STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY
BRANCH 1

STATE OF WISCONSIN,

PLAINTIFF, MOTIONS HEARING

vs. Case No. 05 CF 381

STEVEN A. AVERY,

DEFENDANT.

DATE: JANUARY 19, 2007

BEFORE: Hon. Patrick L. Willis
Circuit Court Judge

APPEARANCES: KENNETH R. KRATZ
Special Prosecutor
On behalf of the State of Wisconsin.

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

NORMAN A. GAHN
Special Prosecutor
On behalf of the State of Wisconsin.

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

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

STEVEN A. AVERY
Defendant
Appeared in person.

TRANSCRIPT OF PROCEEDINGS

Reported by Diane Tesheneck, RPR

Official Court Reporter

THE COURT: At this time the Court calls State of Wisconsin vs. Steven Avery, Case No. 05 CF 381. We are here this morning for a motions hearing. Will the parties state their appearances for the record, please.

ATTORNEY KRATZ: On behalf of the State of Wisconsin, your Honor, Ken Kratz, Calumet County District Attorney; Norm Gahn, Assistant District Attorney for Milwaukee County; Tom Fallon, from the Department of Justice, all appear as Special Prosecutors.

ATTORNEY STRANG: Steven Avery appears in person. Jerome Buting of Buting and Williams, to my left, on his behalf. And Dean Strang of Hurley, Burish and Stanton, as well.

THE COURT: All right. I will indicate for the record that I met briefly with counsel in chambers before we began, to take an inventory of motions that are outstanding and set up the order in which they will be addressed this morning. The first motion is the State's motion for relief from pre-trial scheduling order. Mr. Kratz.

ATTORNEY KRATZ: Mr. Gahn will handle that motion.

THE COURT: Okay. Mr. Gahn.

ATTORNEY GAHN: Your Honor, I believe that the motion that we filed speaks for itself. We're just asking the Court -- Today was the deadline for us to turn over rebuttal witnesses, and in light of the recent events, we're asking to be relieved from that, because we may need to do some additional testing. We don't know yet if we will, but we're asking the Court to relieve us from that responsibility to reveal any of our rebuttal witnesses, expert witnesses especially, today.

And I have cited a ***State v. Konkol*** in support for this request. And also our own discovery provisions under 971.23 (1)(d) which basically excludes rebuttal witnesses from what a district attorney must disclose to the defendant.

THE COURT: All right. Will it be Mr. Strange or Mr. Buting?

ATTORNEY BUTING: I have got it, Judge. We don't have a real concern about their request, assuming that it relates -- it's limited to this issue of the blood vial and whether there's any other testing that can still be done on it. I don't know that at this point that there is any, and they haven't decided if there is anything yet at all.

But assuming that it is limited to that

and that something is ongoing between now and the next few weeks, we don't have any objection to extending the time for them to file any kind of notice. And, frankly, I'm sure that Mr. Gahn would share with us whatever results they are going to come up with anyway. I don't think that he's intending to do some ambush on this issue.

THE COURT: Mr. Gahn.

ATTORNEY GAHN: Your Honor, I don't want this to be limited to just the blood vial situation. It may involve other witness' testimony as far as the whole -- the fording or attacking the defense that may be presented in this case. So I don't want to just limit to that one area.

We have some additional investigation to do to look at in light of some recent documents also that have been filed by the defense. So we may not want that limited at all to just the blood vial, but all aspects of the defense; the location of the vial, where it was, who had custody of it, all -- everything. It's all related. It surrounds all of that issue. But it's not just to that, it may be other testimonial evidence.

THE COURT: Your motion refers to the blood

vial and other related evidence. So I take it that you are not looking for blanket relief from the requirement of the pre-trial order, but you are pointing out, that to the extent that other evidence relates to the blood vial, that's the nature of your request?

ATTORNEY GAHN: That's correct your Honor.

THE COURT: Mr. Buting.

ATTORNEY BUTING: Well, I'm not sure how that other related evidence would involve expert witnesses. I thought that's what he was referring to here. The Court's order, Paragraph 4 B 4, I don't have right in front of me, but.

THE COURT: It provides that the State shall provide to the defense the identity of any rebuttal expert witness the State intends to call, along with copies of reports of any such expert, on or before January 19. Goes on to provide, the State may request additional time, if necessary, based on the nature of any proposed but previously unanticipated testimony of any named defense expert.

ATTORNEY BUTING: So, again, I'm not sure what other kind of expert testimony might be involved in this, but as long as it's not a blanket exemption from the Court's -- I think the Court does

have discretion to pose these kinds of deadlines. The Court did impose the deadlines, and imposed the deadlines against the defense as well, which we have complied with. So, I think maybe there needs to be more clarification later if there is something that we're not anticipating here. But otherwise --

THE COURT: Let me ask this, I understand, based on the previous arguments and information presented to the Court related to the type of testing that might be involved, that it may be difficult for the State to put any timetable on when information might be presented to the defense. But can there be a description, in terms of so much time before such evidence would be offered, that the information would be presented to the defense?

ATTORNEY GAHN: I don't know if I can commit to that, your Honor. Because it's just -- I don't know exactly, depending on future rulings, where we are going to be going. I guess at this juncture I would inform the Court that, as far as expert testimony, I suspect that testimony will be pertaining to the vial, but there may be other lay witnesses that we'll be presenting to thwart the overall defense of, we're talking the location, the security, and everything involved in the defense.

And I simply would ask the Court to perhaps recognize ***State v. Konkol*** and what the Court has held, and also the statutory language which basically states that the State does not have to turn over its rebuttal witnesses to the defense.

THE COURT: Mr. Buting.

ATTORNEY BUTING: Well, on the other hand, the Court did impose the December 15th deadline for discovery, of all types of discovery. Now, obviously, some discovery may be forthcoming based on additional investigation that they have been doing, but I would expect that the State would be required, or should be required, to turn over such discovery immediately, as soon as they get it, rather than, you know, holding it back as some ambush that they are going to present in the rebuttal, whether it's lay or otherwise.

I think that the discovery, the ongoing duty to supplement the discovery, should require prompt compliance, as we have been doing. We have turned over some reports just in the last few days, in fact.

THE COURT: All right. What I'm going to do is this, the motion as I understand it requests

relief from the pre-trial scheduling order in order to allow the State to conduct scientific testing on the blood vial and other related evidence. I believe that this type of an extension was contemplated at the time the pre-trial order was issued, and so I'm going to grant the request as it's framed.

I'm gathering from the argument of the parties that other issues could arise that may be contested, but they haven't been presented, specifically, to the Court at this time and I'm not going to speculate about those. However, given the recent time frame within which the evidence described in the motion was first presented to the State, I'm going to grant their motion.

The next item is the State's demand for compliance with discovery requests. And I believe that relates to the January 5 defense disclosure of potential expert witnesses. Who will be arguing this motion for the State?

ATTORNEY GAHN: I will, your Honor.

THE COURT: Mr. Gahn, you may proceed.

ATTORNEY GAHN: Your Honor, I'm basically going to rely upon the brief we filed in this

matter. I simply would highlight what is stated in our statute of 971.23 (2m)(am), which simply states that if -- that any relevant written, or reported statements of a witness named on a list under Paragraph A, including any reports or statements of experts made in connection with the case; or if the expert does not prepare a report, or statement -- or statement, a written summary of the expert's findings, or the subject matter of his or her testimony, including the results of any physical or mental examination, scientific test, experiment, or comparison that the defendant intends to offer in evidence at the trial.

It clearly states that, summary of the expert's findings. And reading what the defendant has submitted, certainly does not come anywhere close to telling us what are the findings of their expert.

They have not supplied any written reports which have been prepared by their experts but -- and they have not provided us with a summary that is telling us what the findings are. They have simply told us that their experts may or may not testify to something. They may agree with, they may challenge, they may disagree with,

what our experts have come up with.

This is telling us absolutely nothing. I don't believe they are complying with the statute and I believe that the case that we cited, the ***Schroeder*** case, certainly stands for that proposition, that they tell us something. I mean this isn't really difficult. It's quite simple.

If they are going to call these experts to testify, tell us what they are going to say, what is the issue, and what are their findings, what are their conclusions, not this general broad, they may discuss some topic that is so broad in nature that there's no way for us to determine exactly what, you know, what their testimony is going to be. So I would ask the Court to require them to make this more definite and more certain. And provide us with a written summary of what their findings are.

I did speak with Mr. Buting, in our motion we also talked about the October 6th discovery demand that we filed that pertains to the DNA evidence specifically. Mr. Buting is going to look at that motion that we filed, that discovery motion that we filed. And my

understanding is that he's going to get with his expert and will comply as best he can with that, so we needn't discuss that. I believe that Mr. Buting will do that and take him at his word, and will provide us with the necessary information that we have asked for.

But overall, we still believe that we have not been -- that the statute has not been complied with.

THE COURT: Mr. Buting.

ATTORNEY BUTING: Judge, I assume the Court got the letter that I faxed yesterday.

THE COURT: It did.

ATTORNEY BUTING: Okay. I think we have more than adequately complied with the statute. And, in particular, the way the statute reads is, really, one of three things can be done. If a report is prepared, then the report is turned over. However, if there is no report prepared, then the statute says a written summary of the expert's findings or, and that's the important thing, or the subject matter of his or her testimony.

And as I understand, the State's complaint is that the disclosure doesn't specifically list each and every finding, if

that's the way that they want to term it, but the statute doesn't require that. The statute requires a summary of the subject matter of his or her testimony in lieu of that.

Now, we actually do include certain findings. There's some opinions specifically expressed in there of what we anticipate Dr. Fairgrieve may testify about, in particular, as well as Dr. White. It's perhaps a little less -- it's a little more vague maybe on the DNA expert, Dr. Friedman, but in part that's because we explain in the last paragraph that we're not offering any specific test results or manipulation of data through the genotype or various software types of thing.

So, I think clearly we have complied with the statute as to description of the subject matter. And really the ***Anderson*** case that I point out to the Court, -- First, before I get to that, the language of "this witness may testify about that" or, you know, rather than "will testify" is, really, simply a reflection of the fact that none of these experts may testify at all. The defense doesn't have to present any evidence.

And so what we're saying by using that language is that obviously this witness may or may not testify. If the witness testifies, this will be the subject matter of their testimony. So to clear up any confusion about that, there's no uncertainty as to what the subject matter will be if they will testify.

And in ***Anderson***, the State was permitted to introduce a witness at trial without any kind of expert disclosure under the discovery statute, but simply by saying in a motion in limine that an expert will testify about the dynamics of child sexual abuse and -- or actually the -- I think the specific phrase was -- I don't recall it exactly, but the witness was not even named, much less any written summary of what they were going to say.

All that was disclosed was that there would be an expert, unnamed, in the area of the effects of child abuse, and disclosure, and all of that. And the Court said that, in their view, satisfied this discovery statute requirement of a written summary of an expert's finding, or subject matter of his testimony.

So if that was adequate in ***Anderson***,

this is way more than adequate under the statute. As ***Schroeder*** says, ***State vs. Schroeder***, that the State cites, the purpose of the discovery statutes is to enable the other side to prepare for the trial, not to do the preparation for them.

We have done that, we have presented the witnesses, the experts that we may use. If they testify, these are the subject matter. I think we were very specific as to what it is, what subject matter they would testify about, and there are some actual findings included in there. So I think that we have more than adequately satisfied the State's request.

As to the DNA, I did speak with Mr. Gahn beforehand. Some of what he asked for in his October discovery demand I didn't turn over because I thought it related only if Dr. Friedman had performed separate independent tests. I will take another look at that and I think that we will work out whatever remains in that. I will turn over whatever protocol, if he still wishes that, even though tests weren't done. But as to the others, I think we have more than satisfied the requirements.

THE COURT: Mr. Gahn.

ATTORNEY GAHN: Your Honor, even the ***Anderson*** case, when I read the ***Anderson*** case that Mr. Buting has provided under Westlaw printout, this is a 15 page decision. And as far as the portion on the statutory section, 971.23 (1), it's a mere one paragraph of -- looks like 20 lines, and it really is sort of an aside in the ***Anderson*** case.

In fact, under ***State v. Anderson***, the Supreme Court case at 291 Wis. 2d, 673, this ***Anderson*** case that the defense has cited was reversed by the Supreme Court. And they don't even mention this aspect. They don't even bring it up that I could find in the 40 page decision.

So the case being cited was reversed and they didn't even address this very, very minor issue. But even what is said in the ***Anderson*** case is -- what their response to us has been: These experts may testify to something; they may not. They may agree. They may challenge.

This is telling us absolutely nothing. This isn't the spirit of the statute or the spirit of the ***Schroeder*** case. If your expert is going to testify, tell us what their findings are and what their conclusions are so that we can

address that issue at trial. It is something that to state, as the defendant just said, that they gave a summary, I think he said -- if I could have just one moment here while I get that -- that it was, or the subject matter of his or her testimony.

Well, to state something like they may testify to DNA frequencies, well, that's not -- that's such a broad expansive topic that tells us nothing. What exactly is your finding or your conclusion as to the statistical analysis.

They may or may not testify as to DNA protocols. Well, what, what, the protocols are a 100 pages long, and they are all different types of, you know, quality assurance, quality control. What exactly is the finding or conclusion of your expert, that they have come up with. And they just have not provided us with anything close to that.

And I don't believe that's in the spirit of ***Schroeder***, or in the spirit of the statute. And we would ask that they make a more definite and certain explanation to us of what their experts will testify to. Thank you, Judge.

THE COURT: All right. I took the

opportunity to review the legal authorities cited by the defense and also some other cases that interpreted the statute in this case. I also read the defense disclosure of potential expert witnesses that was offered.

And the Court concludes as follows: First, I think the defense adequately explained its use of the term may in the sense that it meant, not that this may or may not be this expert's opinion, but rather that the State is not -- or the defense is not required to produce any expert testimony. And the defense used the term may to indicate it was not committing to call these experts, only that it may call them. And I think that's perfectly appropriate.

With respect to the meaning of the statute, the operative statutory language reads as follows: If an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony are what must be provided.

In the case law I examined, I found the most helpful explanation of that statutory language, which admittedly when it uses the term subject matter, could be somewhat ambiguous, the

most helpful explanation I found was in the case of ***State v. Revels***, R-e-v-e-l-s, reported at 221 Wis. 2d, page 315. And at 330, the Court summarized its interpretation of the statutory language as follows:

We agree with the State, that given the language of Section 971.23 (2m) and its obvious purpose, it must be construed to require disclosure of relevant substantive information that a defense expert is expected to present at trial, whether in the form of findings, test results, or a description of the experts proposed testimony.

The Court also finds that to be the most reasonable interpretation of the statutory language, given the purpose for which discovery is supposed to be provided. As I take that standard and apply it against the disclosure that was presented by the defense, I find that some cases, that some of the information provided by the defense has met the standard, in other situations it falls short.

For example, I'm not going to read it verbatim, but if counsel has the defense offer in front of it, the first full paragraph on page 3,

describing what Dr. Fairgrieve may testify about, I view as consistent with the type of information that is called for by the statute.

If I look back at page 2 and read, for example, that Dr. Fairgrieve may testify about identification of human remains, including specific deficiencies in the recovery of the remains at issue in this case, the Court finds that that type of information falls short of what the statute requires. The other side is entitled to know what are the specific deficiencies that are going to be testified about.

Otherwise, the discovery doesn't serve its purpose. It doesn't allow the State to prepare for the type of evidence that's going to be admitted. And that's not to say that the defense is required to do the State's work for them, it's just to let the State know what work it is going to have to perform on its own to answer the claims made by defense experts.

Another example, a little further on page 2 is the role of temperature and duration in the rendering of a human body to cremains. Well, what is that role? The State is entitled to know what the opinion -- or what the position of the

defense expert is, so that it can determine whether or not it agrees with that position, or whether or not it intends to dispute the findings.

Likewise, moving on to the statement of Dr. Friedman on page 5: It says he may be offered to testify about the reliability or lack thereof of the Wisconsin Crime Lab conclusions in this case. That's a conclusory statement that doesn't really address the type of information the statute calls for.

The defense is entitled to know, what is it that the defense expert finds unreliable about the Wisconsin Crime Lab conclusions, again, so that the party can answer it. And although its not at issue here, I would hold the State to the same standard -- standards in providing its expert information to the defense.

So the Court, necessarily in this case, cannot say with specificity exactly what the defense must do, but I do indicate that, with the examples I have given, I find that the defense disclosure of potential expert witnesses and summary of their expected testimony falls short of what the statute requires. And the Court will

grant the State's demand for compliance, along the lines outlined by the Court.

The next item the Court will address is the defendant's motion for disclosure of exculpatory information, which was filed on January 17th. Will that be Mr. Strang?

ATTORNEY STRANG: Yes, that's I. Buting gets the hard things and I get the easy ones. The case law on the State's due process obligation under the -- here the Fourteenth Amendment, to provide exculpatory information known to it is not entirely clear in terms of what request, or what specificity of request a defendant must make to trigger fully the State's obligation of disclosure of exculpatory information.

And it -- I think it used to be clear that absent a defense request, with some specifics about what it is the defendant thought the State might have that is exculpatory, the State did not have a due process duty. Now, I think since ***Brady*** against ***Maryland***, and assuming almost 44 years, the defendant's obligation to ask has somewhat eroded and been replaced by an affirmative obligation of the State to tender.

But, this is the only way, I suppose, in

which I'm conservative, but I'm conservative on this in the sense of, I thought it better practice to ask, with as much specificity as I could, for what it is I think the State may have, and in doing so invoke the State's due process duty to disclose to me.

So this is a bit of a belt-and-suspenders approach. It was preceded by a narrower request, in writing to Mr. Kratz, that I didn't file with the Court. But I thought, given developments in the last couple months, that it would be a good idea for me to make specific requests and thereby trigger the State's duty.

