6 '87. Overnight guests in a house have an  
7 expectation of privacy, *State vs. Whitrock*,  
8 again. Even commercial areas, in garbage, if  
9 steps are taken to exclude the public, can't  
10 have -- are areas that one can have an  
11 expectation of -- reasonable expectation of  
12 privacy in.

13 The *Trecroci* case, at page 282, sort of  
14 lists, gives a helpful list of factors to  
15 consider in determining whether someone has  
16 standing in a particular place. And it's not  
17 necessary that all of them be met, but they are  
18 considered in part -- as part of the totality of  
19 the circumstances.

20 The first is whether the person had a  
21 proprietary interest in the premises. And here,  
22 clearly, he had a proprietary interest in the  
23 house and the garage. He did not have -- He was  
24 not an owner of the Avery Salvage business but,  
25 on the other hand, he worked there.

1                   It's a family business. He lived on the  
2 property. Earl talked about how he did -- Steven  
3 Avery did all the things that Earl did, including  
4 dismantling vehicles, driving out to pick up  
5 junks and bring them back and forth. And so the  
6 fact that it's a family business, I think, makes  
7 that factor somewhat less critical.

8                   Second factor is whether the person was  
9 legitimately on the premises that are searched.  
10 Clearly, Mr. Avery lived on the Avery compound so  
11 to speak, or right next to it, and he worked on  
12 the compound every day. So he clearly was  
13 legitimately there.

14                   Whether the person had complete dominion  
15 and control, and the right to exclude others,  
16 perhaps he didn't have as much of complete  
17 dominion as he would as an owner, but  
18 nevertheless, he worked there, he lived there, he  
19 worked the car crusher right near the area where  
20 this was found. He had full access to all of the  
21 property as a family member, and as a person who  
22 worked in the family business.

23                   The next factor is whether the person  
24 took precautions customarily taken by those  
25 seeking privacy. I have covered that already.

1 But I think the berms, the fences, it's clear  
2 that the property itself does have attributes to  
3 indicate that there is a reasonable expectation  
4 of privacy in that property.

5 Whether the person had put the property  
6 to some private use, clearly they did. There's a  
7 business in the front. There's a public office  
8 in the upper right, or northeast corner of the  
9 40-acre parcel, but the rest of it is private.  
10 There's private residences, both to the north  
11 edge and down the eastern edge, where Chuck Avery  
12 lives. All the land belonged to the family.

13 And, finally, whether the claim of  
14 privacy is consistent with historical notions of  
15 privacy. This is a fluid concept because --  
16 that's probably changed over time -- but here,  
17 people know, that if you enter someone's private  
18 property, you must receive permission to do so.

19 Even the volunteer who testified, Pamela  
20 Sturm, recognized that she had to get permission  
21 from Earl Avery before she could go into any area  
22 of the yard to do a search. So I think that  
23 that's a factor that clearly indicates that there  
24 is a historical and reasonable expectation of  
25 privacy in that area.

1                   Then, finally, there is the question of  
2                   the -- Well, let me just, before I turn to the  
3                   burn barrel and burn pit area.

4                   If I make the first hurdle, if we pass  
5                   the first hurdle, and the Court finds that there  
6                   is sufficiently reckless or intentional  
7                   misstatements, falsehoods, in the affidavit, and  
8                   that, therefore, they are stricken, then the  
9                   Court, I think, sequentially, next, has to look  
10                  at the question of whether or not Detective  
11                  Remiker, therefore, was in a position where he  
12                  was not lawfully permitted to make the  
13                  observations -- the rest of the observations that  
14                  are included in Paragraph 5.

15                  And if so, then there is no probable  
16                  cause for the warrant. The entire warrant is  
17                  void and the entire search is void, at least as  
18                  to that warrant. Later warrants were obtained  
19                  and we have to deal with those issues later, but  
20                  as to this warrant they would be void.

21                  And that would also answer the question  
22                  as to any evidence found outside of Mr. Avery's  
23                  residence, such as the burn pit, or the burn  
24                  barrel, or whatever. We wouldn't even have to  
25                  get to the question of standing, because if the



1 warrant is void, it's void.

2 But as to the question of standing, it's  
3 not clear to me just what position the State is  
4 taking on this, but the testimony was, and the  
5 exhibits show, that the burn barrel was right  
6 outside the front residence, front area of the  
7 trailer, and that the burn pit was behind the  
8 detached garage.

9 So I don't know how they are going to  
10 argue that he had a privacy interest in the house  
11 and the garage, but not in those areas that are  
12 close by. If that's their position, then they  
13 will have to make it, but I don't see it. It's a  
14 bit of a different argument, I think, when we get  
15 to the far corner of the property, where the  
16 vehicle is made. But as to those other areas, I  
17 don't see any legitimate argument.

18 So, for those reasons, I think we have  
19 established a reasonable expectation of privacy,  
20 by a preponderance of the evidence. I think we  
21 have established that there were material,  
22 intentional or reckless disregard for the truth  
23 in the affidavit. And I think we have  
24 established, as well, that when those improper  
25 falsehoods, or illegally obtained portions are

1 stricken from this warrant, there is no probable  
2 cause left in the warrant. And so the search --  
3 any searches based on this November 5th warrant,  
4 would have to be voided and any evidence  
5 suppressed. Thank you.

6 THE COURT: Mr. Fallon.

7 ATTORNEY FALLON: Thank you, Judge. Well,  
8 the defense argument is stunning for the facts which  
9 were omitted during the presentation of their  
10 argument. So, in an effort, let's first all start  
11 with a couple of general principles and then we'll  
12 go through the evidence which I understand was  
13 presented during the last day and a half.

14 Counsel is correct, it is a totality of  
15 the circumstances analysis, with respect to  
16 determination of whether or not Mr. Avery has a  
17 reasonable expectation of privacy, in the areas  
18 searched, and in the items seized.

19 If there is no reasonable expectation of  
20 privacy, in the areas searched, and the items  
21 seized, there is, as it pertains to Mr. Avery, no  
22 Fourth Amendment event. There is no search.  
23 There is no basis for a hearing. And there is no  
24 basis to request suppression.

