

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

3 STATE OF WISCONSIN,

4 PLAINTIFF, MOTIONS HEARING

5 vs. Case No. 05 CF 381

6 STEVEN A. AVERY,

7 DEFENDANT.

8 **DATE:** JANUARY 19, 2007

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

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

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

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

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

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

21 STEVEN A. AVERY
22 Defendant
Appeared in person.

23 **TRANSCRIPT OF PROCEEDINGS**

24 Reported by Diane Tesheneck, RPR

25 Official Court Reporter

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

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

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

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

23 ATTORNEY KRATZ: Mr. Gahn will handle that
24 motion.

25 THE COURT: Okay. Mr. Gahn.

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

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

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

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

25 But assuming that it is limited to that

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

8 THE COURT: Mr. Gahn.

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

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

25 THE COURT: Your motion refers to the blood

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

7 ATTORNEY GAHN: That's correct your Honor.

8 THE COURT: Mr. Buting.

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

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

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

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

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

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

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

7 THE COURT: Mr. Buting.

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

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

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

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

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

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

22 ATTORNEY GAHN: I will, your Honor.

23 THE COURT: Mr. Gahn, you may proceed.

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

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

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

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

1 what our experts have come up with.

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

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

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

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

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

10 THE COURT: Mr. Buting.

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

13 THE COURT: It did.

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

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

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

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

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

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

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

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

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

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

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

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

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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

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

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

12 They may or may not testify as to DNA
13 protocols. Well, what, what, the protocols are a
14 100 pages long, and they are all different types
15 of, you know, quality assurance, quality control.
16 What exactly is the finding or conclusion of your
17 expert, that they have come up with. And they
18 just have not provided us with anything close to
19 that.

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

25 THE COURT: All right. I took the

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

6 And the Court concludes as follows:

7 First, I think the defense adequately explained
8 its use of the term may in the sense that it
9 meant, not that this may or may not be this
10 expert's opinion, but rather that the State is
11 not -- or the defense is not required to produce
12 any expert testimony. And the defense used the
13 term may to indicate it was not committing to
14 call these experts, only that it may call them.
15 And I think that's perfectly appropriate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 pleadings.

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

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

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

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

1 there's much more to be had there.

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

6 THE COURT: Fine.

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

11 THE COURT: Mr. Strang.

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

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

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

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

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

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

25 Does it mean only the lawyers who sit at

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

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

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

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

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

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

1 is gleaned.

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

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

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

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

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

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

16 THE COURT: Mr. Fallon.

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

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

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

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

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

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

1 with that.

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

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

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

23 Case law requires it. Section 973 -- or
24 971.23 (1)(h) requires it by statute. And
25 certainly the State is aware of a number of

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

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

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

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

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

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

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

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

1 subject of the defendant's motions.

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

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

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

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

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

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

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

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

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

8 ATTORNEY KRATZ: I will, Judge.

9 THE COURT: Mr. Kratz.

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

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

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

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

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

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

1 obligation to provide these things to the
2 defense.

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

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

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

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

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

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

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

3 THE COURT: Mr. Strang.

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

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

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

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

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

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

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

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

5 ATTORNEY KRATZ: That's fine, Judge.

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

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

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

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

7 ATTORNEY STRANG: Yes.

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

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

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

1 camera argument. My reasons are these:

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

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

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

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

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

7 THE COURT: Mr. Strang.

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

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

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

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

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

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

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

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

3 It has long been recognized that the
4 requirement for public trials is subject to
5 certain inherent powers of the court to limit the
6 public nature of trials in certain respects where
7 the administration of justice requires it.

8 The circumstances necessary to trigger
9 the discretion to close a courtroom must be
10 compelling. One circumstance which arguably
11 could trigger a trial judge's discretion to close
12 the court is that a fair trial could not
13 otherwise be had.