These are ethical lawyers at the other table, I expect them to comply with the duty. And I don't know at this point the State -- or the Court, really needs to take any action other than inquiring of the State. And I will say that I already know some information within the scope of my request.

And so it's not that I'm completely in the dark necessarily on some of the information I seek, rather in a case this serious, I'm seeking to make sure that I have got it all. That if

there's something that goes to bias of a State's witness, or honesty, credibility of a State's witness, a State's -- a State witness' motives to testify falsely or to shade testimony, evidence that might support a defense or some mitigation of sentence, that I have asked for it and I have gotten everything they have of that stripe.

So that -- that's the reason for the motion. We don't have a specific dispute today. And as I say, other than inquiring probably of the State, I'm not sure that there's a ruling the Court needs to make on the ***Brady*** motion today. But it was better practice to file it in my view.

THE COURT: All right. Who'll be addressing this matter for the State? Mr. Fallon.

ATTORNEY FALLON: Yes, thank you. I would frankly acknowledge that I would have liked a little bit of time to digest the request of the defense as it is framed in the context of an exculpatory evidence request. I did not receive the document until last evening as I, likewise, was out of the office on Wednesday.

The first thing I guess I would like to address in response to counsel's comments, much of what he says I do not disagree with. This is,

as he would say, a particularized or specific demand as opposed to the general demand that is part and parcel of every criminal case.

But I think, again, his argument and his request puts the cart before the horse to the extent that just because one says it is exculpatory, or potentially exculpatory, doesn't necessarily make it so. And I recognize that whether a bit of evidence or information is admissible is not the determinative standard as to whether something is exculpatory or potentially exculpatory.

So I acknowledge that and I wanted to say that upfront. But in having said that, in making a determination as to whether evidence is exculpatory or not, there is a materiality component here. And within the analysis of materiality there is this overlapping concern, overlapping of arguments as to whether such evidence would even be admissible. So I think we have to acknowledge that.

And as I look at the information requested, that's what I am struck by and that is, is this information significantly material, given all that we know now. And the Court has

had pretty extensive pleadings and briefs filed to evaluate the context in which this request is made. I have serious reservations as to whether it's truly material in the context of ***Brady***. And I guess I would like to digest that and think about that further.

Secondly, I'm not convinced that the information is solely or exclusively in the domain or the possession of the State per se. We have, as counsel readily acknowledged, six additional pages of discovery from their investigator regarding information that he has unearthed in his interview of members of the clerk staff, buildings and grounds, maintenance individuals, and the like.

The question is, they have subpoena capability as well as the State to get information. I can represent that in terms of the prosecution files and information that we have available, we don't have any of the information available to us. It's not in our possession.

We will certainly look for the information, but I'm not conceding, for the sake of our argument here, that it's necessarily

material, or that they are entitled to it, or it's solely in our possession and we have the obligation to get it.

We will look at the information but, again, much of the import of what's being asked here will be the subject of additional motion and argument at the end of the day today. And that may or may not have an impact as to the materiality component.

I wish I could say more, but only having it an evening to digest this, that's about all I can say. We'll look at it. We'll make some inquiries, because there are some interesting questions there. But we by no means accept, for purposes of this, that it is an exculpatory information demand. We do not except that it is necessarily material. I'm not saying it's not relevant, I will concede that, but then we have that whole materiality component.

So that's our statement on this. We'll look into some of these matters, both as a courtesy and for our own information. We would certainly like to know some of this. I also believe that most -- much of this has been complied with, with respect to some of our recent

pleadings.

And I would acknowledge, for instance, Paragraph 2, our last pleading, I think we have answered that. Paragraph 5, I think recent discovery information, which should have been sent to defense regarding the vial of blood, I think that has been complied with already.

I would indicate with respect to item number 10 for instance, we are, ourselves, correctly so, we're waiting for a report from Mr. McCurdy at the FBI. We do not have that report. We have a request in. We're told it's coming, but we don't have it yet. So, in terms of those specifics, those I think I can provide to you.

With respect to the absence or presence of keys, I can tell you after the recent discovery that we sent to defense and discovery we received from them, I'm not sure with respect to keys and access issues that there are -- there is any more. We can certainly look.

But I think Investigators Wiegert and Fassbender did a round of interviews regarding that point and Defense Investigator Baetz, I believe it is, likewise did some. I'm not sure

there's much more to be had there.

Again, raising the question, I'm not convinced this is entirely in our bailiwick. But that's my comments at the moment. If I may confer with counsel for a second.

THE COURT: Fine.

ATTORNEY FALLON: And, again, as I said, I think a further discussion, perhaps regarding the two motions, at the end of the day, this can be discussed even more freely, so I will pass on that.

THE COURT: Mr. Strang.

ATTORNEY STRANG: There are three things I can add that will, I think, be helpful in reply. First, it's of course not at all uncommon that prosecutors dispute the materiality of information that may be exculpatory or dispute with the defense whether something is exculpatory.

Common situation, advocates on both sides look at facts from their peculiar perspective and experience, of course. I request that in such situations, the State follow -- take the high road in the sense of erring on the side of disclosure, recognizing that as lawyers who defend people, rather than prosecuting them, we may have a better sense of how to use something

in an exculpatory fashion, or of what exculpatory admissible evidence, something inadmissible may lead to.

If the State is unwilling to do that in its announced pursuit of the truth, which would suggest erring on the side of disclosure, there is available the option of tendering something that's questionable from the State's advantage point, to the Court, for an in camera and neutral determination.

I think for a lot of reasons that's less preferable than simply disclosing it and fighting later about what it means, but it is an available option. And if nothing else, ought be used here if the State has information about which materiality might be in dispute.

Second, and this is quite specific to this case, I recognize, and I want to make sure that the Court and counsel recognize here, the contours, as I see them, of the application particularly of a case like ***Kyles vs. Whitley***, the 1995 U.S. Supreme Court decision that discusses, essentially, what is the State, or the prosecution mean.

Does it mean only the lawyers who sit at

counsel table or who are employed by a District Attorney's Office? Does it include law enforcement officers; if so, how deep within the department, so to speak, or within the investigating agency. And this case, happily, is not typical in this sense.

It's a Manitowoc County case, as a matter of venue and as a matter of original statutory law enforcement obligation. We can fight about how completely or what this means, but on November 5, 2005, some steps were taken to turn over some level of investigative control to the Calumet County Sheriff's Department. And there is no question that on or about November 5, I think it was November 5, but I could be off, a judge in this county entered an order appointing a Special Prosecutor from outside the county, hence, Mr. Kratz's appearance.

In my view, though, this lessens not at all the obligations of the Manitowoc County Sheriff's Department, to yield to the prosecutors, exculpatory information within its possession, at least if that's known by officers who took an active role in the investigation that led to the charges here.

I further acknowledge that not only are there institutional problems in out-of-county people relating to in-county-people and, you know, maybe the informal working relationships aren't what they would be within a county, between the D.A.'s Office and the Sheriff's Department, but here, of course, the Manitowoc County Sheriff's Department's conduct has been put at issue by the defense. And we have had the unusual situation of DCI investigators engaged in interviews, quasi formal at least, law enforcement interviews of Manitowoc County Sheriff's Department or other Manitowoc County personnel.

So there are practical problems, but it doesn't change, in my view, the due process obligation in the end to route out information that the Manitowoc County Sheriff's Department may have, and to which the prosecution is entitled, and as to which it has a due process obligation to disclose to the defense.

Third, the due process obligation, of course, is ongoing. So if compliance is complete today, it doesn't necessarily mean that it's complete for all time, obviously, as information

is gleaned.

And counsel acknowledges, faithfully, that the information covered by Paragraph 10 should be disclosed to the defense and says that he can't disclose it yet, because he doesn't have it. Well, if he doesn't have it, that's true, he can't. So he has an ongoing obligation.

We were told by a Calumet County officer at the last hearing in Chilton, that this information had been received from the FBI. But that I was told, in fairness, the very same day, was news to Mr. Kratz. And so I don't know, it doesn't matter. The point is that the obligation is ongoing and I'm sure the State will comply with that.

As to Paragraph 5, in specific, the State has made reference in a recent filing to what it says a phlebotomist says. But of all the interviews recently disclosed to us concerning the general topic of the blood vial, that's the interview that's missing.

We don't have a report of any interview from the, I think the now retired, phlebotomist. And I would expect to get that, if in fact the State is representing what she says in a

pleading. I'm sure the State is doing that accurately, but I would expect to have the underlying witness statement. And I'm sure it will be disclosed by my friends at the next table.

So, this is an ongoing process and I will end where I started, which is to say the request has been made, the obligation triggered. And I don't know that the Court can enter specific rulings today, necessarily, but I wanted to make a record of it. And the nuances here of the relationship of some ranking members of the Manitowoc County Sheriff's Department with this particular prosecution team complicate, but don't alleviate, the State's duty.

THE COURT: Mr. Fallon.

ATTORNEY FALLON: Yes, one final point. And I guess this dovetails back into the recent -- the discussion that we just held regarding relief from the pre-trial scheduling order. Because this is a perfect example of what is rebuttal testimony.

If the defense wants to put forth the defense that they are suggesting and implying in their pleadings to date, then they do so at their peril. The State has indicated -- sought relief

from that order on the specific vial and the other related matters, well, here is a related matter.

Now, admittedly, the whole concept of rebuttal does not excuse one's obligations with respect to what is potentially exculpatory evidence, so I acknowledge that. But, again, it is an example of the complexity of this case, and the issues, and the import.

Again, the State doesn't have to show all of its cards with respect to how it will respond and refute certain defenses which are going to be proffered. We only have to show our hand, or tip our hand, if such information is going to be, quote, "truly exculpatory", in the meaning of that phrase.

And, again, as I had said, I would like to review some of the law on that. I'm aware of counsel's representations. In fact, I don't disagree with much of what he said at all in terms of what our obligations are. I'm quite aware of those obligations. And the fact that the prosecutor's obligation is to look in areas immediately beyond their own office is pretty well settled in the law. So, I don't take issue

with that.

But, again, there is the relationship here between what is truly rebuttal and what is truly exculpatory. And if it is truly exculpatory, then counsel is absolutely correct. Anything short of that, then they go down the road at their peril, because we are entitled to respond as the law permits.

And that's why the statute is written the way it is. And that's why rebuttal is set up the way it is, such that the State has a fair right to reply, since we have the burden of proof, beyond a reasonable doubt. Thank you.

THE COURT: All right. First of all, I believe Mr. Strang is correct in the sense that I don't know there's much the Court can decide about this motion today. I'm just going to make a couple of observations. To the extent -- and I believe the parties agree with this -- to the extent the State possesses information that may be exculpatory, the obligation to share that with the defense goes beyond the need for the defense to make a motion.

Case law requires it. Section 973 -- or 971.23 (1)(h) requires it by statute. And certainly the State is aware of a number of

criminal cases where convictions have been reversed because of a failure to provide exculpatory information.

The motion for disclosure, to the extent it draws attention to any exculpatory information that the State may not have been aware of before would assist the State, if you will, in determining the existence of the information and turning it over to the defense, if both parties agree that it's exculpatory, the State, in any case, runs a risk if it doesn't turn over evidence that is later determined to be exculpatory.

If there's any evidence requested in the motion that doesn't fall under the heading of exculpatory evidence, and has not been previously requested, the discovery deadline ended on December 15th, so it would not have to be turned over.

In addition, I will note that whether or not evidence may be exculpatory and may be material to this case may depend on the outcome of rulings on motions on which the Court has yet to rule. And as defense counsel points out, the State's duty is ongoing, so there may be a duty

to turn over evidence that hasn't been turned over yet, depending on future court rulings.

Having made those comments, which I think for the most part the parties reflect in their statements to the Court today, I'm not going to issue any ruling on the motion at this time. If at some point in time the defense doesn't receive something it feels it is entitled to receive that is in existence and wants to specifically renew the motion, I will take it up at that time.

But it appears to be, at this point, more of a work in progress, for the reasons that I have said. Some of the items the State contends that it has turned over, the materiality of other types of evidence, may still yet to be determined and may trigger at some point in the future -- in the near future -- an obligation to turn over additional information.

Next, the Court will take up the defendant's motion to exclude computer generated animations. And when I say take up, I'm just going to address it and recognize it as being outstanding. The Court has been provided earlier this morning with the information that is the

subject of the defendant's motions.

I will, because of the proximity of today's date to the start of the trial, get an explanation from the defendant of the basis for the motion, on the record. And also, hopefully, get some idea from the State of the reasons for which the information will be provided, as they may have relevance in determining whether or not the information is admissible. Who is going to present the State's position, Mr. Strang? Excuse me, the defense position. It's your motion.

ATTORNEY STRANG: I will. I understand the Court hasn't had a chance to look at the three animations at issue and, indeed, neither have we. We received the same CD's or DVD's today. We have had, and the Court has not until now, had copies of slides, for want of a better word, for two of the three animations.

The simple point, though, that ought not get lost in the shuffle here, is that I believe early on, in fact probably before Mr. Buting and I entered our appearances, Mr. Avery invoked his discovery rights under Section 971.23, without reservation. And it's a little bit unclear to me here how the State would explain or justify, with

good cause, the failure to disclose these exhibits, particularly the FBI animation, as to which we have seen nothing at all until today, I assume on the CD or the DVD we have, as gauged against the December 15, 2006 discovery cut off.

The underlying information I think in these animations isn't something newly discovered, isn't something that the State got only from the defense, and does relate to information and physical items that the State has had in its sole custody, at least as to the Toyota, since November 5, 2005.

And as to the Avery property, the underlying information as I understand it is drawn from the State's seven or eight day exclusive possession of the entire Avery property, again, from about November 5 to November 12, 2005, where even family members and people who lived on the property were excluded, by the State.

So there is a -- there is a tardiness issue here that is separate from, and stands independently of, the question then of relevance, completeness, fairness, and a 904.03 balancing that I have addressed at greater length on brief,

as to which there's no point in my offering further argument until the Court has had a chance to look at the exhibits. And for that matter the State hasn't had much chance here to respond in writing, if that's its wish.

THE COURT: All right. Who will be handling this for the State?

ATTORNEY KRATZ: I will, Judge.

THE COURT: Mr. Kratz.

ATTORNEY KRATZ: First and foremost, your Honor, let me explain what we're talking about. There are three different areas of the generation of summary exhibits that the State has had performed. Those include a computer generated virtual tour, if you will, of the Avery property itself, which includes buildings and curtilage which basically surround the Steven Avery trailer.

We have also asked for, and have received, a representation, or series of representations, to assist one of our expert witnesses, the anthropologist in this case, in describing what human remains were recovered to better assist the jury to understand from where on the human body, where on the skeleton, to be blunt about it, these items may be found.

And lastly, we had performed, through assistance of the FBI, a representation of the victim's vehicle, which was recovered, which as this Court and defense knows, is of a highly probative nature, and items found within.

Mr. Strang's submission, which I do request an opportunity to respond to in more detail, makes claims like, the angles depicted in the computer generated animations are not such that a human could make, and -- and that's true. I guess that's the point of demonstrative evidence.

Demonstrative evidence, rather than original evidence, rather than the thing from which the demonstrative evidence is generated, is to assist the trier of fact. And the only thing that a Court has to determine, at least from an admissibility standpoint, is whether or not it's a fair representation of what it purports to show.

Now, the State today, so that the Court understands what we were talking about, has provided 3 CD's, 3 discs, which are examples of those summary exhibits. I couldn't disagree with Mr. Strang more about the State's requirement or

obligation to provide these things to the defense.

The defense is entitled to the actual items that are seized, or measurements of, or business records, or phone records, or photos. But they aren't entitled to summary exhibits. They are not entitled to maps, or timelines, or charts, or diagrams. And even though these three animations are computer generated, they are clearly within the category of diagram.

If we go to the most basic kind of a diagram that juries sometimes see in an automobile accident, the diagram of an intersection, kind of an overview, where was the car coming from. Well, that's not an angle that is available to the human eye. But nobody would suggest, that because it's from a different angle, that it's somehow not relevant or not of assistance to a jury.

So to suggest that because it's -- I think Mr. Strang is arguing, so nicely done, because it is of a high-tech nature, because it's computer generated, somehow that goes to its admissibility, it is somehow prejudicial to Mr. Avery. We do disagree.

We will be able, at trial, or before if the Court wishes, a more detailed offer of proof to demonstrate how this demonstrative evidence, how these summary exhibits, will be of benefit to the jury, so that the jury can see in an overview, or an overall representation, where specific evidence is found, how it may relate, or interrelate, to other evidence, and how, certainly, it is not going to be cumulative.

These are very well done. The timing of them was for the State's presentation of its case-in-chief. I provided them to the Court and to the defense as a matter of courtesy. That's how I'm looking at my provision of these. Again, I don't think the entitlement to summary exhibits occurs until the very moment, that day witness intends to refer to them at trial.

But in order to speed up the trial process, which we're all, I think, sensitive to in this case, I'm happy to have the Court review these matters and to issue a pre-trial ruling. And, again, would ask for an opportunity for more detailed argument if, in fact, after reviewing these, the Court has a question as to their materiality or to their relevance at the time

that that might come up. That's all I have at least for today, Judge. Thank you.

THE COURT: Mr. Strang.

ATTORNEY STRANG: I agree with counsel up to a point, that if this properly is viewed as a summary exhibit under 910.06, which certainly the State is free to argue on brief, that it's the underlying physical items that the defendant is entitled to see, or examine, or to have, as a matter of the principle discovery statute, Section 971.23. I don't agree that the timing of the disclosure of this exhibit, therefore, is unimpeachable.

The defendant certainly is entitled to have his jury not consider irrelevant, unfair, overly suggestive, or unhelpful demonstrative evidence to the jury. This Court set a December 15 deadline for motions in limine, which would ordinarily be the way to address demonstrative evidence, or summary exhibits, or other things that might be excludable as not relevant or -- under Section 904.03.