25 Now, first and foremost, Counsel is

1 correct and does cite *Rakas vs. Illinois*, which  
2 is a case that we clearly cite in our brief.  
3 It's a critical case. And counsel is right, in  
4 fact, it's one of the few things that I do agree  
5 with, and that is the Fourth Amendment reasonable  
6 expectation of privacy is not conditioned upon  
7 the existence of a property right. We agree.  
8 Quite frankly, that supports the State's argument  
9 that there is no standing, no reasonable  
10 expectation of privacy.

11 In determination of whether there is a  
12 reasonable expectation of privacy, the burden is  
13 on the defense, to establish by a preponderance  
14 of the evidence, whether it is more likely than  
15 not, whether it's somewhere over 50 percent. Is  
16 it likely that this person has two things,  
17 whether the individual has exhibited an actual,  
18 subjective expectation of privacy in the area  
19 inspected or searched, and in the items seized.

20 The second part of the question is, is  
21 the expectation, is it one that society is  
22 willing to recognize as reasonable, as a  
23 reasonable expectation of privacy, under the  
24 circumstances. There has been no evidence of an  
25 actual, subjective expectation of privacy

1 produced by Mr. Avery.

2 We have references to berms and we have  
3 references to fence lines. We have no reference  
4 to the fact that the berms were created with that  
5 intent, with that subjective expectation. We  
6 have no evidence that there's actually a fence  
7 that goes along the fence line.

8 We have no evidence that Mr. Avery took  
9 any -- any reasonable steps to secure the salvage  
10 yard, the location of where Teresa Halbach's  
11 vehicle was found, the vehicle in which her  
12 license plates were found. The burn barrel,  
13 which I might add and point out to the Court on  
14 Exhibit No. 18, is located up here, Mr. Avery's  
15 residence is here. We have a burn pit, which is  
16 behind a garage, and I will get to that in a  
17 minute.

18 There has been no demonstration of an  
19 actual, subjective expectation of privacy that  
20 has been provided to this court. All we have is  
21 a berm line, a fence line. We have a rather  
22 isolated geographical piece of property. That  
23 alone is insufficient to justify, or a  
24 conclusion, first of all, that there's an actual,  
25 subjective expectation of privacy.

1                   And more importantly, or equally  
2                   important, I should say, there's been nothing  
3                   here that demonstrates that society is prepared  
4                   to accept that Steven Avery has a reasonable  
5                   expectation of privacy in the location of the  
6                   Toyota RAV 4 vehicle, found at the bottom of  
7                   Exhibit No. 18.

8                   More importantly, there's been no  
9                   evidence whatsoever that suggests he has a  
10                  reasonable expectation of privacy about anything  
11                  in that vehicle. And while he may not have a  
12                  property right, we agree he has no property right  
13                  with respect to her vehicle. He has no property  
14                  right with respect to the blood found in the  
15                  vehicle, unless of course it's his blood.

16                  But then, again, we don't have any  
17                  testimony saying that. We don't have any  
18                  evidence of the fact, introduced in this hearing,  
19                  of those facts, justifying a reasonable  
20                  expectation of privacy there.

21                  He did not drive that vehicle. He did  
22                  not own that vehicle. As far as we know, the  
23                  only time he touched that vehicle was sometime  
24                  during the week of October 31st.

25                  With respect to the contents of the burn

1 barrel, the location of the burn barrel, where's  
2 the reasonable expectation of privacy? Anyone  
3 would drive up and down that upper road there,  
4 stop and look in that burn barrel. Burn barrel,  
5 anything in the burn barrel is discarded  
6 abandoned property. It's the quintessential act  
7 of abandoned property. Burned stuff is in there.

8 What reasonable expectation of privacy  
9 actual -- First of all, what subjective, actual  
10 expectation of privacy did that man have in the  
11 contents of this burn barrel? What expectation  
12 of privacy did he have in the remains of the  
13 camera, in the remains of the cell phone, in the  
14 remains of other items collected there? It's not  
15 only an expectation of privacy in the place, but  
16 also in the things. And there's been no  
17 evidence, no argument, nothing whatsoever.

18 The burn pit, located behind the garage,  
19 what special -- what evidence do we have there  
20 are any special expectation of privacy there?  
21 Yes, okay, it's located behind the barn. Great,  
22 do we have any demonstration? Do we have any  
23 evidence that there was an actual, subjective  
24 expectation of privacy created by Steven Avery in  
25 the burn pit?

1           There's no evidence in the record, not  
2 one iota, that he did anything special to secret  
3 that area, to shield it from anywhere else, other  
4 than it's geographical location. And, quite  
5 frankly, that's not enough.

6           More to the point, what reasonable, or  
7 what actual, subjective expectation of privacy  
8 does he have in the contents of the pit. What  
9 subjective, actual expectation of privacy does he  
10 have in the remains of Teresa Halbach? I  
11 certainly didn't hear any evidence suggesting  
12 that he has such an expectation of privacy  
13 relative to the contents of the burn pit either.

14           Now, let's further address some of the  
15 case law cited by the defense. It's been a while  
16 since I read **Arizona Hicks -- vs. Hicks**, but it  
17 seems to me the principle that Counsel cites in  
18 that is that individuals can't have an  
19 expectation of privacy in stolen items. That's  
20 true.

21           But the search in **Hicks** occurred in the  
22 house of Mr. Hicks, if I remember, and it's been  
23 some time, so there is an expectation in the  
24 place, which then, of course, provided an  
25 additional expectation of privacy in the items

1 within the place. Well, that's a far different  
2 set of facts than we have here.

3 Then they cite *O'Connor vs. Ortega*.

4 Ownership is not -- Let's see, *Ortega*, if memory  
5 serves me, that was a case involving a search of  
6 an individual at his place of employment. As a  
7 matter of fact, *O'Connor vs. Ortega*, I believe,  
8 was an actual search of the person's private  
9 office. Again, that's an entirely different set  
10 of circumstances that we have in this particular  
11 case.

12 Again, they cite the *Whitrock* case,  
13 which I also cite for the principle, the general  
14 principle in my brief, for another point.  
15 Certainly guests can have an expectation of  
16 privacy in someone else's home. We're certainly  
17 not contesting that but, then again, it's the  
18 place that's searched and how reasonable is their  
19 expectations.