And to time that with a discovery deadline, on the same day, by disclosing this after December 15 I'm, of course, in no position to make a motion in limine by December 15. And

my motion in limine to that extent necessarily is tardy, although I think without fault, because I can't move to exclude that which I haven't been told will be offered, or shown.

So timeliness in that sense here, very much remains an issue. And, again, the other -- the other details about the fairness of the presentation are probably best addressed on paper and then by the Court's review, and ours, of the exhibits themselves.

THE COURT: All right. Neither party is asking the Court to make a ruling on this particular matter today. And since I haven't seen it, I think that's appropriate. The only comment I would reiterate is that this offered exhibit, or set of exhibits, whether they are admissible or not, may not be determined simply intrinsically by the exhibit, but the purpose for which it's offered.

At this point I don't know that yet. You know, the fact that they don't show shrubbery, or foliage, I think that was mentioned in the defense's motion, for some purposes that may be significant, for other purposes it may not be. So in order for the Court to evaluate the defendant's motion, I'm not only going to have to

see the exhibit, but be informed as to the purpose for which it's offered. And it's my understanding, counsel, that we're going to take this up at the final pre-trial on February 2nd.

ATTORNEY KRATZ: That's fine, Judge.

THE COURT: Okay. The next item, which I believe should be brief, is the Court, based on the stipulation submitted by the parties concerning the exclusion of witnesses at the trial, drafted a proposed order. The Court received a response from the defense with a couple of suggested modifications. I didn't receive anything back from the State. But do I take it, at this point, that with the modifications suggested by the defense, that the form of the order is acceptable to both parties?

ATTORNEY KRATZ: The Court may recall that this was the subject of a written stipulation by the parties. And since Mr. Strang and I jointly drafted that, we don't have an objection. Mr. Strang included, in at least in the Court's form of the exclusion order, one suggestion. With that -- with that one variance to the Court's offer, the State doesn't have any objection that the exclusion order be adopted and the Court can enter that order.

ATTORNEY STRANG: Just so we're not going past each other, I think I actually made two changes. I don't have it in front of me.

THE COURT: Right. Just for my own information, Conrad Baetz, is he a defense investigator?

ATTORNEY STRANG: Yes.

THE COURT: Very well. The next series of motions that has been presented for the Court's consideration deals with evidentiary matters, which for the most part I believe the State wishes to argue are inadmissible for, among other reasons, being not probative and unduly prejudicial. And the State has asked that the Court hear argument on those motions in camera. So, before getting to the motions, I will hear from the State on its request to consider these matters in camera.

ATTORNEY FALLON: Yes. Thank you, Judge. The State does request that these matters be addressed in camera. As the Court and the parties are aware, there's been a flurry of briefing which occurred since the first of the year on third party liability and blood vial evidence.

I have asked in our pleadings for oral argument and that -- that the argument be an in

camera argument. My reasons are these:

First and foremost, there will be a great deal of discussion amongst the parties regarding facts which may or may not be facts heard by the jury. For instance, if the Court determines the evidence to be inadmissible, then those are facts which are not going to be disclosed or heard by the jury.

And given the nearness in time to the jury selection process and the potential for such prejudicial and possibly inflammatory argument, and fact, and statement being made this close in time to the selection process, runs a risk of contaminating the jury pool.

Additionally, the three matters to be discussed are all interrelated. The State sees the interrelationship far stronger than the defense, but I think the defense would agree, that to adequately discuss these motions, there will be a variety of facts that need to be brought out on the record, and discussed, and argued.

As a result of which, we do not want to run the risk of potential contamination of the jury pool this close to the jury selection

process. So, that's why the issues of third party liability, the admissibility of the blood vial evidence and, thus, the subsequent bias issues, need to be addressed in camera until a ruling is obtained. And that is the basis for our request.

THE COURT: Mr. Strang.

ATTORNEY STRANG: The State -- The Court is correct that this is the State's request, that the Court take up facts and available possible evidence that will have a great bearing on this trial outside of public scrutiny and outside the hearing of the media. The State has offered some good reasons for that.

I don't stand to oppose that today, in part because I am relying on counsel's assessment of where this factual discussion could take us. In the end, of course, this is one of these issues on which the Court cannot defer to the parties, because the Court has to speak for the broader public and speak for the First Amendment. And I don't presume to undertake that role, or to tell the Court how it should exercise its overriding public duty in that respect.

I do say that I -- I don't understand

the State, by the use of the term "in camera" to be seeking to exclude the defendant himself. And I would ask that he participate. I understand it to be the public and the public's representatives of the media that would be excluded. And I tender the decision to the Court.

THE COURT: All right. First of all, that is also the Court's understanding of the State's request; I don't believe the State is asking that the defendant be excluded. I will state for the record that when I received the written arguments of the State and read the request, I took the opportunity to explore this issue a bit.

Under Section 757.14 of the statutes, they provide that sittings of every court shall be public. And that is certainly the general rule. It is extremely rare that a session of court can be closed. I have been on the bench for almost 10 years and I don't believe I have ever closed a session of court.

However, the law is that in certain rare situations a sitting of court can be closed. The leading case on the issue, as far as I can tell, is ***State ex rel. La Crosse Tribune vs. Circuit Court***. It's a 1983 reported court decision.

Some of the most important language in that decision for our purposes reads as follows:

> It has long been recognized that the requirement for public trials is subject to certain inherent powers of the court to limit the public nature of trials in certain respects where the administration of justice requires it.
>
> The circumstances necessary to trigger the discretion to close a courtroom must be compelling. One circumstance which arguably could trigger a trial judge's discretion to close the court is that a fair trial could not otherwise be had.
>
> The trial judge should recite on the record the factors that impel him to close the courtroom and why such factors override the presumptive value of a public trial. Findings of fact must be made with specificity, process must be a rational one and the rationality of it must be demonstrated on the record, showing that the conclusion was reached on facts of record, or which are reasonably derived by inference from the record.
>
> A trial court is required to hold a hearing and publicly reach a conclusion based on

the exercise of discretion prior to ordering a closing. The parties and members of the public present in court may appear at such hearing, that is, the hearing that we have today, which is on the record.

As I said before, closing court proceedings is rarely done, but I do find that in this particular circumstance there are circumstances which justify that decision. I will be repeating some of the arguments made by the parties, or primarily by the State here.

But I first want to note for the record, the Court is aware that this case has received, at least for purposes of this county, unprecedented public coverage. This has included live television coverage of most of the court proceedings, and in addition, video of the court proceedings in their entirety have been posted on media websites for persons who are not otherwise available to view the proceedings.

As a general rule, the Court views this as a positive situation, that is, it enables the public to see the court system in action. Court proceedings are supposed to be public and the participation of the media significantly assists

in that regard.

However, it can pose a problem in a case such as this where the publicity concerning the pre-trial hearings is widespread. And we're dealing with disputed matters relating to important pieces of evidence to the parties that some of which may determine -- be determined to become inadmissible and could be highly prejudicial and threaten fairness of the trial.

In this particular case, we're within 10 days of beginning the jury selection process. This trial has already been delayed once for a number of months. And one of the important reasons advanced for the delay was the existence of previous publicity that could well be considered prejudicial and threaten the fairness of the trial. Given the fact the trial is not going to be starting until approximately 15 months after the alleged offense, it's important, I think, not to unduly create a reason for another adjournment.

The Court also notes that it's impossible in this case, particularly, to successfully insulate potential jurors from the publicity that comes out of today's hearing. The

jury is going to be selected from Manitowoc County. This is not a case where we're bringing jurors in from a far-flung part of the state where they might not be exposed to the publicity from this hearing.

As I indicated, it's not just a normal motion hearing, it's a motion hearing that deals with evidence which is alleged by one party, in this case the State, to be inadmissible, to be arguably inflammatory, and highly, potentially prejudicial to threaten the fairness of the trial.

Finally, I will note that I believe the disadvantages of holding the hearings in camera can be somewhat alleviated by the fact that, to the extent the Court issues a decision -- and I will indicate in open session it's not likely to be issued today, I'm going to want an opportunity to review the arguments of the parties and their written submissions, many of which have been received simply in the last few days -- but at such time as the Court issues a decision, determining that any evidence is admissible, that ruling will be made public and immediately available to the public and to the media.

So for those reasons the Court finds that consideration of the evidentiary motions that remain, and that have been described by the State on the record, will necessarily be conducted in camera; that is, out of view of the public.

I will take a recess at this time in order to permit the courtroom to be cleared and then we'll resume with the hearings. Mr. Gahn.

ATTORNEY GAHN: Judge, just -- I have just one very quick matter and I believe Mr. Kratz also does. Regarding our issue number two this morning, the demand for compliance with discovery, we had asked on Page 8 of our brief that the compliance be completed within three days. I would ask the Court, would you make that part of your ruling?

THE COURT: First, I would want to hear from the defense as to the feasibility of that.

ATTORNEY BUTING: Give me just one second to look back in my notes here, for what I have to do. And three, we're talking about three business days, or I'm going to have to contact --

THE COURT: Lets' name a day. Next week, I assume you're talking about.

ATTORNEY GAHN: Yes, you'll not include the

weekend.

THE COURT: Wednesday?

ATTORNEY GAHN: That will be fine, your Honor.

ATTORNEY BUTING: I think that should do. Yes, that would be the --

THE COURT: 31st.

ATTORNEY BUTING: No, 24th.

THE COURT: I'm sorry, I'm a week ahead, Wednesday, the 24th.

ATTORNEY GAHN: Thank you.

THE COURT: Mr. Kratz.

ATTORNEY KRATZ: Two things, Judge. The Court set today as a date by which the State should file proposed jury instructions, and recognizing that these may change and evidentiary rulings may affect them, I have that document for the Court and I wanted the record to reflect its filing.

Secondly, the Court had asked that, if either party contemplated the inclusion of any images, that is, photographs or other images, within its opening statements, power point presentation, or however else they may be included in its opening, that those be provided to the Court by today's date. I have prepared a

CD with the images the State intends to include in its opening. Both of these submissions, I should tell the Court, have been provided to Mr. Strang before the start of this hearing.

ATTORNEY STRANG: I acknowledge receipt of both, just as Mr. Kratz says. And I will note as well that we provided two letters by facsimile to the Court and counsel, both dated January 18, 2007; although, I think one only faxed early this morning to the Court and counsel relating to proposed jury instructions.

THE COURT: All right. I understand, I believe when I read Mr. Strang's letter, he indicated that because of the outstanding motions that have not yet been resolved, it was impossible to submit, necessarily, all jury instructions requested by the defense. I understand Mr. Kratz to be saying the same thing for the State. And the Court understands that, that both parties will be given a chance to supplement their requests for jury instructions pending the outcome of outstanding motions.

ATTORNEY KRATZ: Do we know whether the defense intends to offer any images during their opening statement, or whether they even intend to

give their opening at the start of the case?

ATTORNEY STRANG: I --

ATTORNEY KRATZ: If so, I ask for some notice or opportunity to object, just like the State has given.

THE COURT: I don't believe they are required to state today whether they are going to make an opening statement.

ATTORNEY STRANG: I'm not, but I will. And I will, I will be giving an opening statement, or we will, probably I will, I expect immediately after the State's. And my present intention is not to use exhibits in that opening. If that changes, I will disclose that to the State and to the Court if it wants, just as soon as I change my mind about that. But that would be a change of mind.

ATTORNEY KRATZ: That would be just fine, Judge. I don't need more notice than that, that's fine.

THE COURT: Anything else before we take our break?

ATTORNEY FALLON: No.

ATTORNEY KRATZ: No.

THE COURT: If not, lets report back in 15 minutes.

(Recess taken.)

THE COURT: At this time we're back on the record. As I announced previously, this portion of the proceedings is being conducted in camera and the public is not present in the courtroom at this time. The next motion that I had up for consideration was the ***Denny*** motion.

Specifically, the defense filed a statement on third party responsibility indicating that as a first point that ***Denny*** did not apply to this case, but in the alternative, if the Court determined that ***Denny*** did apply, the defense identified a number of persons who could be considered possible perpetrators of the crime and explained the offer that would be made, of evidence to support those allegations. The State filed a memorandum to preclude third party liability evidence. Will Mr. Strang or Mr. Buting be handling? Mr. Strang, you may proceed.

ATTORNEY STRANG: Thank you. Let me just take care of a housekeeping issue first. We have a Manitowoc deputy in the courtroom who is a court officer. And I think for -- as much for his own good as anything, since his possible testimony or

facts about which he knows may come up at some point along the line here, we may want to excuse him so that he is clean, so to speak, and not subject to a cross about what he may have overheard bearing on the subject matter of his possible testimony. I don't have any -- again, I don't have any problems with this guy in particular, just probably is a good thing to do. Deputy Riddle.

THE COURT: Well, we have --

ATTORNEY STRANG: Oh, and we have Deputy Tackes too. Okay.

THE COURT: Does the State wish to be heard?

ATTORNEY FALLON: This seems to be a security based issue. We'll defer to the Court and counsel as to how you wish to proceed on this. To me, I don't see it as much of an issue at all. But if Mr. Strang has some significant concerns and the Court has agreed, that's fine. I think the determination should be made from a security based. And if there's another officer available, great, if not, then we'll have to -- Court will have to make a determination whether you want to proceed with just one bailiff.

THE COURT: Let me suggest this. We're in

here on an in camera basis, what if the Manitowoc County bailiffs step just outside this door instead of just inside, and that way we'll have some level of security. But to the extent some of the motions involving testimony by Manitowoc County Sheriff's Department employees have not been addressed yet, I assume that can take care of the defendant's concern.

ATTORNEY STRANG: Absolutely, I'm looking to avoid an issue rather than create one. Stepping outside the door would be fine. Mr. Avery has been fitted with a stun belt, I don't know who has the control on that, but.

THE COURT: We have two Calumet county officers here.

ATTORNEY STRANG: Then we're fine. Then we're just fine.

THE COURT: Very well, we'll wait just a couple minutes. If you want to stand outside this door, Gary.

OFFICER TACKES: Okay.

THE COURT: Mike will be out one door, you will be out the other.

ATTORNEY STRANG: You know, your Honor, I wrote a fair amount on ***Denny*** and I really have no

desire to blather for the sake of hearing myself talk, so if there's some focus the Court can give me, or particular issue to address.

THE COURT: Actually, I'm just giving you an opportunity to supplement your memo. I will indicate that I have read the written submittals by the parties on these remaining issues at least four or five times already. But at the time you wrote yours you perhaps did not have the benefit of having receiving the State's response, so if there's anything else you wish to present at this time I will receive it.

ATTORNEY STRANG: Okay. Well, I -- I do think it's important here at least to try to separate ***Denny*** which, you know, is maybe significantly different on its facts than this case, to begin with, from ***Richardson***. If only because the Wisconsin Supreme Court in ***Richardson*** said this isn't ***Denny***, we're not going to apply ***Denny*** in this context; indeed, we're going to reject the State's invitation to apply ***Denny*** in the frame-up context that ***Richardson*** addressed.

And I -- ***Denny*** is not even a good fit to begin with, as I argued on brief, and I shan't repeat that. But the nitty-gritty here is, when

we -- when we suggest that there are others at the Avery property who had the same or no less apparent motive than Steven Avery to commit the crimes alleged in the Amended Information, and who had about the same opportunity and about the same direct connection, that really is about as far as the facts allow the defendant to go here, where the defense -- where the defendant's own assertion that I'm not guilty, always factually has been, at bottom, an assertion that I just didn't do it, and I can't shed any light for you on who did.

And there's no real persuasive motive that the State can offer for the crime; that is, you know, this isn't a case where the victim owed the defendant money, or there was a divorce ongoing or, you know, any -- any of the usual sort of causes of human action, or usual reasons that might lead to a homicidal anger, or to passion getting out of control, you know, murderous passion, not amorous passion.

We're really in no better position to tender a motive on the facts here than is the State. And that really is very different than ***Denny***, where the very evidence the defendant

wanted to offer was evidence of someone else's motive. He had, you know, a motive that he wanted the jury to consider, that another person had. So it's a tough fit.

THE COURT: Let me ask this.

ATTORNEY STRANG: Sure.

THE COURT: ***Denny*** doesn't require a defendant to come up with ***Denny*** evidence. The defendant certainly, here, is not obligated to say these other persons could have done it, so I didn't do it. The burden is on the State to prove that the defendant did do it.

ATTORNEY STRANG: Right.

THE COURT: But I didn't understand your pleading to be saying that you didn't want to offer evidence that others did it; that is, not just -- the defense, as I understand it, is not simply going to be that the evidence is not sufficient to prove that Mr. Avery committed these crimes, but rather to identify if not one person, a group of other people, who did. And it seems that type of thing does get you into ***Denny***, does it not?

ATTORNEY STRANG: It can and, certainly, as I see the argument and the trial unfolding factually, you know, we will be saying, what

investigative scrutiny did some of these other people get. Steven Avery became, very quickly, the focus of the investigation. And the State will say, well, that's right and we have got good reasons for him having been the focus.

What we want the jury to understand is that there were others who, at least initially, looked about equally situated as potential suspects. And not much investigative effort was expended on exploring whether they were good suspects, or whether they were easily excluded and, therefore, not viable or good suspects.

And at that level, if I understand the Court, I think that's not ***Denny*** at all. That's something we're free to do. And this is where I do agree with the Court that much of what we have presented in writing and orally, overlaps at some very -- connects up at some very general level in that you are getting into bias issues, an investigative bias, or a tunnel vision on one person of particular interest, when in fact an objective investigation might have looked at other people more seriously than the State did.

THE COURT: Let me stop you there. Who is going to handle this for the State? Mr. Fallon, if

the -- one of the State's investigators is on the stand and the -- they give their testimony and the defense says, well, why didn't you investigate further other people who you determined to be on the scene, on the date of the alleged crimes; does the State take the position that they have got to make a ***Denny*** showing to ask that question, or can they ask it, from the State's perspective?