20 And it's not a carte blanche, just  
21 because you have a guest, they always, forever,  
22 have a reasonable expectation of privacy in, for  
23 instance, your home. There are other factors  
24 that the Courts look at, but it's not uncommon.  
25 I don't see how that case has any particular



1 relevance, or the principles therein, have  
2 application to this case, because the facts are  
3 so unique and so different.

4 Next, it's pretty much conceded in their  
5 argument, and in the testimony, that by and  
6 large, the vast area contained in Exhibit No. 18,  
7 here, is attributed to the auto salvage yard.  
8 Well, the last time I looked, an auto salvage  
9 yard was a commercial enterprise and business.

10 And while one may have, and I use the  
11 word one because I will come back to that, one  
12 may have a reasonable expectation of privacy in  
13 commercial property, but it is less than a  
14 reasonable expectation of privacy one would have  
15 in a private dwelling. The best case for that is  
16 **New York vs. Burger**, B-u-r-g-e-r, 482 U.S. 691,  
17 page 700, 1987. And if memory serves me, **Burger**,  
18 I think, involved a search to a auto salvage  
19 yard.

20 Now, with respect to the challenge here,  
21 we have no reasonable -- no actual, subjective  
22 expectation of privacy, which has been  
23 established in the defense presentation of  
24 evidence, in this particular case. Not only is  
25 there no actual, subjective expectation of

1 privacy in the areas that we have just talked  
2 about, there's no one that society is willing or  
3 prepared to accept as reasonable under the  
4 circumstances of this case. Again, this is a  
5 commercial piece of property, by and large. It  
6 is a property which is held open to the public.

7 It's the State's position that Mr. Avery  
8 doesn't have a basis to challenge the search  
9 warrant except, and only limited to, the search  
10 of his residence and the garage. Any property  
11 located elsewhere, he did not have a reasonable  
12 expectation of privacy in.

13 Particularly in addition, the argument  
14 is, with respect to the burn area and the burn  
15 pits, you have abandoned property, you have burn  
16 property. And more importantly, relative to the  
17 expectation of privacy, there is no evidence,  
18 there is no testimony, that there were any steps  
19 taken by Mr. Avery, evincing an actual,  
20 subjective expectation of privacy, other than  
21 their mere location. And, quite frankly, in or  
22 near the curtilage, to borrow the old common law  
23 term, is not enough.

24 All right. Moving on to the challenge  
25 to the **Franks** motion. The State's primary

1 argument, and I'm going to begin with the  
2 procedural argument, and then I will reach the  
3 merits. The procedural argument is, first and  
4 foremost, the defendant's pleading. Its motion,  
5 affidavit, supporting documentation, we believe,  
6 was insufficient to justify the Court's taking  
7 the evidentiary testimony in the first place.

8 First, there must be a substantial  
9 preliminary showing that there was a false  
10 statement, knowingly and intentionally, or with  
11 reckless disregard for the truth, was included in  
12 the warrant and affidavit, and that that  
13 statement is necessary to the finding of probable  
14 cause. We agree.

15 ***Franks vs. Delaware*** is the seminal case  
16 in this matter. It has been adopted and it's  
17 reasoning applied in a couple of Wisconsin cases,  
18 most notably ***State vs. Anderson***. To make a  
19 substantial preliminary showing there must be  
20 allegations of deliberate falsehood or reckless  
21 disregard. And those allegations may be -- must  
22 be accompanied by an offer of proof.

23 When you look at the motion and  
24 supporting documentation of the defense, they  
25 raise conclusory allegations that there were

1 certain false statements made, but they don't  
2 really show or demonstrate that there was any in  
3 the pleadings, any intent on the part of the  
4 affiant, in this case Investigator Wiegert, to  
5 deliberately mislead and lie to the Court, in an  
6 effort to obtain the warrant.

7 Their pleading is totally and completely  
8 deficient. It is conclusory only. And I will  
9 rely on the argument raised in my written brief  
10 on that particular point. Again, a presumption  
11 of validity attends to the affidavit.

12 In this case, there pleading fails to  
13 establish that the key statement was false or  
14 made with reckless disregard for the truth.  
15 Defense hinges it's argument primarily on two  
16 concepts, whether or not there were really  
17 volunteers and this -- the manner in which the  
18 vehicle identification number, commonly referred  
19 to the VIN, was obtained. So let's take those  
20 one at a time.

21 In their pleadings, they allege that  
22 they weren't really volunteers. I believe I  
23 specifically point pages, I think, it's 7 or 8,  
24 or 8 and 9, where they raise the specter, that  
25 there was this grand scheme to employee

1 volunteers to secretly invade the Avery compound  
2 and conduct a search. At best, the pleadings  
3 suggest that they might do something like that,  
4 at best. In other words, might use the volunteer  
5 searchers to help assist in a search.

6 This discussion, while there was a  
7 meeting, that we were all going to meet at the  
8 Manitowoc Sheriff's Department, that all, at  
9 best, signifies an intent to have something  
10 happen in the future. It doesn't exist --  
11 doesn't establish the existence of any kind of  
12 working relationship, or to take the legal phrase  
13 now, an agency relationship, or a joint venture  
14 relationship, with law enforcement, at the time  
15 of Pamela Sturm's entry to that property.

16 At best, it's a -- suggests that maybe  
17 at some point we will utilize these searchers to  
18 assist us in the search. As it turned out, we  
19 know from Mr. Hillegas, that several days later  
20 he did assist in that capacity. But the  
21 pleadings don't tell us that such -- or suggest  
22 that such an agency existed at the time of entry.

23 There's no other evidence to suggest  
24 that Pamela Sturm, in the affidavit, was working  
25 at the behest, or for, law enforcement. There's

1 no evidence anywhere in the affidavit that  
2 suggests that such an agency relationship  
3 existed, or was established, prior to gaining  
4 entry on the morning of November 5th. So their  
5 pleading is deficient.

6 Secondly, with respect to the VIN  
7 number, they say that there was a lie regarding  
8 this whole concept of matching, primarily hinging  
9 its argument on whether the -- Pamela Sturm found  
10 all of the VIN characters upon her examination of  
11 the vehicle. Well, regardless of whether she did  
12 or she didn't, it is irrelevant.

13 Detective Remiker did have the  
14 opportunity to examine the vehicle, did have the  
15 opportunity to find all 17 characters. And that  
16 was hours before the warrant and affidavit were  
17 prepared and submitted to a judicial officer for  
18 review and signature.

19 Again, with respect to the pleadings,  
20 we'll come back on the technical argument and  
21 make this point. I think if you were to remove  
22 the discussion of the VIN number entirely from  
23 Paragraph 5, the affidavit prepared by  
24 Investigator Wiegert states probable cause,  
25 easily.

1                   We know at the time of the affidavit,  
2                   and the Court has the affidavit, I believe it's  
3                   marked as Exhibit 15, if memory serves me. Yes,  
4                   Exhibit 15.

5                   We know that in Paragraph 2 of this  
6                   particular case, that a missing person Complaint  
7                   was filed with the Calumet County Sheriff's  
8                   Department, by Karen Halbach. We know that her  
9                   daughter had not been seen or heard from since  
10                  Monday, October 31st, 2005, and that it was  
11                  unusual for her not to have contact with family  
12                  friends or work people. We know further, from  
13                  that paragraph, that she was driving a 1999  
14                  Toyota RAV 4, dark blue in color.

15                 We also know that on November 4th, we  
16                 have Mr. Avery informing the investigators, I  
17                 believe Investigator Remiker, that Teresa Halbach  
18                 was in fact on his property. He did see her on  
19                 October 31st, 2005, that she was there to take  
20                 photographs of the vehicle he was selling.

21                 We also know, taking out the concern  
22                 regarding the obtaining of the VIN number, that  
23                 Pamela Sturm found a Toyota RAV 4, on the  
24                 property, on November 5th. That's less than five  
25                 days, a few hours less than five days after she

1 was last seen on the property.

2 The interesting thing about the Toyota  
3 RAV 4, as she described it, the affidavit says it  
4 was dark blue in color. She finds a RAV 4. The  
5 RAV 4 that she finds, her attention is drawn to.  
6 It is not an unfair inference to draw that it has  
7 some similar appearance to the RAV 4 of Teresa  
8 Halbach's.

9 But what really makes this case rather  
10 interesting is the fact that, of all the vehicles  
11 there, we have a RAV 4 which is secreted by brush  
12 and other automobile parts, less than -- again,  
13 less than five days after she was last seen and  
14 known to be driving that vehicle. That in and  
15 off itself is probable cause to justify a search  
16 warrant, the issuance of a search warrant in this  
17 particular case.

18 Now, additionally, let's assume for the  
19 sake of argument that -- we don't have to assume,  
20 but we will for purposes of the procedural  
21 argument -- that Pamela Sturm was only able to  
22 read four of the characters, not 10. But let's  
23 say it was just four, let's just say it was the  
24 last 4, 3044.

25 What are the odds, what are the



1           probabilities, that it is, in fact, Teresa  
2           Halbach's vehicle, when you consider all those  
3           facts. Easily meets probable cause. At 10  
4           digits, does that make it closer? Ten digits,  
5           we're at -- we're preponderance of the evidence.

6                     All right. Now, to the merits of the  
7           argument, and to the testimony that was  
8           delivered. The testimony establishes, I think  
9           critical testimony was provided by Pamela Sturm  
10          and Ryan Hillegas.

11                    With respect to Pamela Sturm, she  
12          testified that she had no contact whatsoever with  
13          any member of law enforcement regarding the  
14          decision to participate in the volunteer search  
15          program and, more importantly, in the decision to  
16          go to the Avery property and look for Teresa  
17          Halbach's vehicle. As she indicated, and was  
18          confirmed by Ryan Hillegas, it was her idea.

19                    No one told her anything. No one  
20          suggested anything. In fact, she hadn't even  
21          been given any instructions by Mr. Hillegas as to  
22          what to do and how to do it. He gave her a very  
23          generalized map of the area. And she and her  
24          daughter, Nikole, went on their way and took the  
25          initiative and decided they would go there.

1                   Because, at least she knew in her mind,  
2                   from the media newscast, the last place Teresa  
3                   Halbach was seen, that anyone knew at that time,  
4                   was the Avery property. It was her decision to  
5                   go there, without any association with law  
6                   enforcement whatsoever. That was confirmed by  
7                   Ryan Hillegas.

8                   The entire volunteer search effort,  
9                   especially in those early days, that being  
10                  Thursday night, Friday when the posters were  
11                  picked up, Friday afternoon when the posters and  
12                  information were distributed, was entirely his  
13                  workings, along with his friend, and Teresa  
14                  Halbach's roommate, Scott Bloedorn. They were in  
15                  charge of the volunteer efforts.

16                  There's no testimony they took any  
17                  organization, any direction, any control, any  
18                  supervision, or any advice, for that matter, from  
19                  law enforcement, other than, perhaps -- and the  
20                  record is thin on this -- if you find something,  
21                  call us, here are the phone numbers. Hardly  
22                  evidence indicating, or establishing, the  
23                  existence of an agency relationship, or a joint  
24                  venture relationship.

25                  In fact, as I recall the testimony of

1 Ryan Hillegas, it wasn't until later on Friday  
2 that they decided that he would have a meeting at  
3 the residence of Teresa Halbach and Scott  
4 Bloedorn's, the next morning, and perhaps do some  
5 searches.

6 And when questioned about the scope, or  
7 purpose, or focus of these searches, he indicated  
8 that they were searching the roads, the ditch  
9 lines, the general fields, in the area from  
10 Manitowoc to Mishicot, to the area where -- the  
11 apartment where Teresa Halbach lived.

12 Their assumption was the fact that she  
13 perhaps had some automobile accident. That was  
14 their focus. They weren't looking to search  
15 private premises or private property, per se,  
16 other than something that might be associated  
17 with an open field. That was the focus.

18 There was no law enforcement involvement  
19 in that. And as indicated, Pamela Sturm and her  
20 daughter, Nikole, show up a good hour after  
21 everyone else has been dispatched. Again, the  
22 decision to go there was entirely theirs.