ATTORNEY FALLON: Your Honor, I think that's just a backdoor way of introducing the potential of a third party liability suspect. And I guess as I'm sitting here listening to the Court and counsel begin the argument, the first thought that came to my mind is simply this, does the defense want to introduce the evidence set forth in their statement on third party responsibility, either in their case-in-chief or on cross-examination? Do they want to do that?

THE COURT: I wonder the same things, but we haven't gotten to that yet.

ATTORNEY FALLON: Because I'm treating it as a motion for introduction of that evidence, and do they want to argue that one of those individuals could have, or did, commit this offense. Then I can respond to that. I think we're miscasting the

issue.

THE COURT: I'm trying to take this in the order in which it may come in. I'm saying that -- and I asked myself this as I was reading the briefs -- if the State -- or if the defense, on cross-examination, asks a investigating officer, or officers, why they focused in on the defendant and did not investigate other suspects further -- or maybe they did investigate other suspects, at this point I have no way of knowing -- without referring to a specific other suspect, my own feeling is that at least that question doesn't get you into ***Denny***.

ATTORNEY FALLON: Depends on what they want to do with the answer. And then the question is, well, then why is that relevant? Counsel will say, well, it goes to bias. Since when is bias and an institutional conundrum?

THE COURT: It may go to bias.

ATTORNEY FALLON: Then why is it relevant? Why is it material to whether or not Mr. Avery committed the offense? Sure, they can ask the question, my concern is, what are they going to do with the answer? What are the arguments to be made? It's a backdoor attempt at pointing a finger that somebody else committed the offense. Otherwise, the

jury is going to get sidetracked. That's the whole idea behind ***Denny***. That's my take. I will let the Court and counsel continue.

THE COURT: All right.

ATTORNEY STRANG: Let's go at this from an element standpoint on the homicide charge. The jury has got to find that someone has been killed. And let's suppose the jury finds that they are satisfied that Teresa Halbach is killed. Then the next two things they have to decide are, was it Steven Avery who killed her, and did he do it intentionally. Those are the elements. And, you know, we can't hop over that second element, which is, is it the defendant who killed her.

One of the reasons that a jury reasonably might doubt whether the State has proven that he killed Teresa Halbach is to say to themselves, gee, I haven't heard any reason he would have to kill her that's any more compelling than the reason that his brother might have had to kill her, or that Scott Tadych or Robert Fabian might have had to kill her.

And I understand that they were there, and I don't think the police looked very hard at, for example, the fact that Earl Avery and Robert

Fabian give very different times for when they are out on the rabbit hunt, which is a short hunt, strange to do at darkness and, gosh, both of them probably have .22 rifles in their hands; although the police didn't bother to ask that either.

And we understand that Mr. Avery's back door to his trailer was broken open. And we don't know why a member of this family, or somebody who's riding around on a golf cart on the property, couldn't have gone into the back door of his trailer, either to put the .22 rifle there, or to take it from there, or both.

And we're interested in the fact that a cadaver dog hit on the golf cart that Earl Avery and Robert Fabian said they were riding around on, which then gets concealed in Mrs. Avery's, Delores Avery's, garage. And we have got some doubts here about whether the State got the right man.

I don't see that as being a ***Denny*** argument, although clearly it relates to other people in the same way that evidence would have to relate to other people if, you know, we were trying, you know, the 1912 attempt to assassinate

Theodore Roosevelt outside the Gilpatrick Hotel in Milwaukee where there is a whole crowd of people and the issue might have been who's the gunman. And --

THE COURT: Well, let me ask you this, I'm reading from ***Denny*** now and they conclude, while our decision establishes a bright line standard requiring that three factors be present, that is, motive, opportunity, and direct connection, our holding is consistent with the ***Lasecki*** language regarding the term "tendency".

So how can you argue that to be entitled to show ***Denny*** evidence you have got to have these three factors, but somehow if you only have two you don't?

ATTORNEY STRANG: No, I guess what I'm arguing is that I have got just as much as the State does on all three. You know. I can't tender a motive for one of these other people to have done this, but the State can't tender a motive for Steven Avery to have done it.

So it seems to me surpassingly odd that the defense, which bears no burden, is in the position here of having to jump hurdles that the State, in seeking to prove Mr. Avery guilty,

doesn't have to jump. And, indeed, on request, will get a jury instruction saying that they don't have to prove motive, but I do, if I want to challenge his guilt by pointing out --

THE COURT: How's that different from ***Denny***? I assume the jury instruction was there at the time of ***Denny*** and they showed motive.

ATTORNEY STRANG: Because in ***Denny***, it's motive that the defendant wanted to offer. And the facts of ***Denny*** are that he was excluded from offering the motive of a particular third person, evidence of that motive. ***Denn***y's tough, I mean, it really is.

And, you know, everybody talks about it, myself included, for years, as if it's an immovable and unchallengeable feature of Wisconsin law. It never went above the Wisconsin Court of Appeals. And the footnote in ***Richardson***, where the holding is we're not applying ***Denny*** here to frame-up, the footnote is, we have never approved ***Denny*** at all. So I take it ***Denny*** is a published decision it stands, but --

THE COURT: There's a Supreme Court decision authored by Justice Crooks that applied

Denny, I forget --

ATTORNEY STRANG: Yes.

THE COURT: -- the name of the case, but.

ATTORNEY STRANG: ***Scheidell***, there is. And have -- And, again, I accept ***Denny*** as the law. It's not a great fit here, and how far beyond its facts it can be applied isn't clear to me, and that's what I tried to address in writing.

The proffer and, you know, Mr. Fallon asks a fair question, do you want to offer this. Yes, we do want to be able to offer the facts we proffered alternatively, if the Court finds that ***Denny*** applies. And we want to be able to offer them if it finds that ***Denny*** doesn't apply.

These are fair areas to explore, both as a matter of simple reasonable doubt, and as a matter of the bias that each individual investigative officer may have brought to the task where the person at issue was Steven Avery.

I guess, you know, specifically, as I read ***Denny***, the defense that I want to offer, this evidence of a third person's motive. And I think the actual holding as opposed to the discussion in the dictum in ***Denny*** is that, if you want to offer evidence of motive of a particular

third person, motive alone is not enough. You also have to offer some evidence, you know, a plausible showing, or whatever the phrase is, of opportunity of that third person and of some direct connection to the offense.

So it's not enough that you say, hey, I want to show that the decedent had a bookie who was mad at him because, you know, he hadn't made good on his bets and had a reason to kill him. And when the facts are that the bookie, undeniably was in the City of New York, when the homicide occurred in Milwaukee, Wisconsin, and had no opportunity to have committed it, you know, then I understand ***Denny*** on those terms on why the motive wouldn't be relevant, wouldn't be enough.

This is very different. We're not seeking to offer a motive. What we're saying is we have got the same evidence of motive, opportunity, and direct connection to the crime as to this group of people, as the State does as to Steven Avery.

THE COURT: Well, and I agree with your summary of the holding in ***Denny***, it is different to the extent that the defendant in that case wanted to

show evidence of motive. You are saying that's not what -- that's not part of the defense argument.

ATTORNEY STRANG: Not here. I don't have it any more than the State does.

THE COURT: Mr. Fallon.

ATTORNEY FALLON: Has he concluded his remarks?

THE COURT: I suspect --

ATTORNEY STRANG: It's helpful just to --

THE COURT: -- neither one of you has probably concluded your remarks --

ATTORNEY FALLON: That's what I meant to say.

THE COURT: -- but you're next, so you go ahead.

ATTORNEY FALLON: First of all, I take issue with three assumptions, or statements of counsel, one, that they are in exactly the same position as we are with respect to motive, opportunity, and direct connection to the crime. One, I dispute that.

But with respect to motive, however, the Court has ruled our evidence of motive inadmissible. So on the theory of the law of the case, apparently we do not have an explainable

reason why the crime occurred.

However, opportunity clearly exists on this particular case. And more importantly, and most importantly, there is a direct connection, because the defendant's blood is the blood that is found in the SUV. It's the bullet fragment containing the victim's DNA found in the garage, the key is to the Toyota, is found in his residence. So there are direct connections unlike any of the others.

Secondly, I take issue with counsel's characterization of ***Denny***. ***Denny*** is not simply just about a defendant wishing to introduce motive evidence; although, I acknowledge that's how the case got to the Supreme Court. The defense was denied the opportunity to introduce the motive of this third person, in particular the motives attributed to one Gary Peterson over a $130 debt, or the fact that Bill Cudahy also had a motive because a shotgun was exchanged for drugs and then that shotgun was ultimately sold, apparently, to the annoyance of one of the parties, as a result of which this Christopher Mohr was killed.

That's what our facts there are. But if

the Court's attention can be directed to the ***Denny*** decision, it's more than about motive. Motive was the means, that's the -- as it were, if the Court is a card player, that's the ante that gets you in the game, that's jacks are better, to borrow the metaphor.

But the point of ***Denny*** is that -- and it's found on page 17, and I'm looking at the Westlaw, the headnotes 9 and 10, second paragraph, it says, in other words, there must be a legitimate tendency that the third person could have committed the crime. That's the whole idea behind it, is there a legitimate tendency, in which the legitimate tendency is the direct connection.

The legitimate tendency is demonstrated by motive. It's demonstrated by opportunity and the whole connection to the crime. That's what we're talking about here. And those are the circumstances, that's the context of ***Denny***.

Now, looking at the defendant's statement on third party liability, what do we have? Again, our complaint is that, one, ***Denny*** clearly applies here. If they wish to introduce these facts, in direct examination or in their

case-in-chief, and then argue the inference to the jury that the police job was so bad, and by the way, look at how bad it was, these guys could have done it, then they have to comply with ***Denny***. That's just cut and dried. I'm astonished that counsel would say that they don't have to apply, that it's not controlling here.

The law requires the Court to look at each person individually. So as the Court goes through this, there are alternative ***Denny*** proffer beginning at Page 9. They list two different categories, customer or friends category, and I think a family category. So I'm going to address my comments specifically, because I think the law requires the Court to address them specifically.

As to Scott Tadych, it's clear, and counsel acknowledges, there is no motive presented there. Opportunity, sure, he is on the property, I will concede that. But there's no connection. As a result of the no motive, and most importantly, no connection to the crime, and that's the key, it's not just the location, it's not the property, there has to be a connection to the crime. And that is the key here in analyzing all of these, there is no direct connection for

Scott Tadych to the crime. Therefore, evidence, cross-examined, case-in-chief, otherwise, should be and must be excluded.

Next, you have Robert Fabian and Earl Avery hunting rabbits. Counsel points out we have a time discrepancy, well, that's hardly unusual. If there was a situation, or a case, in fact, I doubt whether counsel has ever had one because I'm not sure I have, where witnesses say the exact same thing at the same time and everything lines up perfectly. Quite frankly, when that happens, then I know something stinks. I have yet to see it in my years of experience, where everything lines up so perfectly.

There's no connection, no motive, no connection to the crime, and just because he is on the property for that one hour or two hour period hunting rabbits, I suppose one could say that he had the opportunity. So for purposes of argument, we could concede that. But there again there is no direct connection and no motive.

Similarly, with respect to Andres Martinez, this one is rather interesting, because I think Andres Martinez, again, there's no motive, there's no opportunity, and there's no

connection. And, again, if they wish to offer evidence of third party liability here, I think Martinez is -- the potential admissibility of Martinez is governed by ***Scheidell*** to a certain extent, because it's another act. Although here, we apparently know that -- who the other actor is as opposed to, I think in ***Scheidell*** there was a question as to, I think it was unknown third parties and the adoption of this ***Sullivan*** analysis.

Well, whether you use ***Sullivan*** analysis, or whether you use a ***Denny*** analysis, under either way, Martinez does not meet the requisite admissibility standards. Under ***Denny***, there is no motive, there's no opportunity, and there's nothing to directly connect. If you want to take a ***Sullivan*** analysis then, one, is the evidence offered for a proper purpose, sure, to suggest that somebody else may have committed the crime, okay, fine, that's a proper purpose.

However, on the next two steps of the analysis the Andres Martinez evidence is inadmissible. It does not meet the relevance determination because, as the Court is aware, relevance is a two-part determination. If I may

have a moment to elicit further, here it is. Relevance has two facets. The first consideration is whether the other acts evidence relates to a fact or proposition that is of consequence, and I think that's probably true in this case.

However, the second consideration is whether the other acts evidence has a tendency to make a consequential fact more or less probable. And given the nature of the assault and when that assault occurred, it's one -- it's so sufficiently dissimilar and unrelated to the circumstances of the Halbach murder that it fails on the relevancy prong.

And then, finally, even if it didn't fail there, it would certainly fail on balancing the probative value on the Andres Martinez assault of his girlfriend, with its potential prejudicial effect. In this case, confusion is the primary concern here, delay, waste of time, and a jury going down the wrong road, as opposed to trying to determine whether or not Mr. Avery is, in fact, the murderer.

So the fact that Andres Martinez attacked his girlfriend with a hatchet does not

add anything of consequence to our analysis here. I don't need to comment further on these many inconsistencies to law enforcement.

THE COURT: Before we leave him, I don't know if I missed it in the defense offer, what would be the evidence connecting Mr. Martinez to the location of the crime at the time of the crime?

ATTORNEY STRANG: That's fuzzy. He, I think in the end denies having been there on October 31. And there's a receipt for his son's car having been towed there on November 2, 2 days later. And he, in the end, says, well, that's the day I most recently went to the Avery's.

So it's -- Others -- others suggest that he may have been there and indeed been at a bonfire on October 31. But, you know, I can't -- I don't have any ironclad evidence to put him there. Neither do I need to offer that.

What's -- One of the things that's so striking about Mr. Martinez is his first talk with the law enforcement officers, before he does start changing his story considerably, on some interesting details about his relationship with Steven Avery. His first statement includes what most experienced detectives would have recognized

as a confession to killing her, and sort of explored this strange statement, well, I'm going away for the rest of my life anyway, so I guess if they say I did it I could take responsibility for it. That's -- You know, that's exactly the kind of statement that people sometimes initially make in, ultimately, confessing a shameful crime.

Rather than sort of following that, or going into the crack that Mr. Martinez offered, what we have, these agents, according to their reports, saying is, oh, you know, we're not going to blame you for something you didn't do, and that's just the end of the matter. Really, you know, an interesting bit of tunnel vision there.

ATTORNEY FALLON: I guess I would dispute that, because I'm under the impression discovery has been provided and there's also, and I think counsel acknowledges it, they may not find it greatest in the world, but there is an alibi associated with Mr. Martinez in terms of his location. I believe there is evidence that he was out trick-or-treating with his kids.

ATTORNEY STRANG: With a 16 year old boy, who claims he skipped school, that's true. But, you know, what we do have to avoid here is getting into

the very problem that ***Holmes vs. South Carolina*** warns about. Now, ***Holmes*** approves, in general, rules like ***Denny***, and in fact cites ***Denny***, as the sort of rule that's, in general, permissible, but says, look, you can't look in isolation at the State's showing and say, boy, that looks strong standing alone so, therefore, I'm not going to allow competing defense evidence that standing alone doesn't look as strong. That's what ***Holmes*** is about. And particularly in arguing direct connection, that's really what the State -- the mistake the State is inviting the Court to make here.

THE COURT: I understand what ***Holmes*** says, but as long as you focus on the evidence, or lack of evidence, supporting the third party involvement, I think you steer clear of ***Holmes***' problems. If you say I'm not going to look at your third party evidence because there was DNA evidence connecting Mr. Avery to the crime and that's enough for me, then you are into a ***Holmes*** problem.

ATTORNEY STRANG: Right, I agree.

THE COURT: But I don't understand the State to be making that argument here.

ATTORNEY STRANG: Well, they are saying,

look, you know, the key's found in his trailer, and a bullet with Teresa Halbach's DNA, or a fragment of a bullet is found four months later in his garage. Now, in fact, there will be plenty of evidence at trial that Steven Avery did not have exclusive access to the garage. Others went in the garage. An issue why this bullet is found four months later, after multiple searches of the garage.

I mean, the jury will have all kinds of evidence to consider in assessing the weight, if any, to give that bullet, including the fact that the bullet has also got DNA from a State Crime Lab analyst on it. I mean, that's -- that's just where we have to be careful, because, taken in isolation, finding a Toyota key in Mr. Avery's bedroom sounds terrible when you look at how many searches --

THE COURT: Okay. Wait a minute, I interrupted Mr. Fallon just to ask about the evidence of Mr. Martinez so, Mr. Fallon, you may continue.

ATTORNEY FALLON: Thank you. After Mr. Martinez, the defense then suggests that a couple of adolescent school girls, K.S. and A. MCK, that there was a group of people at a bonfire.

Again, those people, apparently Mr. Martinez has mentioned a Dawn Hauschultz, German spelling, H-a-u-s-c-h-u-l-t-z, Steven Avery and --

ATTORNEY STRANG: This is all part of the Martinez discussions?

ATTORNEY FALLON: Right.

THE COURT: Yes.

ATTORNEY FALLON: So, again -- All right. Then I will accept that. Apparently those aren't being offered as viable suspects.

Next, you have James Kennedy, again, opportunity solely because he happened to be on the property at the time.

THE COURT: Just, before we leave that, when was this bonfire, I don't know if I caught that from the offer?

ATTORNEY FALLON: I believe that was supposedly the night before.

THE COURT: October 30th.

ATTORNEY FALLON: Yes.

ATTORNEY STRANG: No.

ATTORNEY BUTING: No.

ATTORNEY FALLON: Well, there certainly was a fire, and we're going to introduce evidence of a fire on the night of the 31st, but there's evidence

of a bonfire before.