23 The tape played by counsel is rather  
24 interesting, but there's a couple of ways to look  
25 at that. But more importantly, it supports the

1 argument made relative to the procedural point,  
2 and that is, at best, it signifies that, well,  
3 we're going to have the searchers, maybe we can  
4 use those searchers do something later.

5 We want to go back. We want to get a  
6 reinterview of Mr. Avery, want to get a  
7 reinterview of Mr. Zipperer, and we're going to  
8 ask for consent. We can get the searchers to  
9 help us with a search. Again, doesn't signify  
10 any agency existed, doesn't signify any joint  
11 venture existed at that time.

12 At best, it signals that perhaps one  
13 would occur in the future. It certainly doesn't  
14 suggest, and it doesn't even come close to  
15 suggesting, that there was an error, a lie, or an  
16 omission, relative to just who these searchers  
17 were and what they were up to.

18 Now, with respect to that, I would like  
19 to direct the Court to the case of **State vs.**  
20 **Anderson**, as an example of what would constitute  
21 an error, a lie, or omission. **Anderson** was a  
22 case that came out of Kenosha County regarding  
23 the execution of a search warrant for narcotics  
24 at a particular residence there.

25 In that case, the defense challenged the

1 search warrant on a **Franks** motion, alleging that  
2 there were two lies, or reckless disregards for  
3 the truth that occurred, in the presentation of  
4 the affidavit.

5 One was a statement by the undercover --  
6 or by the officer, the affiant, who said, Well, I  
7 have reason to believe that the informant we use  
8 here is reliable because we made two prior  
9 purchases with that individual and they  
10 demonstrated their reliability. Defense  
11 challenged that as a reckless statement,  
12 insufficient to justify credibility, reliance by  
13 the Court on that.

14 Secondly, they challenged the statements  
15 when the undercover officer said, Well, I saw the  
16 ve -- I saw the informant go to and from the  
17 residence of the defendant, return to and come  
18 from the residence of the defendant. It turns  
19 out that, actually, the investigator did lose  
20 sight of the informant for a moment or two, and  
21 never actually saw them enter the house and exit  
22 the house, but it was a matter of moments.

23 The Court likewise determined, under  
24 those type of facts, that those were not lies,  
25 they were not reckless disregards to the truth,

1 they were reasonable inferences drawn from the  
2 circumstances which were presented in the court.

3 And, again, under those circumstances,  
4 and taking by analogy what's occurred here, there  
5 is no unfair, unreasonable inference drawn from  
6 the contents of this affidavit. And if those  
7 statements, under those circumstances, were found  
8 to be supportive of the issuance of the warrant  
9 in that particular case, then certainly anything  
10 that occurred in the affidavit here, meet legal  
11 sufficiency.

12 The other thing which the **Anderson** case  
13 notes, and I would again point out, in footnote  
14 seven of **Anderson** --

15 THE COURT: What's the citation?

16 ATTORNEY FALLON: Yes, 138, Wis. 2d, page  
17 451, specifically, page 464. The **Anderson** cite is  
18 in my brief. Footnote seven, the Court noted that  
19 they were, quote, "We are unconvinced that a hearing  
20 was providently granted in that case."

21 The **Anderson** case is also significant  
22 for another reason, which was discounted by the  
23 defense, and so we take issue with that. And  
24 that is, the defense says that what information  
25 was contained in Investigator Wiegert's mind, in

1 other words, what information he had available to  
2 him at the time he applied for the warrant, which  
3 may or may not have found it's way into the  
4 affidavit, was irrelevant.

5 Well, quite frankly, nothing could be  
6 further from the truth. Because as *Rakas vs.*  
7 *Illinois*, as *Franks v. Delaware*, and as *State vs.*  
8 *Anderson* tell us -- specifically, I should say as  
9 *Franks v. Delaware*, not *Rakas* -- as *Franks v.*  
10 *Delaware*, and the *Anderson* case tell us, it says,  
11 Because the defendant must show either intent or  
12 reckless disregard, a *Franks* hearing, by  
13 necessity, focuses on the state of mind of the  
14 affiant.

15 So what Investigator Wiegert knew and  
16 when he knew it, was important. That was the  
17 basis for the testimony. He knew that they had  
18 found a Toyota RAV 4. He knew from the telephone  
19 conversations that it was a late model. In fact,  
20 the Court can consult Exhibit 16 regarding that.

21 As a matter of fact, Exhibit No. 6 --  
22 I'm sorry -- Exhibit 16 was the recording, so  
23 either one, Exhibit 16, but Exhibit 17 is the  
24 written transcription. Looking at page 62  
25 question by Detective Wiegert:

1                   Question: Does it look like a newer  
2 one?

3                   Caller: Yeah, it's the '99 to 2000.

4                   Wiegert: Is there any --

5                   Caller: It's more of a bluish-green,  
6 though, that's why we don't want to put, you  
7 know --

8                   Question: Is there any license plates  
9 on it?

10                  Caller: No plates on it, but it's a  
11 little covered up. It's weird, it's covered up.

12                  There's also much discussion as to  
13 whether it was dark blue, blue, bluish-green.  
14 And the Court can consult the transcript on the  
15 tape, but she says it's more blue than green.

16                  During the course of that trip from  
17 Calumet County, to Manitowoc County, to the  
18 property itself, Investigator Wiegert knew that  
19 there was a Le Mieux sticker, dealer sticker, on  
20 Teresa's vehicle, and then confirmed with Ms  
21 Sturm that the vehicle she found, likewise, had a  
22 sticker. They knew some of the VIN numbers, upon  
23 arrival they got the rest of the VIN numbers.

24                  All of that information goes to the  
25 state of mind. So when the officer uses the word



1 matching, that's what's in his mind. And  
2 matching, by the way, doesn't have to be a hyper  
3 technical term, as counsel would like to suggest  
4 it is.

5 And perhaps in purposes of DNA analysis,  
6 matching means hyper technical, dot your eyes,  
7 cross your t's, perfect fit. But in every day  
8 parlance, matching means matching. It looks like  
9 it, it is, it's similar to, etcetera.

10 Again, and that becomes relevant,  
11 because the whole purpose of the Fourth Amendment  
12 search and seizure law, the whole determination  
13 of probable cause is that it -- it's not a hyper  
14 technical determination. It's based on reason.  
15 It's based on common sense. It's based on  
16 inferences. It's based on reasonable  
17 possibilities and probabilities that the item  
18 looked for will be found in the place searched.

19 Now, also did want to respond to some  
20 concerns, because yes, first and foremost, Pamela  
21 Sturm did have consent. I don't think that's  
22 questioned. She had consent to enter the  
23 property. She told us so. And Mr. Earl Avery,  
24 likewise, confirmed that he allowed her in.

25 As a matter of fact, his words when

1 questioned about that, words to the effect:  
2 Well, he was concerned. He wanted to help out.  
3 He wanted to do what he could. And when I asked,  
4 Well, if it was your sister, you would want  
5 somebody to be willing to help out and let you  
6 take a look around, and I believe his answer was  
7 yes. So there's no question that Pamela Sturm  
8 rightfully had a way to get on there.

9 Again, it is a commercial property.  
10 Again, this occurred in the morning, when the  
11 property, the salvage yard where the vehicle was  
12 located, was in business. It was during business  
13 hours, 8 to noon. They were there at 11.

14 So it's a property held open to the  
15 public. There were other members of the public  
16 milling about, through that yard. In fact, the  
17 phone call, Exhibit 16 and 17, which the Court  
18 is, again, free to peruse, indicates there was  
19 observations of other individuals floating around  
20 at the time the vehicle was found.

21 In fact, Ms Sturm was somewhat  
22 concerned, because she didn't know who they were,  
23 or what they were up to. And she had a pretty  
24 good feeling that she had found the vehicle.  
25 Otherwise, I don't think she would have been all

1           that concerned.

2                       But not knowing who is there, what's  
3 going on, I think the fact of her heightened  
4 sensitivity, is further evidence. Also, a fact  
5 in the mind of Investigator Wiegert and Sheriff  
6 Pagel, that there was something to the finding of  
7 that vehicle, that it was the vehicle everyone  
8 was looking for.

9                       Next, the defense would have us to  
10 believe that, there is no basis for law  
11 enforcement to even come in there. Well, excuse  
12 me, but you have a situation where you have the  
13 vehicle of the missing person, found in the  
14 corner of a business piece of property. Law  
15 enforcement had every right to go in there and  
16 assist in, one, securing the vehicle, you have  
17 exigent circumstances here.

18                      It's interesting to note that, as was  
19 pointed out in the testimony, the vehicle is  
20 reasonably close to the car crusher. The vehicle  
21 is also secreted from view. It is a vehicle, as  
22 Mr. Avery told us, he didn't even know it was  
23 there two or three days earlier.

24                      So all of these factors come into the  
25 equation as to the reasonableness -- and that's

1 the linchpin of Fourth Amendment analysis, the  
2 reasonableness of law enforcement behavior upon  
3 arrival at the scene. They went there. They  
4 secured the vehicle. Took care of the safety of  
5 Pamela Sturm and her daughter, Nikole.

6 Now, even if the defense wanted to make  
7 the argument, I saw -- I heard inklings of it,  
8 that there were somehow some kind of trespass  
9 here, by law enforcement. Well, the reality is,  
10 that doesn't matter. We don't believe there was.

11 But even if the Court were somewhat  
12 concerned, I would ask the Court to direct, and  
13 perhaps consider, the case of **United States vs.**  
14 **Oliver**, Supreme Court case at 466 U.S. 170.  
15 **Oliver** is not particularly noteworthy for the  
16 Court's analysis, except with respect to one  
17 point. And -- And that deals with the law of  
18 trespass and it's possible application in Fourth  
19 Amendment determination.

20 The law of trespass, this is page 183.  
21 Law of trespass, however, forbids intrusions upon  
22 land that the Fourth Amendment would not  
23 prescribe. For trespass law extends to instances  
24 where the exercise of the right to exclude  
25 vindicates no legitimate privacy interest.

1                   And then they go on to say -- there is a  
2                   footnote, which I will get to in a minute -- they  
3                   go on to say, less in the case of open fields,  
4                   the general rights of property protected by  
5                   common law trespass, have little or no relevance  
6                   to the applicability of the Fourth Amendment.  
7                   Well, by analogy, we're in a salvage yard here,  
8                   and whose expectation of privacy are we concerned  
9                   with, Earl and Charles Avery, or is it Steven  
10                  Avery.

11                  With respect to trespass, the Court went  
12                  on in the footnote, the law of trespass  
13                  recognizes the interest, and possession, and  
14                  control of one's property, and for that reason,  
15                  permits exclusion of unwanted intruders. But it  
16                  does not follow the right to exclude conferred by  
17                  trespass law, embodies a privacy interest also  
18                  protected by the Fourth Amendment.

19                  To the contrary, the common law of  
20                  trespass furthers a range of interest that have  
21                  nothing to do with privacy and that would not be  
22                  served by applying the strictures of trespass law  
23                  to public officers. And the footnote goes on.

24                  In examining the totality of the  
25                  circumstances here, taking all of the evidence

1           that the Court has taken in, over the course of  
2           the last day and a half, there is no basis,  
3           whatsoever, under the Fourth Amendment law, to  
4           suppress any of the evidence. One, there is no  
5           standing, by Mr. Avery, to challenge any of the  
6           searches, other than the search of his trailer  
7           and his residence, although he attempts to do so.  
8           And he attempts to do so on the basis of a **Franks**  
9           challenge.

10                        Again, there was no basis to hold a  
11           hearing and, clearly, based on the testimony  
12           which was established by all of the witnesses  
13           here, there was certainly probable cause to  
14           justify the search warrant and conduct the search  
15           that law enforcement conducted. There is no  
16           material omission, or material lie, affecting the  
17           establishment of probable cause in this  
18           particular case. As a result, this Court is duty  
19           bound to deny the request and we ask the Court to  
20           do so. Thank you.