THE COURT: I'm looking at Page 13, and it says a schoolgirl and her friend, that Martinez, Dawn Hauschultz, Steven Avery, and another Steven had been at a bonfire and party at the Avery residence. A. MCK confirmed that she heard from Dawn Hanes that Martinez and his friends, Roberto Brooks, were at the Avery property on October 30th. When I put those two together, I read it as being a bonfire on October 30th.

ATTORNEY STRANG: There are two different statements there and the one girl does place it as Sunday night, October 30, the other doesn't.

ATTORNEY FALLON: I think it makes it all the more speculative and full of conjecture when one goes to analyze the admissibility or the possibility of any of those people, particularly Mr. Martinez, being involved.

ATTORNEY STRANG: That's a tough argument for the State to make where its own witnesses are going to be in conflict over whether there was any fire on October 31st. It's certainly the State's theory that there was. But it's going to present people who say I didn't see a fire on October 31. So, none of this is ideally crisp and clear.

THE COURT: All right. Mr. Fallon, you may continue.

ATTORNEY FALLON: Thank you. Again, with respect to Mr. James Kennedy, their ***Denny*** analysis, no motive and no direct connection to the crime are offered. So evidence regarding him should be excluded.

With respect to the family members, you have a -- Charles Avery is the first one mentioned. Defense argues, well, apparently he may have a motive, but his motive is no greater than their client's because of the sex offender charges and/or convictions associated with both Charles and Earl Avery.

As I noted in my pleading, one of them was actually convicted, the other was not. But there's nothing to directly connect Charles Avery or Earl Avery, for that matter, with the crime. Yes, they are connected to the crime scene, when one considers the salvage yard as the crime scene, or the location, but there's not a direct connection to the crime itself. And such allegations need more before the jury is going to have a finger pointed at one of the defendant's brothers.

That gets us to the Dassey boys, which there are four: Bobby, Blaine, Bryan, and Brendan. We're excepting Brendan from the discussion for the obvious reasons. That leaves us the remaining three Dassey brothers.

Again, the motive, the opportunity, and the connection are very, very thin. Motive, absolutely none. Connection to the offense, none. Opportunity, depending on which version of the time frame, arguably that could be conceded. But, again, certainly insufficient evidence connecting them to the offense in question.

As a result, under a ***Denny*** analysis, for the defense to suggest and point a finger that one of the individuals mentioned in their statement is a viable suspect, such that the jury ought to consider that in evaluating the quality of the investigation, is a reach. It's going to lead to confusion. It's going to have the jury going down who knows what path. And it doesn't add anything to the possibility or reality of what the jury's actual determination or job is in this case, and that is to determine whether Mr. Avery is, in fact, the one who killed her.

If they are going to suggest and imply,

or directly say in argument, that anyone of these 6, 8, 10 people listed in that statement could have been the murderer, then they have got to have more than what they have shown us. So that evidence should be denied, Judge. Thank you.

THE COURT: Anything else on the ***Denny*** motion?

ATTORNEY STRANG: I would be reiterating the brief and I think, you know, I will stand on that. I don't think I'm waiving a thing. But the -- just to go back to the real basics here, I think that ***Denny*** does not apply at all. If the Court disagrees and finds that ***Denny*** does apply, then the facts we have offered in the alternative, we do wish to pursue on cross-examination, conceivably in the defense case-in-chief.

And I understand what the 904.03 limitations might be on cumulative questioning or other cumulative evidence. But the Court does need to understand that some of the people we discuss, and James Kennedy, for example, would be a good example here, Dawn Hauschultz would be another one, are there not because we view them as suspects themselves, but because they are in a position to offer testimony that bears on the

activities of others.

James Kennedy is there to say what he sees about Charles Avery and how peculiar it is that Charles Avery, at 3:00 on October 31, 2005, isn't in or around the office, and has to be hailed by shouting for five minutes or more and comes from behind the building. And James Kennedy is there to talk about the gray smoke that he sees rising from the center of, not Steven Avery's burn pit, but from the center of the salvage yard pit, at 3:00 on October 31, 2005, or shortly after.

So, you know, this -- and if the writing was inartful, I take the blame for that, it's my writing. But on the alternative hypothesis that ***Denny*** applies, I'm doing my level best here to assemble, from what the State did and didn't do, the evidence suggesting the least legitimate tendency to believe that these people had no lesser motive than Steve Avery, no lesser opportunity, and no lesser connection to the place of the offense.

I mean, let's take the Dassey boys just to finish. There isn't any physical, direct connection between Brendan Dassey and the death

of Teresa Halbach, but this 17 year old boy is facing the rest of his life in prison on the State's accusation, without any physical evidence of a direct connection. Brendan Dassey, for all that appears here, has the same encounter with Teresa Halbach, or walks past her as he's getting off the bus, that his brother, Blaine, does.

Their really isn't any difference here in apparent motive, opportunity, or direct connection. And when we have Teresa Halbach's bones being found, not just in Steven Avery's burn pit, which has gotten all the public attention, but some of them being found in a burn barrel immediately behind the Janda house, where the four Dassey boys live, is this something that a jury ought to be allowed to consider in deciding whether the State has proven Steven Avery's guilt, beyond a reasonable doubt? You bet it is.

THE COURT: Let me ask this, let's say that if, to the extent that ***Denny*** is not on all fours because Denny sought to offer evidence of motive, and you are saying the defense does not, then what -- what does the defense contend are the rules for determining whether third party liability can be

presented to the jury?

ATTORNEY STRANG: I'm sorry to be quarrelsome, but I don't know that we're talking about third party liability. We're talking about evidence of the activities and presence of others that has some tendency to make it less likely that Steven Avery was the person who murdered Teresa Halbach.

THE COURT: Well --

ATTORNEY STRANG: This is simply relevant evidence.

THE COURT: The thing is, if you look at ***Denny***, ***Denny*** wasn't just saying that one specific person -- other person did it, he is other persons. He wanted to suggest multiple possibilities. It seems to me that while the defense in this case is not basing its claim on the allegation that others had motive, that in other respects you are trying to do essentially what ***Denny*** did. You are saying, look, there were these other people, and I can name them, who were in a position to commit this crime, who could have committed this crime, who were at the scene, had the opportunity. Isn't that what you are doing?

What are the rules -- From the defense

perspective, what are the rules the Court is to apply in determining whether or not the defense will be allowed to elicit testimony that these other person or persons could have committed the crime?

ATTORNEY STRANG: Relevance, 901 -- 904.01 and 904.02, and the ordinary balancing under 904.03. Indeed, I mean, let's not kid ourselves, the State will name the people who were there. The State will elicit testimony on direct examination, from at least some of them, that they were there at the right time. The State will elicit evidence about the activities of some of them. The State will elicit, I'm sure, testimony from law enforcement officers about the persons with whom they spoke.

So when we explore bias, by showing that law enforcement officers immediately narrowed their focus, for practical purposes, to Steven Avery, we necessarily have to do that by showing what the broader focus would have included. It's just practical stuff.

Again, you know, the rabbit hunt is one example, but an example only. That -- This is a dynamic scene, there are a number of people there. And an unbiased investigation would have

pursued many of the facts that we have laid out in the alternative proffer. And the admissibility here is the same standard it is for the State's evidence, circumstantial though it is, that Steven Avery did it, which is, does it have some tendency to make it more likely that he committed the crime. This has some tendency to make it less likely.

THE COURT: All right. Let me ask, Mr. Fallon, with respect to ***Denny***, at least one -- setting aside for the moment its significance, there is at least one difference between ***Denny*** and what the defense is attempting to do, and that is the defense is saying, we're not offering a motive for these alternative possible suspects. What's the State's position on that issue?

ATTORNEY FALLON: As I indicated earlier, the State's position on that is that Denny is more than just offering evidence about motive. The case stands for the proposition that if you are going to point the finger at a third party, you have to establish the legitimate tendency. You have to establish, which is primarily in the construct of is there a direct connection. I think that's the -- the operative fact here.

THE COURT: No, but -- Let me rephrase my question. Is the State's position that, if a defendant wants to offer evidence that a third party or parties might be responsible for the crime, that the only way they can do that is if they provide motive plus opportunity and a direct connection to the crime, or is the State's position that, well, there's still this legitimate tendency test, but they have to -- if they are not going to use motive, they have to do -- show opportunity and direct connection?

ATTORNEY FALLON: Under ***Denny***, they have to establish all three. Now, I want to address, if I may, because I think this dovetails into the point you are making --

THE COURT: Okay.

ATTORNEY FALLON: -- your request if ***Denny*** doesn't apply, then what do we apply.

I think counsel is correct, 904.01, .02, and .03 analysis is the analysis that would be the fall back position to determine the admissibility of this evidence. Then I would invite the Court to look at the evidence under that analytical framework as well.

Because, quite frankly, it's

inadmissible under that framework, and here's why. Relevance, as I mentioned earlier, has two facets. First is whether the evidence relates to a fact or proposition that is of consequence, and why that may be met here.

The second consideration for relevance is what we all learned in law school years ago as the materiality component of our relevant statute. And that is whether the other act evidence -- or not just other acts, excuse me, whether the evidence has a tendency to make a consequential fact more probable or less probable.

The fact that, for instance, Robert Fabian was on a rabbit hunt with a .22, the fact that there was a golf cart that was found rather interesting by one of the cadaver dogs, the fact that there was smoke in the middle of the salvage yard as opposed to the far corner up on the upper right side, great.

But how does that really make a consequence here, the consequence of fact more or less probable. And even if you were to accept the establishment of that second facet of relevance, you still must then evaluate whether

the probity, the strength -- and this is where counsel misreads ***Holmes***, and I think the Court happily noted that -- where you do consider the strength of what's being discussed here.

So is the probative value substantially outweighed by the prejudicial effect, by the confusion of issues, the potential of the jury being misled, undue time considerations, and things of that sort. And even in a 904.03 balancing test, everyone of those individuals mentioned in the statement on third party liability fails to meet that standard, admittedly a lower standard of admissibility as well.

Because they -- I strongly challenge whether they meet that second facet of relevance, the old materiality. And even if they did, the probative value under all of the evidence known here is substantially outweighed by the prejudicial effect. Thank you.

THE COURT: All right. Let 's take a lunch break and then we'll come back and I will hear argument on the other issues. I'm in my office for lunch, so I will defer to counsel; how much time do you want?

ATTORNEY STRANG: Forty-five minutes to an

hour.

THE COURT: 1:15, does that work.

ATTORNEY FALLON: Sure.

THE COURT: See you at 1:15.

(Noon recess taken.)

THE COURT: At this time we are back on the record. All counsel and the defendant are present in the courtroom. When we left off before lunch the Court finished hearing argument on the third party evidence issue, that is, the ***Denny*** motion. Counsel, I'm not sure whether, next, it pays to take up the wrongful conviction issue or the planted blood issue first.

ATTORNEY FALLON: We would prefer to take the blood vial issue, the planted blood issue.

THE COURT: Any objection from the defense?

ATTORNEY BUTING: No.

THE COURT: Very well. I will hear from the defense first then. Who will be presenting this matter? Mr. Buting?

ATTORNEY BUTING: Yes.

THE COURT: Very well, you may proceed.

ATTORNEY BUTING: Like Mr. Strang said, we have pretty thoroughly set this forth in the written submission, so I don't want to repeat everything in

there, but I do want to point out a few things.

First, the ***Richardson*** case. I think we need to recognize and distinguish it a little bit from what we have here. And I understand I think the -- why that case was decided the way it was.

There's a very big difference between that case and this. That was a direct evidence case. There was a victim, or alleged victim, at the time, saying Mr. Richardson had sex with me, or raped me. He denied it. But balance -- And offered a convoluted argument of a frame-up that was collateral in part because he was two steps removed from the victim. Wasn't just the victim, wasn't just the victim's mother, it was his ex-wife who supposedly then got the victim's mother and the victim to frame him.

What the Court noted as the frame-up evidence, when it came to the question of probative value, how it had little probative value, they balanced it against the fact that he says, I didn't have sex with her, period.

Yet his semen was there. Her underclothes were found there. The injuries, significant injuries, torn hymen and what not. Which his frame-up evidence did not go to explain

any of. Wasn't like he was saying she, you know, deliberately injured herself, tore her hymen, did all this kind of stuff. His frame-up evidence did not go to explain away any of that evidence.

Now, this case, on the other hand, is a circumstantial case. There is no direct evidence that Mr. Avery committed this crime. Here, the proffered evidence does offer an explanation for some of the circumstantial evidence, directly. And I can just hear it right now, if this blood evidence is not allowed in, the prosecution is going to get up in their closing argument and they are going to say, no matter what doubt the defense may have raised about this, or that, or these other pieces of evidence, the bottom line is his blood was in her car. And that kills him. He said he was never in her car, his blood was in her car.

We will be standing there with our hands completely tied behind our back, unable to defend against the underlying accusation in this case, without this evidence. That's why, in this case, it goes directly to the heart of the right to present -- the constitutional right to present a defense.

If this is -- Frankly, if we are not allowed to do this, I think this case is going to be reversed. Because there is no other way that Mr. Avery can adequately defend himself against these allegations, allegations that he made from the very beginning of this case. I think even before he was arrested, or certainly -- must have been before he was arrested, because he was saying it to the television camera, if my blood is in that car, or my DNA is in that car, it was planted, because I didn't go in that car. That's the first point I want to make.

Second point, I want to clear up something here, because the State wants to link, merge, ***Denny*** and ***Richardson*** in this case because of the blood planting defense. And that's partly because I think they wrongly assume that if the police planted the blood, necessarily they also murdered Teresa Halbach.

And that does not follow logically and it does not necessarily follow with the defense that can be offered. Mr. Avery has never said that. He is entitled to let the jury consider that some other unknown individual may have committed this murder and that the police are

opportunistic and took the opportunity that was presented to frame him, which thereby totally destroyed his civil claim against them.

That's why, for instance, it's entirely unnecessary, therefore, for us to show that one or more police officers had a motive to kill Teresa Halbach. Because they are separate, what the pleadings demonstrate is a motive to frame Mr. Avery, and an opportunity to do it as well.

So when they -- when they talk about -- Recognized, by the way, not being a civil case, we don't have the opportunity to do depositions, to question all of these officers ahead of time and present, perhaps, as clear and thorough and airtight an offer of proof as you would in a civil case.

These are police officers that, if they were involved, necessarily, have covered their tracks in a way that we have not been able to pierce yet. Some more may come out at trial and should come out at trial.

But at this point we're limited by the fact that how is any defendant going to ever prove a direct connection saying that a witness saw Lieutenant Lenk, or Sergeant Colborn, or

anyone else, take that vial of blood and put it. You know, it's almost impossible to expect in any case, a defendant being able to do that. The police control the scene, they control the evidence, they control the documentation of that evidence, the written documents.

Despite all that, I think we have already shown they slipped up and that there are indications that a reasonable jury has a right to hear, and look at, and consider when we're talking about whether there's a reasonable doubt that Mr. Avery committed this offense. And if there's --

And logically, if he says there's no way his blood could be in there, in that car, because he was never in the car, and his blood is found there, if he -- if evidence shows that there's an explanation that someone else put it there, then that also would tend to indicate at least a reasonable doubt about whether he committed the crime itself. Because it pulls the rug out from under one of the major pillars of the State's case and challenges the credibility and the reliability of everything else that they have brought up to try and point the finger against

Mr. Steven Avery.

The one thing that I want to say, though, about ***Holmes***, ***South Carolina vs. Holmes***, it's not that we're saying that ***Holmes*** overrules ***Denny***, or that ***Holmes*** even overrules ***Richardson***. But there is one aspect of ***Richardson*** though, that may no longer survive, and that is, the whole idea that -- that you can -- that you weigh the strength of the State's case against the proffered evidence from the defense.

And in that case -- That's why I'm saying -- That case, by the way, has never been cited, as far as I could tell, by any other case authority in the country, since it was decided. And I think it's because it's a narrow case on those narrow facts.

But the analysis that they went through and that I went through earlier here, about how, yeah, he says he was framed by this girl, not by the girl or her mother, but by his ex-wife putting them all up to it, they didn't balance that say, well, let's look at that, but besides the fact there is semen, there's her bedclothes, there's the injuries, and ultimately they said -- the analysis, as I see it, is that they said that

that outweighed the defense.

That's what I think ***Holmes*** says you can not do. ***Holmes*** says you have to look at the proffered defense evidence separate from the State's evidence. And at page 10 of the slip opinion, this really is the second to the last -- or third to the last paragraph of the whole decision.

What they point out is, quote, just because the prosecution evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third party guilt has only a weak, logical connection to the central issues in the case.

And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that South Carolina did not purport to make in this case. I think we may fall into a similar trap here if we start trying to balance too much what the State's forensic evidence is versus Mr. Avery's in this case.

But let me turn to some of the so-called facts that the State has now presented in their response. These facts, a number of them are disputed and, therefore, the fact finder in disputed facts should be the jury not the court, because they go directly to Mr. Avery's right -- to the heart of his right to present a defense.

For instance, Paragraph 5, Page 2, of the State's response says that, Lenk placed himself on duty at approximately noon, and approximately 2:00 p.m. he arrived on the scene. Well, right away, that's directly contradicted by sworn testimony from Lieutenant Lenk that he arrived at the property at 6:30 or 7:00. Lenk never filed a report of those, his activities or whereabouts.

They have, as yet, produced no work records of his. We did receive, however, some -- and by the way, some of the documents that we have asked for in the ***Brady*** motion, should not be implied to mean that -- that there isn't already significant evidence that supports the arguments we're making. We want to make sure there is nothing else out there that would make it even stronger.

But we do have reports that Deputy Inspector Schetter made showing the hours that every officer worked on that day and what their duties were. And that's what we put in our proffer here. Lenk says he works 10 hours. We also have logs that show when officers signed in and signed out.