21                        THE COURT: Mr. Buting, brief rebuttal?

22                        ATTORNEY BUTING: Yes, Judge, I will try to  
23           be brief because I know it's getting late here.  
24           The -- A couple things are not -- a lot of things  
25           are not clear about what position the State is

1 really taking here. It seems to say that, because  
2 Mr. Avery has no personal privacy interest in, for  
3 instance, the remains of Teresa, he can't have any  
4 standing.

5 That's totally irrelevant. The Court's  
6 have made it clear that would also be true as to  
7 stolen property, as in *Hicks*. One has no  
8 expectation, or no personal interest in that  
9 stolen property, you shouldn't even have it in  
10 your house, but the Court said that's not the  
11 issue. Ownership is really irrelevant when it  
12 comes to standing.

13 So -- And that applies also to -- he  
14 said it a couple times, I think he also mentioned  
15 it when he was talking about the vehicle, he  
16 didn't drive it, he didn't own it, etcetera,  
17 etcetera. Again, that doesn't matter. The issue  
18 is, is there an expectation of privacy. And,  
19 frankly, if -- One factor that he ignored is, in  
20 determining whether someone has an expectation of  
21 privacy, if the State is going to argue that  
22 there was some effort to conceal it, that would  
23 seem to even more indicate that there was an  
24 expectation of privacy, if it was not out in the  
25 open.

1                   The reference to the burn barrel somehow  
2 being, and the burn pit somehow being, like  
3 abandoned, and somehow no expectation of privacy,  
4 absolutely, I totally disagree with. First of  
5 all, it's not like garbage, even garbage you have  
6 an expectation of privacy in until -- as long as  
7 it's by your curtilage, until it is picked up, as  
8 people often retrieve things from garbage.

9                   This is entirely different. When you  
10 burn, a burn barrel, expectation is it's not  
11 being picked up. It's not ever going to go to  
12 someone else. The contents of the burn  
13 barrel are, it's going to be entirely burned up.  
14 That's the point of it.

15                  Moreover, the location of it, as we have  
16 seen numerous times through these descriptions,  
17 is it's probably a good half a mile, you have to  
18 get off the highway and drive a half a mile down,  
19 to the driveway that goes over to Mr. Avery, and  
20 then back over to his property, going all the way  
21 around this big parcel of --

22                  ATTORNEY FALLON: I'm going to object. I  
23 don't believe there's any evidence that's a half  
24 mile ride from one point to the other. I don't  
25 recall any evidence of that being introduced.



1                   ATTORNEY BUTING: Well, whether it's  
2 exactly a half mile, it's clearly a long way off the  
3 highway. Would Mr. -- Suppose this analogy, would  
4 Mr. Fallon say, that if you have a clothes line  
5 hanging over the area where that burn pit is, with  
6 your clothes on it, that any individual from the  
7 public, or law enforcement, could drive down highway  
8 147, turn right on Avery Road, and then drive around  
9 the corner, take a left, go all the way over to the  
10 Steven Avery residence, park, get out, walk around  
11 to the back of it, and start going through your  
12 clothes? Of course not. The location of that is  
13 obviously not open to the public and there's clearly  
14 an expectation of privacy.

15                   By the same token, would he expect that  
16 somebody would be allowed to drive off of Highway  
17 147, down the road, turn left, go all the way  
18 down the driveway and start sticking their nose  
19 in the burn barrel? No, I don't think so. I  
20 think the location clearly indicates an  
21 expectation of privacy. And it's not like  
22 garbage, because there's no expectation it's  
23 going to be picked up by anybody.

24                   The reference to commercial business, as  
25 I want to mention for just one second, *O'Connor*

1           **vs. Ortega**, I think, did deal with a private  
2 office and it was in a hospital, I think. But  
3 the comparison of this, what I cited it for is to  
4 point out that even -- there's even an  
5 expectation of privacy in a commercial setting,  
6 not just a private setting.

7           But, this is not strictly what you would  
8 classify as an employment, or employee, employer  
9 type of case, because this is a family run  
10 business. It's not like Mr. Avery is just an  
11 employee of GE or something, who has his own  
12 private office and expectation in there, but  
13 everything else in the big plant is not. This is  
14 different. This is a small, family run business  
15 where he is not just an employee, he's a member  
16 of the family working there and living there.

17           And there is one other case that I would  
18 cite to the Court on that point, and that's **State**  
19 **vs. Schwegler**, S-c-h-w-e-g-l-e-r, 170 Wis. 2d,  
20 487, 1992 case, which was a horse barn, again, it  
21 was a commercial business. But where the horse  
22 barn, and there was an inspection done, that the  
23 Court ultimately found, the owner of that  
24 business, even though it was a commercial  
25 business, had an expectation of privacy in the

1 barn and the warrantless inspection was unlawful.

2 One last point on the question of  
3 proximity and, used to be called curtilage, and  
4 that sort of thing. Again, like in all Fourth  
5 Amendment law, it is very fact intensive, the  
6 Courts recognize the difference between a very  
7 large property and a small one.

8 In **State vs. Martwick**, M-a-r-t-w-i-c-k,  
9 that's 231, Wis. 2d, 801, I don't have the year,  
10 I don't think, but it's at page 819. The Court  
11 notes, On a smaller property, such as Martwick's  
12 property, the curtilage may very well extend for  
13 less distance than on a larger property, where  
14 the owner has more room to conduct his or her,  
15 quote, "intimate activities of life", citing a  
16 U.S. Supreme Court case.

17 And they also -- In this case, they  
18 found that it wasn't, but they also note in **State**  
19 **vs. O'Brien**, which is at 223 Wis. 2d, 303, at  
20 page 316, a 1999 Wisconsin Supreme Court case,  
21 the Supreme Court found that a truck parked  
22 approximately 200 feet from a farmhouse was  
23 nonetheless within the curtilage. So, when one  
24 is talking about a large, open, farm type, or  
25 parcel like we have here, the whole concept of

1 curtilage is different than if you are talking  
2 about a little city house.

3 Now, as to the question of probable  
4 cause, and whether the State argues that even if  
5 you take -- you strike certain parts from the  
6 Paragraph 5 of the affidavit, there's still  
7 sufficient probable cause. And one of the points  
8 that he made is, he argues, Well, the rest of the  
9 affidavit says, she's been missing since October  
10 31st; they spoke to Mr. Avery, he conceded that  
11 he did see her on October 31st; and that, then,  
12 Sturm, the volunteer searcher, citizen searcher,  
13 found a Toyota RAV 4 on the property, and as if  
14 that alone, I think he says, would be probable  
15 cause.

16 But -- And maybe in some settings it  
17 would be, if this was a farm, with no other  
18 vehicles, and you happen to have -- or maybe just  
19 one or two vehicles, and you happen to find a  
20 Toyota RAV 4. Well, perhaps that is probable  
21 cause, probably would be.

22 This is a auto junkyard. There's 4,000  
23 cars on there. So the mere existence of a Toyota  
24 RAV 4 would not be unusual, and would not be so  
25 significant that, in and of itself, absent any

1 other descriptions that match, that there would  
2 be probable cause.

3 Now, I would concede, so there is no --  
4 we don't waste anymore time on this, that in our  
5 pleadings, we believe the evidence would indicate  
6 that there was an agency type relationship  
7 between these searchers, these citizens, and the  
8 police, and that they were conducting -- using  
9 them as an end around. And I will concede that  
10 the way the evidence came out on this record, we  
11 haven't established that.

12 Patricia (sic) Sturm and Ryan Hillegas,  
13 whether truthful or not, clearly the record from  
14 them is that they did not have any contact with  
15 law enforcement. They weren't organized,  
16 encouraged, or whatever.

17 My point in playing that segment of --  
18 or that brief phone conversation today, of  
19 Investigator Wiegert, was not to try and show  
20 that his reference to volunteers proves that he  
21 was using them for that, but it goes to his  
22 credibility on the other matters that he's  
23 testified to, because he swore under oath that he  
24 did not say anything to Remiker on the phone  
25 about using, or intending to use volunteers, to

1 search the Avery property.

2 ATTORNEY FALLON: I'm going to object,  
3 that's a mischaracterization of his testimony.

4 ATTORNEY BUTING: Obviously it's --

5 THE COURT: His testimony will speak for  
6 itself, I will take a look at the transcript.

7 ATTORNEY BUTING: Okay. So, yes, but  
8 conceding that that -- that one part of Paragraph 5  
9 we have not established our burden on, says nothing  
10 about the rest of it, though. Granted, okay, so  
11 they are volunteer searchers, according to this  
12 record. But, Wiegert also says that the volunteer  
13 searcher said they had a matching -- a vehicle  
14 matching the description, and we know that that's  
15 not true.

16 The reference in **Franks** and **Anderson**  
17 that the State makes, to the state of mind of the  
18 affiant being important, he totally  
19 misunderstands, or he's taking it out of context.  
20 What the Court is talking about is, sure, the  
21 state of mind of the affiant is important,  
22 because it's important as to the intent or  
23 recklessness element, of the test.

24 It's not relevant what the affiant has  
25 in his mind that he doesn't present to the Court.

1           Otherwise, why would we have search warrants in  
2           the first place, if all that it needed was that  
3           the officer, in his own mind, is convinced that  
4           he's got enough evidence, but he feels like he  
5           doesn't have to even tell the Court.

6                         That's preposterous. That's turning on  
7           its end, the whole process of requiring an  
8           independent evaluation by a magistrate, not  
9           allowing officers themselves to accumulate facts  
10          or beliefs and come to some conclusion on their  
11          own. Those facts and beliefs need to be  
12          presented to the Court. It's not enough that he,  
13          in his own mind, thought, oh, well, this is  
14          enough for a match. He should tell the Court  
15          what it is that makes him think that. And he  
16          didn't do that.

17                         Just two other quick points. One, yes,  
18          this is a property open for business, and yes,  
19          there are other people wandering around there at  
20          the time. But all of them had permission. It's  
21          clear, that the custom and practice was that  
22          people don't go into that salvage yard, into the  
23          pit, and start looking at cars, without -- that  
24          is customers -- without permission from the  
25          owners first. And that's what Patricia (sic)

1           Sturm did, that's not what Detective Remiker did.

2                     It's not a question of trying to apply  
3           trespass law, specifically, which is the **Oliver**  
4           case. It's a question of, under the Fourth  
5           Amendment, whether Detective Remiker had a lawful  
6           purpose in being where he was and observing what  
7           he saw.

8                     Even if there is some exigent  
9           circumstances to allow him to come down to the  
10          property and to, quote, "secure the vehicle", he  
11          did much more than that. And that's the point,  
12          he didn't just come down here, secure the  
13          vehicle, talk to the Sturms, then go get a  
14          warrant, which is what he should have done.

15                    He did more. He searched the vehicle,  
16          because he went up to it with a flashlight and he  
17          looked in and he used illumination to allow him  
18          to see other evidence related to the car,  
19          particularly the VIN. That's what happened.

20                    It's analogous to what happened in  
21          **Hicks**, where they recorded the serial numbers.  
22          They moved them, the speakers or stereo  
23          components, recorded the serial numbers. And  
24          that was considered a search that was unlawful.

25                    So, for all those reasons, I think the



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Court should find that we have met our burden,  
under **Franks**, and that the motion to suppress  
should be granted. Thank you.

THE COURT: All right. Given your  
arguments, and my need to look at the transcript,  
I'm not sure I will have a decision for you on this  
issue on the 22nd, but we certainly will have some.  
And I will see you then. Is there anything else  
from either party?

ATTORNEY KRATZ: No.

ATTORNEY STRANG: No, your Honor. Thank  
you.

THE COURT: If not, we're adjourned for  
today.

(Proceedings concluded.)

1 STATE OF WISCONSIN )  
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2 COUNTY OF MANITOWOC )

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I, Diane Tesheneck, Official Court Reporter for Circuit Court Branch 1 and the State of Wisconsin, do hereby certify that I reported the foregoing matter and that the foregoing transcript has been carefully prepared by me with my computerized stenographic notes as taken by me in machine shorthand, and by computer-assisted transcription thereafter transcribed, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge and ability.

Dated this 15th day of August, 2006.

\_\_\_\_\_  
Diane Tesheneck, RPR  
Official Court Reporter

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