And that goes to the Paragraph No. 6 in Mr. Fallon's response, that a logbook is created to account for the comings and goings of law officers and others. Well, I would add, except for Mr. Lenk. Because, according to the log book, he never arrived at the scene of the Alvery (sic) Salvage. And yet we know he was there because they do show that he left.

A reasonable inference that a jury, and only a jury, should make is that he somehow snuck in unnoticed. He was able to bypass that. And if he was able to bypass that perimeter, or whatever it was, then what else could he have been able to bypass without there being documentation.

It doesn't necessarily require a huge conspiracy of the entire police department. He may have -- You know, the person who's the guard

who's checking people in in the logs, may or may not have been involved in this at all. If he was able to bypass that guard, he may well have been able to get to the vehicle.

These are factual contradictions, factual contradictions. They are not pure speculation, as Mr. Fallon would argue. He was there, but he never checked in. He said he worked 10 hours, but the only record of his work is, according to his testimony, four hours at most, 6:30 to 7:00 is when he arrived, I think he said under oath. And he left at 10:40.

Now, the State is perfectly free to explain to the jury, if they can, these factual contradictions away. But Mr. Avery is equally free to argue these factual contradictions to the jury in the way that he sees fit and that they fit and support his theory of defense.

Another fact, so-called fact, mentioned I believe in Paragraph 14, is that the DNA profile obtained from the key to the SUV was not blood, but another biological source. Well, actually, I don't believe that's been ruled out, according to the preliminary hearing testimony, because there was never a presumptive test done

on the key.

Visually, she didn't see it, but she swabbed it immediately for DNA. If all blood could be seen visually, there would be no reason for doing presumptive tests. So we don't know whether the source of his DNA at that point, on the key, could have been from the blood or not.

More importantly the blood is found in his house, where they had four days to obtain plenty of sources of his own DNA. It is not unusual to find someone's own DNA in their own house. It's all over the place. And on top of that, they have specific DNA samples from him, buccal swabs, in not just the Clerk's Office, but in the Manitowoc County Sheriff's Department, from prior DNA exoneration efforts. And that was verified by their own investigation.

Paragraph No. 14 in the so-called facts claims that this Marlene Kraintswood (sic) testified, as she's the phlebotomist, and that she drew the blood sample and that she was the one that put the hole in the tube top. Well, we have seen no such report. And his response earlier was, we don't have to show all of our cards. This is like in the nature of a rebuttal

witness is what I'm assuming, he has got the report.

We have seen the interviews of everybody else in the links of these, no pun intended -- of this chain. But there's no report of this nurse. Now, he may say they don't have to show all their cards, but that's exactly what they are trying to get the defense to do, number one.

And number two, he can't put these facts in here and make averments to the Court that they are facts, if he is not even going to turn over any reports that support it, to the defense. And we have seen nothing of that.

More importantly, the tube top was not sealed. And we said that right in our papers, in our moving papers, that the hole there is only one of several ways that the blood could have been taken. Whether the hole was put there, or used -- an existing hole was used by inserting a needle to withdraw it, or even more likely the top is just pulled right off and blood, whatever they need is taken out. Because it was unsecured and there really would not even have been a need to use a needle, you just pull the top right off.

Paragraph 17, and this is an example of

how all of these so-called facts are jury questions that only a jury can decide. Moreover, testimony would reveal that neither Lenk, nor Sergeant Colborn, or anyone else associated with the wrongful conviction lawsuit entered the SUV on Saturday, November 5th.

Oh. Okay. So that's it. That's the end of the question, huh? We're just supposed to accept that and walk away and go home and say, Lenk is now saying that, that's all we need. Please, that is for a jury to decide. Lenk's credibility is already in question because he's been caught in inconsistencies under oath at best, perjury at best, for the defense perspective.

And the same that goes to their claim later that Lenk did no more than just prepare transmittal paper work. Again, that's what we're supposed to believe and just accept as a given fact instead of letting the jury know.

In essence, what they want us to do is just assume that it's a mere coincidence that Lenk is on these documents in 2002; that he's deposed as a witness in a civil case three weeks earlier; that he volunteers to search the

defendant's home, after his superiors have already determined there is a conflict of interest and with his department's involvement because of that very same lawsuit.

He doesn't tell, neither does Colborn, the new superior officers that he was a witness and involved in that case. He finds this magic key in plain view, when no else could, and he's still involved in the case, five months later, in March, after the Brendan Dassey so-called confession, when the bullet is found.

Now, we don't know, and I don't want to leave the Court with the impression that the only explanation is that Mr. Lenk planted that bullet there; we don't know that. There are other explanations, including one that it wasn't even her DNA on that bullet.

Because the evidence will also show that the DNA analysis of that bullet was flawed in that the control failed and included the analyst's own DNA, which by protocol means the test gets thrown out. But she applied for a deviation from that protocol in order to make the call.

And the evidence will also show that

that is the only time in her career she's ever even asked to deviate from a protocol. Again, those are questions that a jury is going to have to decide and the jury will hear.

So, really, what it comes down to is, it seems to me, the State is arguing that -- they are conceding that it's material, and it's relevant, that it's probative. But that really what it comes down to is that this is a waste of time, this is a confusion, there's unfair prejudice.

The unfair prejudice thing, let me just respond briefly to, since we are in closed hearing, we can talk about these inmate statements. They claim, well, the inmate -- the Court has already ruled these inmate statements to be inadmissible and that somehow they are prejudiced by that.

When, in fact, if they think that that is so critical to their case, that those statements are so important, they have an appeal, as of right, that they could have taken, or still could, under 974.05, ***State vs. Eichmann***, which says that a -- an order that bars admission of evidence that, quote, might normally be

determinative to the success of the prosecution, gives them an automatic right to an appeal. And they haven't done that.

And the case also says that it's -- they give the State so much authority and discretion that they are the one -- the prosecution is the one to make the determination of whether the evidence that is excluded is that important to them or not.

So to argue that this somehow has prejudiced them so much, when they have other remedies, is really an auspicious argument. So it comes down to the confusion and delay, which is the last argument that they make, which is really a 904.03 argument.

And they argue that so much time is going to be taken up by the defense. Well, we just saw a calendar here that shows -- I don't remember how many days for the State's case, but basically four weeks, but only -- I'm sorry -- with five days projected for the defense. As if any evidence that goes -- that would tend to indicate Mr. Avery is not guilty is somehow a waste of time. That's absurd.

They claim there would be an endless

parade of witnesses. Well -- And that they would be forced to present and hour by hour accounting for Lieutenant Lenk and Colborn, or whatever.

First of all, the State, in particular those Manitowoc officers, put themselves in that position. They chose to remain involved in this investigation when it was obvious to everybody else that they shouldn't be; not only on that day, but even five months later, when Lenk is at the scene again, still involved. It's a conflict of interest. It demonstrates their bias and bias is not a collateral matter, particularly when it's this critical to the defense, and it's never a waste of time.

I disagree that every witness they discuss in here has to testify and that that's going to take forever. At some point they may -- We don't need to offer them, if they feel like they need to, if they think that interviewing witnesses 15 months later, when they could have done it right away, that relying on 15 year old -- 15 month old memories is probative, so be it. It would be their choice to waste the jury's time, not ours.

So, for all of those reasons, I think

the defense has presented a very strong case of the importance, relevance, and, indeed, necessity that this blood vial evidence be introduced or presented in this case. So we oppose the State's motion to exclude.

If the Court has questions about, again, feel free to just throw them at me here if there is some legal issues or questions.

THE COURT: What is the defense's version of when the blood would have been taken from the Clerk's Office? Is it between --

ATTORNEY STRANG: It's not two years like the Court I think at one point -- or what Mr. Fallon argues something about from September 2003. We're not going to be offering that as, like, somehow these officers took a sample of his blood two years earlier and just hung on to it until the opportunity. I can't completely rule that out, but I think the most likely scenario is going to be that it was after Teresa Halbach's disappearance, probably after Teresa Halbach's disappearance was reported, which narrows it even more. But again --

THE COURT: So sometime between 10/31 and November, is it the 5th?

ATTORNEY BUTING: Yes, November 5th.

ATTORNEY FALLON: Actually, she's reported missing on the 3rd.

THE COURT: Okay.

ATTORNEY FALLON: But last seen on the 31st.

THE COURT: Okay. So, November 3rd and November 5th. And I think there was -- and this may have been touched on this morning, the idea of who would have committed the crime and whether or not anyone from the Manitowoc County Sheriff's Department would have been committed -- or would have been involved in the commission of the homicide. That is not a part of the State's -- or the defense theory. Or I don't want to put words in your mouth; what is the theory?

ATTORNEY BUTING: I think if we were going to argue that -- Well, probably -- probably the only ones that would fit that scenario would be Lenk and Colborn, because we think there's motive. At least there's bias. If that's strong enough motive to also involve killing. This is not going to be a primary defense that's offered.

I think that -- I can't rule out that a jury could consider it, but they had opportunity because -- well, we don't know if they had

opportunity. We haven't determined exactly what they were doing on the 31st. That may be ruled out simply by producing the documents that we requested back on December 15th, I believe. They may have alibis for the actual crime itself. And so that may not even be an issue that the jury could even speculate on. It's more likely, frankly, that there are -- that these are independent events.

THE COURT: All right. I mean, I -- to leave even open the possibility that it would be alleged that either Lenk or Colborn were involved, the -- I mean, the argument would be that somehow because they were employees of the Manitowoc County Sheriff's Department, and the Manitowoc County Sheriff's Department was being sued by Mr. Avery for a claim that is, near as I understand it, was covered by insurance, I don't know what the limits on the policy might have been, but that either Lenk or Colborn felt they had a sufficient stake in that that that would have been a motive for them to kill Teresa Halbach for the opportunity to frame Steven Avery?

ATTORNEY BUTING: Probably not. Very, very likely not. And my only hesitation in saying that

is, because I just don't know what they did or where they were on October 31st, even though we asked for it over a month ago. But unless we could show some connection, I mean I think in that instant you would have to satisfy ***Denny***, and we don't have a connection of them to the scene.

But in any event, I think the motive is not a motive to kill. I think the motive is a motive to frame. And that's why the defense is coupled with not just the planting of the blood theory of defense, but also the investigative bias that ignored other likely suspects, to the point where they were getting preferential treatment in the case of Chuck Avery.

But also, the -- recognize that on November 5th, before the body had been found, when all they have is a vehicle with some blood in it -- in fact, at that point they didn't even have that, because nobody at the scene -- that's another important thing, none of the cops who originally arrived at the scene saw any blood in it, inside the RAV. It was broad daylight on a sunny -- maybe not sunny, but broad daylight on a Saturday morning, 11 a.m.

They have got flashlights with them and

they are looking in the car as well. They are able to see little pieces of paper with her name on it. They are able to see all this stuff and they don't see a piece -- a splotch of blood right on the ignition, where they were looking and shining around the whole dash area looking for the VIN number. That's very questionable.

But even without seeing all of that, when they go to apply for a warrant, search warrant, they are swearing under oath that they think there is probable cause to believe evidence of a crime, including homicide, occurred. So for whatever reason, whether they were involved in it, or perhaps more likely they know how these things turn out and they had enough at that point to realize that's where this was going, in all likelihood. I think that's the more likely scenario, but.

THE COURT: The -- I indicated to counsel when we were talking about setting up this hearing today, in terms of scheduling, that one matter that I -- concerned me was the question of whether bias evidence had to be related to a particular witness, or that whether or not there was some argument that bias could be imputed to an entire, in this case,

Sheriff's Department. Anything from the defense on that issue?

ATTORNEY BUTING: Mr. Strang is going to take on that issue, your Honor.

ATTORNEY STRANG: Only because I'm the one who took a look at that, your Honor, and to me the bottom line is that evidence of bias adduced on cross-examination, or conceivably extrinsic evidence of bias, is related to an individual witness. You know, it's the witness' bias that is relevant and important to a jury in assessing the witness' credibility at trial.

That said, one of the biases that we can have as human beings is, of course, an institutional bias. It's only one of the biases that may drive us, that may tilt our behavior, our words, in one way or another.

Now, I didn't find anything anywhere that addressed, specifically, cross-examination of an individual witness on the question of institutional bias. But again, I wouldn't expect to find that, because the issue is bias of the individual, which may have institutional roots. And there I did find, you know, some useful sort of comment by courts, not directly on point, but

it helped me to think about the question of bias as it relates to an individual witness.

When the U.S. Supreme Court has spoken of institutional bias, when its used that term, it's most often been in the context of a re -- a re -- a conviction at trial, a reversal on appeal, or a conviction after a guilty plea and then a reversal on appeal, a remand, and then the State upping the ante, or the court upping the ante, either with additional charges on the retrial, or with a longer sentence on the retrial. And defendants then challenging that on subsequent appeal as vindictive and a denial of due process.

And I think the very first time the U.S. Supreme Court spoke of institutional bias was in acknowledging that its decisions putting due process limits on higher sentences after remand, or additional charges after remand. And here I'm quoting the U.S. Supreme Court, "reflected recognition by the court of the institutional bias inherent in the judicial system against the retrial of issues that already have been decided", closed quote. And that's ***United States vs. Goodwin***, 457 U.S. 368, at page 376, decided

in 1982.

The other common setting, or the other setting in which the Supreme Court has spoken of institutional bias is considering forced medication or competency assessments, competency to refuse medication, for example. And the court recognizing that often these are done at state mental hospitals, or state institutions by psychologists or psychiatrists employed by the state with an interest in furthering treatment as the doctors think is recommended. And there could be an institutional bias there that may color the testimony of such witnesses in favor of forcing medication.

So, you know, what that says to me is, of course, and I started thinking about it, I mean, all of us, to the extent we work for an institution or within an institution, may adopt its interests as our own biases. This is why it is not at all uncommon or improper for the State to ask defense expert witnesses, how much are you being paid, who is paying you.

In other words, you know, the old biblical comment in the Gospels, His bread I eat, His song I sing. Also fair with the defense with

State witnesses to establish they are employed by the same sovereign who's prosecuting a defendant.

In civil cases, not at all uncommon or improper for one side's expert to be asked whether he or she has ever testified for the other side in a civil conflict. A toxic tort where an epidemiologist is called, for example or, you know, whatever the example might be. A medical malpractice case in which a particular M.D. is simply known as a plaintiff's doctor or as a defense doctor.

And again, that gets at the issue of institutional bias. We don't enshrine that as significant in and of itself, it is just an aspect of the individual bias that one explores with any witness, or may be entitled to explore with any witness.

So, in its application here, the State will call them. The State will call, I predict at least in its case-in-chief, a number of Manitowoc County Sheriff's Department employees. Indeed, every significant piece of physical evidence in this case against Steven Avery was discovered first by, or had present at the time of discovery, a Manitowoc County Sheriff's

Department employee.

So we're going to hear from these people. And will it be appropriate to cross-examine them, establish their employment, establish their awareness of the lawsuit against their department, establish that they take pride in their work and that they take pride in the reputation of their department, and that they felt that pride imperiled by the allegations that their own department had embarked on a course of action that had led to a 32 year sentence for a man who didn't convict -- commit the crime of which he was convicted.

Yes, that is appropriate, because that officer who wears that uniform is entitled to take pride in his work, in his uniform, in his department. And is entitled, I guess, in a sense, he's human, to have his actions, words, thoughts, affected subtly, perhaps even subconsciously, by his own human biases. We all have these. And that's why it's so important for bias to be explored. It's not a dirty word in the end, but it is essential for neutral fact finders in weighing sometimes difficult nuances of credibility.

Now, as to some Manitowoc County Sheriff's Department employees, they had been pulled in directly to the civil lawsuit. They knew because the depositions were focused, in main, on their actions in prolonging the imprisonment of Steven Avery beyond 1995 or 1996.

They knew by virtue of the deposition that their personal reputation was at stake, that their personal actions were under scrutiny, and that regardless of insurance coverage and what insurer had what layer, or whether there was a self-insured layer in there, or what the limits of the top layer of policy coverage were; regardless of all of that, do you think for a moment that a Lieutenant Lenk or a Sergeant Colborn wouldn't consider the fact that his personal ambitions for promotion, or for retaining his rank, or perhaps political ambitions, and low and behold in the fall of 2006, Sergeant Colborn threw in his hat and ran for sheriff in this county; do you think for a moment they didn't consider the possibility that their interests were affected by the actions of their department at issue in that lawsuit and potentially by their own personal actions being

called into question, regardless of how defensible they may have thought their own actions were?

Of course not. It is information that bears on bias. Does it have institutional aspects, sure. It also has highly individual aspects to it. And so that that's why I sort of abjure the idea of adjectives in front of the word bias, in the sense that it's bias that we would be exploring. And, yes, it is linked to an individual witness.

We do not propose to come in and offer evidence in the abstract simply to establish that a department was biased and, therefore, every member of it was biased. This is perhaps subtle, but we may well, though, be entitled to explore an individual witness' identification with his department, identification with its reputation, sense of his own reputation being at stake, or his own actions being attacked, called into question.

And it would not be conceivably out of line here to recall, for the Court to recall, that on the witness stand on July 5, 2006, the former sheriff of Manitowoc County revealed

himself to be perhaps the last person in the world, who's heard of Steven Avery, who's not yet ready to accept that Mr. Avery was innocent of the crime for which he was convicted, a rape for which he was convicted of 1985. Page 7 of the July 5, 2006 transcript -- and it sticks out with me because I remember watching the Court's reaction --

THE COURT: I recall the answer.

ATTORNEY STRANG: -- and my own at the time. Would it be strange that a department headed by a man who held that attitude might be affected by that attitude in the hierarchy down the line? It would not. Doesn't mean we get to go on at, you know, to our heart's content, or forever, about Sheriff Kenneth Peterson. I'm not suggesting that necessarily comes in at all.

But I am suggesting that where we work, and what we do, and the things we commit our life to, create in us biases that might be described in part as institutional biases, just as the United States Supreme Court has, and that these are the among the sources of bias, that it's entirely appropriate for the defense to explore, in a criminal case, and for the State to explore,

if the defendant elects to offer a defense case-in-chief himself.

THE COURT: All right. Let me ask, somewhat as a follow up to that, in terms of the defense offer to get the blood vial evidence in and the argument that the defense would make, do I understand it to be that, in considering what the defense feels is the bias of the witnesses and the opportunity and everything else, that it's Lenk and Colborn that are the subjects, if you will, of the defense claim?

ATTORNEY STRANG: Yes, and they may -- Yes, and we don't know that they necessarily would have acted directly. What we do know is that at the relevant time, James Lenk was not just a lieutenant, but as I understand it, the head of the detective bureau. So he's a person of brass, of rank in the department. And Andrew Colborn, of course, was a sergeant, albeit in the road patrol division, if I recall it, in November of 2005.

Do I know whether they directly acted, or whether by virtue of familiarity in rank within the department they may have known where to get a master key, or been able to ask someone for a key, obtain one, I don't know that. But

the answer remains, I think, yes, that I believe it would be Mr. Lenk or Mr. Colborn to whom, alternately, we would have to a ascribe a plan or an exercise to plant blood.

Now, by his presence, Detective Remiker, also is around and Mr. Lenk, Lieutenant Lenk, is Detective Remiker's superior. However, Detective Remiker was not deposed in the 1983 action in federal court. And although I have not read all the depositions, I am unaware of his conduct with respect to the 1985 conviction of Mr. Avery ever becoming an issue at all. It would surprise me if it had, because I think he joins the department even after the 1995 or 1996 telephone call from a Brown County law enforcement agency that is the connection of Sergeant Colborn and Lieutenant Lenk to this civil action.

So Remiker is there. He's present. He works for Lenk. But I'm not aware of any -- any personal connection of Detective Remiker to the lawsuit that Mr. Avery brought against Manitowoc County. He has only the connection of working for the Manitowoc County Sheriff's Department under Lieutenant Lenk's supervision, in so far as I know.

THE COURT: Who will be speaking for the State? Mr. Fallon?

ATTORNEY FALLON: Yes, I will be addressing the blood vial issue and Mr. Kratz will follow up with the bias discussion on behalf of the State.

With respect to the blood vial evidence, I will begin there. The only thing that I will agree with by the defense is the fact that we actually begin in the same place, with the ***Richardson*** case. After that, I agree with very little, if anything, represented by the defense.

Richardson, it does need to be distinguished. And I think it is important for the Court to consider exactly what ***Richardson*** was about and what ***Richardson*** actually held.

Mr. Richardson was charged with a sexual assault, five counts, and one count of false imprisonment. His theory was that his estranged wife was framing him. He based that on the fact that, again, that his estranged wife was framing him. He based it on the fact that she called his divorce attorney and said that he, being Richardson, had sex with a 14 year old girl, two days prior to the charged event.

Richardson also alleged that the mother

of the victim talked to his estranged wife the day of the assault, that his estranged wife gave the victim's mother the phone number of the divorce attorney. The victim's mom reported the assault to the attorney. And she initially had lied about making the call until she was impeached with phone records. Those are the facts.

The defendant is merging the theories of ***Richardson*** and frame-up evidence with the ***Denny*** case. Because of the nature in which the frame-up defense, the planting of evidence -- because that is the frame -- the planting of evidence by the police necessarily implies the police were involved in the death, either directly or in a cover up, of the death of Teresa Halbach.

There's no other reasoned inference to be drawn. As a result, I think they have to comply with both ***Denny*** and ***Richardson***.

Teresa Halbach was last seen alive on October 31st. Presumably she had Tuesday and Wednesday off, although I think she had an appointment on Wednesday. But the important fact is that she was not seen or heard from by any

member of her family, or anyone else, on Tuesday and Wednesday, the 1st and 2nd of November.

She was reported missing on November 3rd and a missing person's investigation was commenced. At approximately 10:30 a.m. on Saturday, November 5th, her car was found by volunteer searchers on the Avery property, secreted with brush and debris, in the corner of the salvage yard farthest away from the defendant's residence. The vehicle was locked.

Now, let's step back in time, the time about 11 years ago. The defense requires us to do that. Eleven years ago this month, defendant's blood was drawn as part of a post-conviction relief motion process. Blood was drawn at Fox Lake Institution. Marlene Kraintz, M. Kraintz, the name on the paperwork, drew the blood.

It was sent out for analysis by Lab Corp., analyzed and eventually returned to the Clerk of Court's Office where, as far as anyone knows, it sits until June 19th, 2002. On that day the file is examined by the former District Attorney, E. James FitzGerald, and Wendy Paul of Project Innocence and two or three others,

presumably at the request, or order, of Judge Hazlewood, the original trial judge.

The box was apparently resealed with nothing more than scotch tape at the time. At that time the blood was not sent with the fingernail clipping and the one unknown pubic hair, for analysis. It remained with the Clerk of Court.

Moving forward in time, the defendant is exonerated and released after serving an additional 12 years in prison for a crime he did not commit. His case generates significant interest and publicity. Many people come and look at his court file, freely. As counsel noted the last time around either in person or in a call, the public has a right to examine the facts and circumstances. The public includes the media and anyone else who had a interest in the case.

It's within that background that we were asked to make two assumptions. And this is where I think the defense proffer of proof fails, and fails miserably. We are to assume that someone, presumably a member of the Sheriff's Department, gained access to the Clerk of Court's office, at a time unknown.

Even today when the Court asks the defense to narrow the time frame, they can't say for sure that it was a 2 year window, a 26 month window from September of '03 until the end of October of '05. Could be, although they think most likely between November 3rd, 4th and 5th.

But someone gained access to the Clerk's Office, as I said, at a time unknown. Presumably after he was free, could have been before. Or was it after the lawsuit was filed, before this alleged bias was supposedly created, this motive. Apparently a motive and a bias to kill an innocent 25 year old photographer, just so they could get back at Mr. Avery for besmirching the reputation and integrity of the Manitowoc Police Department.

Presumably we are asked to speculate that happened, because the two bailiffs have a key from the Sheriff's department. Perhaps the Sheriff has one for emergency situations as well. But the assumption falls woefully short. The speculation, the conjecture, falls short of what's required for admissibility. There's no evidence to suggest anywhere, known at this time, that a member of the Sheriff's Department, past

or present, ever actually touched or handled that vial of blood. Not one shred.

Part two, that someone planted some of that blood in Halbach's vehicle, sometime between October 31st and November 5th, or if you like, between November 3rd and November 5th. Presumably that someone is a Sheriff's officer, because it would be mighty difficult for a member of the public to wander into that property and somehow gain access to a locked vehicle under cover of debris and brush and the like and managed to plant blood.

The suspects, as we now have clearly revealed, are apparently Lieutenant James Lenk and Sergeant Andy Colborn. I suggested in the State's reply to their proffer, Sergeant Colborn did not even get to the property until 5, 5, 5:30 that evening on November 5th. Although he certainly was on the Avery property on the 4th and 5th for the consent searches previously discussed in motions.

But think about this, for them to have planted the blood to frame the defendant, they would have had to have known that she was dead. How could they have known that? Steven Avery

could have told them. If that was the case, we wouldn't be here. Brendan Dassey could have told them. Well, that's true, but he didn't tell anybody anything of noteworthiness until March 1st.

Perhaps there was an anonymous tip. But we're led to believe if the blood was removed from the Clerk's Office on November 3rd or 4th, or, look, presumably in the early morning hours of the 5th, and then it somehow got from here -- somehow got from here out there, and then not only did it somehow get from here to there but it somehow got inside the locked vehicle, under a guard.

A fact from the hearing is known and in Detective Fassbender's testimony he was responsible in his efforts to cover the vehicle. Later in that afternoon the vehicle was finally removed by Crime Lab personnel at 8:42 p.m.

Crime Lab personnel arrived at 4:00 p.m. and were attending back and forth. They didn't stay with the vehicle. I think the testimony was they weren't constantly there. But the Crime Lab people, the field response unit arrived around 4:00 and did a number of things. Chiefly among

them was to take care of this vehicle.

So presumably someone went in there and planted the blood. You will recall the testimony, I believe, and the information that's been provided, that the vehicle was not opened until the next day, at the Crime Lab, where it was then processed in Madison, not in Manitowoc.

So assuming that someone could have got -- Well, we're led to make two assumptions: Law enforcement found that vehicle on the 3rd or 4th and got it into it then, or they got into it on the 5th. How did they do that? And if they got in on the 3rd or the 4th, or the morning of the 5th, then it stands to reason that they would have had to have known that she was dead.

Example, if that's the case, then is the other evidence planted as well, the cell phone, the palm pilot, the camera. Apparently we were led to believe that Lieutenant Lenk planted the key. And just because Lieutenant Lenk was apparently on the property during the execution of the March search warrant, he must have planted the blood fragment too, the fragment with the victim's DNA.

Well, I can assure you there's only one

way that could have happened. You don't have a bullet fragment with Teresa Halbach's DNA on it unless you killed her. The fact that this is suggested is nothing short of preposterous and outrageous. We're not a court of law. Were we not dealing with pleadings regarding a man's defense on a charge of murder, we'd be dealing with a claim of slander and libel.

Teresa Halbach's remains were not recovered until November 8th. And they were not sure. They knew -- they had a pretty good idea they were human bones on November 8th. And it's probably a reasoned inference that it was Teresa Halbach. But the identification that it was Teresa Halbach was a couple of days after that.

So, it seems to me, if you are going to blame somebody for a crime, then you better damn well know a crime was committed. You can't frame somebody for a crime unless you know the crime was committed. And how do they know the crime was committed on the 3rd, or 4th, or 5th unless they did it, or unless they assisted in covering it up.

Maybe they helped Brendan Dassey. But that, necessarily, by implication, implies law

enforcement's involvement in her death. And if that's the case, then ***Denny*** applies, because that's third party liability, somebody else did it. I want the evidence. Show me the evidence that Lenk and Colborn were responsible for the death of Teresa Halbach, before you got in here and have the nerve, the unmitigated gall to get up here and suggest that they were responsible for her death, by implication.

That's the distinction between Richardson and our case. Richardson did not suggest -- Richardson's frame-up theory did not imply that the victim's mother committed the assault. It did not imply that his estranged wife committed the assault. In fact, it doesn't imply that any one necessarily committed the assault. You can make a case; although counsel alluded to some facts that I don't think were in the Supreme Court opinion, probably were in the appellate opinion, or Court of Appeals opinion.

But one reading of that defense, that doesn't necessarily imply that the crime occurred at all, or implied, to the contrary, that someone else did it. And if that's the case, then the analysis in ***Richardson*** is still a half a bubble

off plumb because they should have used ***Scheidell*** if she has all these injuries indicative of a sexual assault and yet you don't know who did it.

So then there was a merger of a frame-up and a ***Denny*** argument -- or in ***Scheidell*** -- excuse me -- in ***Richardson***. I'm speculating because that wasn't discussed, so we can't go down that road.

In this case it's clear inference that the Sheriff's Department in general, and now we know Lieutenant Lenk and Sergeant Colborn in particular, are involved, we are led to believe, because of some misconceived ill-gotten theory of bias of. Mr. Kratz will address this further. But I have to mention it.

Even though they were not defendants in the lawsuit, they had no personal liability, they had nothing at stake. They weren't even responsible for his original conviction in the first place. They were deposed as witnesses, as I understand it, because they failed to pass on some information after the fact regarding somebody else, presumably Mr. Allen, the actual perpetrator of the crime against Penny Beerntsen.

But they weren't responsible for his

wrongful conviction. They had nothing to do with it. They weren't defendants in the action.

You can't frame someone for murder unless you know the murder occurred. Let's think about it. I'm going to get in there and we'll sprinkle some blood around. Have got to do this quick, got to put some blood in the CDL (phonetic), here put some on the ignition key. We'll put a spot here, another spot there. We'll do four spots. I have to open the car.

Depending on the location of where the blood is, hope nobody will see me, or well, maybe everyone did see me. So there must be more involved. How else could you sprinkle the blood in those locations.

And more importantly, unless they knew Teresa Halbach was dead, how did they know that's her blood in there. Seems to me you are taking an awful chance of planting blood there, if you don't know a crime has occurred, you don't know it's her blood. Not an unreasonable inference that it's her blood, but that's a pretty good risk to take. Obstruction of justice, that's felony behavior. Misconduct in office for a police officer, tampering with evidence, the list

goes on and on. I'm going to risk my career over that, I think not.

By implication, this frame-up theory is entirely different than the frame-up theory posited in ***Richardson*** and it necessarily implies police involvement. Because how can you take the chance of planting something unless you know the crime occurred. And how would they know the crime occurred, unless they were coconspirators.

Under that analysis ***Denny*** does apply. And there is no motive. There's no opportunity. And there's no connection for Remiker, Colborn, Lenk, or any other member of the Manitowoc County Sheriff's Department in this crime.

In the alternative, if you find that the State's argument is not compelling enough, that there's a merger of a frame-up theory with the ***Denny*** theory, and you wish to analyze this strictly under a 904.03 analysis under ***Richardson***, the State would submit that the evidence is inadmissible under that theory as well.

The evidence has to be relevant. And as we have discussed the last time around, relevance has two facets. It is again, in the second facet

of relevance, the materiality component, where this falls short. It's not material.

And by the way, when you are evaluating materiality of evidence, you have to look at the evidence as a whole, you know. And this is where the defense, again, continues to misread and misinterpret the holding of ***Holmes vs. South Carolina***. You still consider all evidence. You still evaluate it in determining materiality. You still have to evaluate it in the calculus of determining the probative value and whether the probative value is substantially outweighed by prejudicial effect, waste of time, confusion, etcetera.

The defense fails on part two, the materiality component, that facet of demonstrating that there is a connection -- and there's that word connection -- to the case at hand, a tendency to make a consequential fact more or less probable.

On the third step of the ***Richardson*** analysis, the balancing, there is unfair prejudice with respect to the existence of that vial of blood and its admissibility. Given the time frame involved here, the Court's

determination that preservative testing, EDTA testing, is not reliable enough, it certainly undermines the State's ability to reply, at least in a scientific mode, if not a practical mode -- and I will get to that in a moment -- as to the probability, possibility, that this blood found in the Clerk of Court's office, which we still don't know how it would have gotten from here to the crime scene, other than by speculation or conjecture, was the same type of blood, was the source of the blood at the scene.

With respect to the inmate statements, I'll rely on the comments in my brief. But I think they need to be reconsidered if this evidence is admitted, and reconsidered because their probative value is now increased as a retort. Because it's evidence of a bias and a motive and intent.

It's evidence of this crime, possessed by the defendant, long before any supposed motive, bias, or evidence existed on behalf of Lieutenant Lenk, Sergeant Colborn, or any other member of the Manitowoc County Sheriff's Department.

In terms of the practical considerations

here, it seems to me there would be a great deal of witnesses called, whether it's the groundskeeper, whether it's members of the Clerk of Court's Office. Anybody ever seen Lieutenant Lenk in the Clerk of Court's office, when did you see him, how long ago was that.

And I point out that there was no reason for any of that questioning. No reason for that investigative purpose until the existence of this vial of blood was revealed. There's no reason to test what was in the car for preservatives. There's no reason to test what was in the car for cellular degradation, or any other type of test one may suggest, until the vial of blood presented itself. And likewise, there was no reason to interview every member of the Clerk's Office or interview the bailiffs where now we're supposed to.

I think the best example of this case getting sidetracked and going down the road of confusion and unrelated issues, is their demand for disclosure of exculpatory information. It reads, for all of the reasons stated in the State's brief, we're going to be looking at work schedules for Lieutenant Lenk, Sergeant Colborn,

and I'm not sure if Detective Remiker has now been thrown in the mix or not.

We're going to be looking at disciplinary records that apparently they want us to track down. We're going to be looking at access, who had keys, what were the codes to the Clerk of Court's Office. There's a key to get in the outside door and there's a code to get behind. So, who got the codes, when they got the codes, when were the codes changed.

Their disclosure form is an indictment of the folly of this argument and supports the State's theory that all we're going to do is go down the wrong track, more confusion, more delay. We're going to be spending time chasing down this vial of blood.

How can they have got into the Clerk of Court's Office. Could they get in on Thursday morning, was it Friday do you think, or maybe it was really early Saturday and then somebody got that blood out there. Well, who had keys and how did they get in.

It's still -- Their offer of proof fails and it fails miserably because there's nothing other than conjecture or speculation as to who

got into the Clerk of Court's Office, whether the vial itself was taken and then later returned, or a portion of the vial was taken and returned.

And just how did they do that? Did they use a needle and syringe? Did they pop the cork? Pour a little in their own beaker and secret themselves away? In other words, they burglarized the Clerk of Court, which interestingly enough is another act. That's a felony.

If it's a law enforcement officer, you have got burglary. You have evidence tampering. You have got misconduct in office. You have got obstructing of justice. I'm sure when we're done with this law school quiz, I could come up with a few more charges.

Confusion and delay will necessarily result by the admissibility of this evidence. And as a result, this evidence must and should be excluded. Thank you. Mr. Kratz will address bias.

THE COURT: Okay.

ATTORNEY KRATZ: I did not know if you had any other questions on the issue of the blood vial itself. I think -- I think Mr. Fallon made it clear

that the State's position is that there is no linkage. There is no connection between the vial of blood and the blood that's in the SUV.

I agree with much of what Mr. Strang said regarding bias, interestingly enough, in that it is not a collateral matter. It is something, when appropriately applied, that witnesses can be impeached with.

And as long as we're talking about cops, let me talk about bad cops, because that's what Mr. Strang and Buting are alleging here, Judge. Again, we're not talking about negligence, or something along those lines. We're talking about criminal behavior. We're talking about malfeasance.

And as my memorandum to the Court suggested, that when bias is involved, like the blood vial evidence, but bias is so interrelated here, when we're talking about criminal behavior of cops, there had better be some proof. There had better be something other than Mr. Buting standing up, because apparently he can, and saying, you know what, Lieutenant Lenk planted evidence, or Sergeant Colborn planted evidence.

And this institutional bias, or at least

some version of that that Mr. Strang has attempted to apply to Lieutenant Lenk and to Sergeant Colborn, at least if their theory is to be adopted, Judge, shouldn't stop there. What, then, difference is it that Lieutenant Lenk was embarrassed by Mr. Avery's lawsuit. Why not Detective Remiker? Why not Deputy Jost? Why not members of the Clerk of Court's Office, who may have been, as county employees, embarrassed?

And so what ***Williamson*** and the other bias cases do, is they don't allow that kind of questioning unless there is evidence, evidence that can be rationally related to that particular witness.

I'm glad that Mr. Strang mentioned Sheriff Peterson, because by at least example, the differences between Sheriff Peterson and a bias that he may hold, if he was ever in fact going to be a witness in this case, may be appropriate to go into this wrongful conviction, or this bias against Mr. Avery.

But that doesn't apply to Lieutenant Lenk, doesn't apply to Sergeant Colborn. And there is no evidence that it does. Again, Lenk and Colborn, not involved in the 1985 prior

conviction, not involved in the lawsuit. Mr. Strang suggests that they are somehow pulled into the lawsuit. The Court already knows to what extent they are involved in this civil lawsuit; that is, giving a very short deposition.

And so, the embarrassment as a member of the Sheriff's Department, when dealing with professional reputations, when dealing with a slur of criminal misconduct, does not raise to the level of rationally related to a particular piece of evidence.

If this Court, however, is going to allow some kind of evidence about the 1985 wrongful conviction, I have given suggestions on the last page. There are facts that do not include the lawsuit. There are facts of the wrongful conviction itself that could be offered as bias, but certainly should apply then to Lieutenant Lenk and Sergeant Colborn and everybody else.

And for those, and for that reason, the State believes that when the Court looks at ***Williamson***, when the Court decides whether or not it's rationally related to any of these specific witnesses, although maybe not as impassioned as

Mr. Fallon, just as strenuously, Judge, I'm asking the Court to reject this kind of evidence.

As they cannot, in fact I think the defense may even agree that they cannot, connect it directly to either of these two witnesses as compared to the universe of other potential witnesses from the Sheriff's Department and shouldn't be allowed. That's all I have got, Judge.

ATTORNEY FALLON: Your Honor, I forgot to mention one other thing in response to the defense and that is on their right to present a defense. With respect to that, I think the Court is familiar with ***South Carolina vs. Holmes*** in the pleadings. I just wanted to make the Court and counsel aware of a decision that was decided two days ago dealing with the right to present a defense. I have a copy for the Court, Section 5 of the ***Muckerheide***, M-u-c-k-e-r-h-e-i-d-e, case.

Part 5 deals with a defense right to present a defense. And interestingly enough there's a discussion of ***Scheidell*** and other acts evidence contained with it. So I would ask the Court to review that as you consider counsel -- one of counsel's opening points, the right to

present a defense. Because, again, here's the latest and the court acknowledging that that's not a limitless right or -- and one must introduce relevant and material evidence. So, thank you.

THE COURT: Thank you.

ATTORNEY BUTING: If I could just address the last point very briefly. I haven't thoroughly read the ***Muckerheide***, I think is the way you pronounce it, ***Muckerheide*** or ***Muckerheide*** decision that Mr. Fallon is referring to, but I did briefly see it when it came down a couple days ago. That's the one where the defense wanted to offer evidence from, I believe the father, that -- it was a homicide while intoxicated, the passenger was killed. Mr. Muckerheide was the driver. He argued the passenger grabbed the wheel, forced him to crash.

And it was the affirmative defense for a homicide while intoxicated. And he had evidence that the victim's father was going to say that the victim had also done that when he, the father, was driving and so on and so forth. Well, the one -- Very little of the case deals with the constitutional right to present a

defense.

What it does say when it gets to that point at the very end is it points out that Muckerheide was, nevertheless, allowed to present his entire defense and to make the argument that on that occasion the defendant did in fact grab the defendant's wheel. And the only evidence they didn't hear was minimally probative evidence that on a prior occasion, with a different driver, under different circumstances, the victim had gestured toward, or grabbed the steering wheel. That's very different than what we have here, where a complete explanation for very otherwise damning circumstantial evidence would be denied.

Mr. Fallon just kept pounding away like there's no way this could be unless the officers killed her. They couldn't have done this planting unless they also were the ones that did the crime. They had to have killed her. He must have said that five or six different times in their argument. And it's just plain wrong. It's just simply wrong.

On November 5th, at approximately 2:00 p.m., which is around the same time, by the way,

in their new statement of facts, or first averment of facts, they say Lenk put himself on duty or -- I'm sorry -- arrived at the salvage yard. Meanwhile, Mr. Kratz, and Wiegert, and Remiker, and I believe also the D.A. Rohrer, were all over, at the same time, at Judge Fox's home in Two Rivers, I believe, presenting an affidavit in which they swore, under oath, that they believed they would find evidence of a homicide if permitted to search the Avery property. Now, we don't presume that that sworn testimony was false, yet, nevertheless, they were investigating this case as a homicide by the time Lenk supposedly even shows up at the scene, as early as 2:00 p.m.

It's not necessary to show murderous intent on the part of officers. We're showing opportunistic intent.

Mr. Fallon got -- made a very nice, passionate closing argument here, which I'm not going to repeat, or try and outdo at this point, except to say that, fine, make that argument to the jury. He is fully entitled to do that and he's going to be required to do that because of the conduct, not because as Mr. Kratz says, Jerry

Buting gets up here and just says it's so.

I'm not the one who put myself on duty at a homicide investigation when I knew that my boss had already recused the department, supposedly, from having leadership involvement. I'm not the one who volunteered to go search the primary, in fact only suspect in the police's eyes, his very residence. I'm not the one who didn't tell the Calumet people that I was subpoenaed and involved in the civil case.

The reason they have to do all of this is because their people put it -- put themselves in that position. And for whatever reason, if it's purely coincidence, then a jury should decide that. I don't think it is.

I think there's more than sufficient -- Remember ***Richardson*** says any tendency. ***Richardson*** doesn't even require the legitimate tendency to show this. It's any tendency. And clearly this evidence has some -- any tendency to make a consequential fact less probable here. That is, the consequential fact of who killed Teresa Halbach.

As I said before, if the blood isn't -- if somebody put the blood of Steven Avery into

that RAV 4, then it's more probable that he is innocent of the crime that he's charged with.

He would impose an impossible burden. I don't know what he expects, that we're supposed to have a video tape, present a video tape of here is the perpetrator sneaking into the Clerk's Office. Here's what key he uses, we zoom in, you can see, aha, this is the key with serial number so and so which must have been taken from such and such, and insert it into the door, and there he is, he's grabbing the video -- the vial, and here's how he's taking it out of the vial, and here's where he goes.

That's ridiculous. It's impossible that you could ever -- any court would expect that kind of certainty, and everything else is pure speculation. It's not speculation. There's a series, a very careful series of steps that we have laid out in our motion in great detail, showing our cards, much more than they have.

Mr. Fallon and Mr. Kratz, from the State's perspective, anything that doesn't go down the track towards conviction is a waste of time. And that is simply not the case. That's why we have juries, that's why we have adversary

system in this country. And Mr. Avery is entitled and, indeed, required to present this defense of the blood vial evidence, this evidence as part of his defense that he is not guilty of this crime against Teresa Halbach. Thank you.

THE COURT: I know, Mr. Buting, that I asked you to do this I think earlier, but just so it's the last thing I hear before we conclude today; I want to make sure as I'm sitting in my office this weekend that I have a clear representation of what the defense offer is. That is that, as I understand it, and you can fill in the blanks or correct me when I'm wrong, either Lenk or Colborn would have a sufficient basis to be biased in this case, or a motive for planting evidence, however you want to put it, because of the fact that they have a connection with the Sheriff's Department, they work for the Sheriff's Department, they were deposed in the civil case some three weeks earlier. And I'm trying to remember is it one or both of them that received a telephone call or something in 1995, that they put in the file?

ATTORNEY STRANG: They were both questioned about their own personal involvement in that particular incident. One thing I forgot to add is,

they were not defendant's in the civil lawsuit yet, at that time, but that is not to say that they couldn't have been joined later as the discovery proceeded and the plaintiff's uncovered more wrongdoing or potential liability. Because from that point forward Mr. Avery sat another eight years in prison.

THE COURT: Okay. The theory being that they were given some information that they should have followed up on that might have led to his exoneration sooner.

ATTORNEY BUTING: Yes, and the call involved, frankly, Mr. Allen, the ultimate --

ATTORNEY STRANG: Maybe you remember this past October -- I will take a stab at it -- I think the testimony from the two depositions was approximately this. That while he was working in the jail, Sergeant Colborn took a call from a law enforcement agency, the name of which he didn't remember at the time of the deposition, he thought maybe it was from Brown County.

Realized that it wasn't a call that belonged in the jail, transferred the call to the Detective Bureau in the Sheriff's Department. And at that point, as I recall the deposition

testimony, it breaks down in that Detective Lenk, who would have been in the Detective Bureau at that time, doesn't remember whether he got the call or doesn't remember what it was about. There was a -- and now I'm not remembering the deposition testimony well. But it's sort of -- there's confusion there, and then both of them write a report about this phone call, for the first time on September 12, 2003, at Sheriff Peterson's request, which is the day after Avery has been released from prison.

So they both write reports the day after. And at that point they don't remember if it's 1995 or 1996 when the phone call came in. The gist of the phone call being from a law enforcement agency saying we have someone here in custody who says that he did a rape for which someone else is in prison and it was in your county.

THE COURT: Well, it sounds from what you are telling me, if that's the way it was presented, Colborn did what he should have done, he got the call at the jail and referred it to the Detective Bureau.

ATTORNEY BUTING: Well, but that was

challenged in the deposition and his failure to write any report --

ATTORNEY STRANG: Maybe the sensible thing to do is just submit the depositions in there.

ATTORNEY BUTING: The point being, at that point this information was just coming out and was being -- they were being challenged on a memo that not only their own reports, but also a memo that a investigator in the Manitowoc District Attorney's Office had written, which he had spoken to the two of them. It was inconsistent with what they had been testifying about, so it was their -- their own involvement in that incident was being challenged.

THE COURT: All right. At any rate, they have these depositions three weeks earlier. Sometime after November 3rd they, along with other members of the Manitowoc County Sheriff's Department, get the report that Teresa Halbach is missing, right?

ATTORNEY BUTING: Actually, Sergeant Colborn, fortuitously or whatever, gets the call from Investigator Wiegert, I believe. Learns that -- or Dedering, one of the two -- learns that one of the last places she had been, or one of the last places she had been that day, she was last

seen, was the Avery residence. And says, okay, I will follow through. We'll get somebody out there to talk to him. Hangs up.

And sometime shortly after that, Investigator Wiegert gets an unsolicited call from Lieutenant Lenk, which obviously means Colborn told Lenk. Lenk is, aha, Avery, let's find out more about this. And he then, on his own, not being asked to, calls Wiegert and starts asking and showing increased interest from that point on, personal interest.

THE COURT: But that's on November 3rd.

ATTORNEY BUTING: Yes.

THE COURT: Then the vehicle is discovered on the 5th. What, was Officer Colborn on the scene on the Avery property on the 5th?

ATTORNEY BUTING: Yes.

THE COURT: I know Lenk was, you said.

ATTORNEY BUTING: Lenk was. Colborn, I think the logs show him arriving around 5:00 p.m. Don't know if he was there earlier, before the logs began to be taken or not.

ATTORNEY FALLON: I can add, Jerry, we asked about when that log started, and I think they started the log about 2:25, ballpark, so for what

that's worth.

ATTORNEY BUTING: So it's about three and a half hours after the vehicle was -- not discovered, but three and a half hours after the police arrived.

ATTORNEY FALLON: Right.

ATTORNEY BUTING: And again, the law enforcement people and the head prosecutors were gone from the scene by 2:00 -- no, between, I think 1:00 and 3:00. Rohrer, Mr. Kratz, Wiegert, Remiker, they all left.

THE COURT: What is the -- Does the defense have a theory as to how either Mr. Colborn or Mr. Lenk would have gotten into the vehicle to plant the blood.

ATTORNEY BUTING: We have several theories. I don't know that -- Again, here we have to show all our cards, they don't have to show anything.

THE COURT: Well, here's the thing, whatever the standard is, and I know the parties are arguing what it is, but certainly there is some burden that the defense has to meet.

ATTORNEY BUTING: I understand.

THE COURT: And if that's the one you are asking.

ATTORNEY STRANG: Sure.

THE COURT: To give you a fair shake, I want to make sure I'm evaluating your request --

ATTORNEY BUTING: Okay.

THE COURT: -- with whatever showing you want to make. If you tell me, we have no idea, I will accept that answer. I'm just saying, what do you want the Court to consider.

ATTORNEY BUTING: Well, the Court can consider what we have put in writing. And if you look at it carefully, you will see that there are some windows of opportunity in both in terms of time and in terms of physical opportunity.

But by the way, the whole question of whether the vehicle was truly locked at the scene when first discovered is not as clear as the State would have you believe. Because the volunteer who discovered it said she thought that they checked the doors and they were locked, at the prelim this is her testimony; however, she also said she thought it was only a two-door, not a four-door.

So that's inconsistent with her having checked all four doors, five doors, actually, if you include the hatch. Even if it was, who do you go to when you lock yourself out of the car?

Who do you call? The police.

We also have evidence they have seen the report that, from a locksmith, that this particular RAV 4 was very easily opened by these jimmies that police officers have. Poses no difficulties. And as is described in the written pleadings, the vehicle was covered actually with almost a ideal situation where it was obscured from the view of other officers by gigantic tarps creating a tent over it, hiding it from view of anybody, but obviously leaving access in and out at either end. So whether that's when it happened, that's another possibility.

It was also getting dark by, probably even before the Crime Lab arrived, because I believe sunset was at 4:30 and the Crime Lab didn't arrive until 4:00.

THE COURT: All right. Is there -- I will definitely reread your memorandum again; is there anything else you want to tell me this afternoon?

ATTORNEY BUTING: I don't think so. I think that really I think we have covered almost all the issues.

ATTORNEY FALLON: Your Honor, if you are going to do that then I would ask the Court to

consider this one circumstantial or coincidental fact. If the blood was planted in the vehicle, then it must have been entirely fortuitous that Pam Sturm happened upon that property of her own volition and by the grace of God found the car, unless of course she was told to go there, unless she's a conspirator.

Because if you're going to plant blood and then have it discovered, then how does that happen? Just coincidence? Who had the jimmy, that's a question. And, finally, I just ask the Court to think back at Special Agent Fassbender's testimony at the motion hearing. He said they attempted to put a tarp on, attempted to do a tent like thing, but were not successful because the wind and the weather prevented that from happening. So, and again, I certainly would invite the Court to check Pam Sturm's testimony at the prelim and the motion hearing, as you evaluate the proffer. Thanks.

THE COURT: All right. I realize that there's another motion related to these and that is the -- what would come in with respect to wrongful conviction evidence. I have the written proposals of the parties, or the written arguments with

respect to this issue, and I think Mr. Kratz addressed it somewhat in his comments as well.

ATTORNEY KRATZ: I did, Judge.

THE COURT: Is there anything else?

ATTORNEY KRATZ: No. No, I rely on my brief comments today but, not only the standards, but the number of facts that the Court will have to decide. What, if anything, is properly admitted for impeachment purposes, is laid out in my memo. That's all.

THE COURT: Anything further from the State?

ATTORNEY KRATZ: The defense.

THE COURT: The defense, I'm sorry.

ATTORNEY STRANG: We laid out a proffer which is essentially everything we would like to offer on the wrongful conviction on the lawsuit. The State comes back saying none of it should come in but, alternately, here is four things, if you are going to let anything in. And the State omits entirely the lawsuit from its proposal. Will allow some very limited evidence as to the prior wrongful conviction.

When you read the four things, someone coming fresh to this would be left with the

impression that the State was on Steven Avery's side in that effort to exonerate this poor wrongfully convicted man. Because, why, it was the State Crime Laboratory that tested the DNA for him and found that it was good, that it was not his. And it was the State of Wisconsin joined in securing the defendant's release in 2003.

My guess is the Court comes down somewhere in between the two poles that the parties have offered. It's -- It's the general impression that the State's limited presentation would leave is that this was somehow a joint effort to secure the release of a wrongfully convicted man for the 18 years that it took and decided that it was not as the docket sheet bears out.

And, again, what we offered was everything we would like to get in. I'm going to leave this one to the Court, the issues of bias, and impeachment, and credibility are pretty well framed here and I think the Court can strike a pretty good balance.

THE COURT: Anything else? If not, we are adjourned for today.

ATTORNEY BUTING: Do you think that we would know Monday on any or some of these?

THE COURT: Depends how far I get this weekend. As soon as I have got something for you, I will let you know. I realize that this issue is important to both parties so I'm going to take as long as I feel I need to make a decision.

ATTORNEY STRANG: Does the Court anticipate a written ruling on these issues?

THE COURT: I don't know that either yet.

ATTORNEY STRANG: Very well.

ATTORNEY FALLON: I'm sorry, I did not hear that.

ATTORNEY BUTING: I didn't hear.

THE COURT: I said I don't know that either yet.

ATTORNEY BUTING: Oh, okay.

(Proceedings concluded.)

STATE OF WISCONSIN)
)ss
COUNTY OF MANITOWOC)

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 29th day of January, 2007.

_____
Diane Tesheneck, RPR
Official Court Reporter