14 The trial judge should recite on the
15 record the factors that impel him to close the
16 courtroom and why such factors override the
17 presumptive value of a public trial. Findings of
18 fact must be made with specificity, process must
19 be a rational one and the rationality of it must
20 be demonstrated on the record, showing that the
21 conclusion was reached on facts of record, or
22 which are reasonably derived by inference from
23 the record.

24 A trial court is required to hold a
25 hearing and publicly reach a conclusion based on

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

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

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

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

1 in that regard.

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

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

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

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

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

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

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

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

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

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

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

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

25 ATTORNEY GAHN: Yes, you'll not include the

1 weekend.

2 THE COURT: Wednesday?

3 ATTORNEY GAHN: That will be fine, your
4 Honor.

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

7 THE COURT: 31st.

8 ATTORNEY BUTING: No, 24th.

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

11 ATTORNEY GAHN: Thank you.

12 THE COURT: Mr. Kratz.

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

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

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

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

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

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

1 give their opening at the start of the case?

2 ATTORNEY STRANG: I --

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

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

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

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

20 THE COURT: Anything else before we take
21 our break?

22 ATTORNEY FALLON: No.

23 ATTORNEY KRATZ: No.

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

1 (Recess taken.)

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

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

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

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

9 THE COURT: Well, we have --

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

12 THE COURT: Does the State wish to be
13 heard?

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

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

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

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

14 THE COURT: We have two Calumet county
15 officers here.

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

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

21 OFFICER TACKES: Okay.

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

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

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

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

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

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

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

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

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

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

5 THE COURT: Let me ask this.

6 ATTORNEY STRANG: Sure.

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

13 ATTORNEY STRANG: Right.

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

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

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

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

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

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

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

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

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

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

1 issue.

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

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

18 THE COURT: It may go to bias.

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

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

4 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 And, you know, everybody talks about it,
15 myself included, for years, as if it's an
16 immovable and unchallengeable feature of
17 Wisconsin law. It never went above the Wisconsin
18 Court of Appeals. And the footnote in
19 *Richardson*, where the holding is we're not
20 applying *Denny* here to frame-up, the footnote is,
21 we have never approved *Denny* at all. So I take
22 it *Denny* is a published decision it stands, but
23 --

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

1 **Denny**, I forget --

2 ATTORNEY STRANG: Yes.

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

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

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

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

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

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

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

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

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

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

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

5 THE COURT: Mr. Fallon.

6 ATTORNEY FALLON: Has he concluded his
7 remarks?

8 THE COURT: I suspect --

9 ATTORNEY STRANG: It's helpful just to --

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

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

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

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

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

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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 ATTORNEY STRANG: Right, I agree.

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

25 ATTORNEY STRANG: Well, they are saying,

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

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

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

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

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

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

6 ATTORNEY FALLON: Right.

7 THE COURT: Yes.

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

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

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

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

19 THE COURT: October 30th.

20 ATTORNEY FALLON: Yes.

21 ATTORNEY STRANG: No.

22 ATTORNEY BUTING: No.

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

1 of a bonfire before.

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

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

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

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

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

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

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

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

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

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

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

25 If they are going to suggest and imply,

1 or directly say in argument, that anyone of these
2 6, 8, 10 people listed in that statement could
3 have been the murderer, then they have got to
4 have more than what they have shown us. So that
5 evidence should be denied, Judge. Thank you.

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

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

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

1 activities of others.

2 James Kennedy is there to say what he
3 sees about Charles Avery and how peculiar it is
4 that Charles Avery, at 3:00 on October 31, 2005,
5 isn't in or around the office, and has to be
6 hailed by shouting for five minutes or more and
7 comes from behind the building. And James
8 Kennedy is there to talk about the gray smoke
9 that he sees rising from the center of, not
10 Steven Avery's burn pit, but from the center of
11 the salvage yard pit, at 3:00 on October 31,
12 2005, or shortly after.

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

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

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

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

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

1 presented to the jury?

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

9 THE COURT: Well --

10 ATTORNEY STRANG: This is simply relevant
11 evidence.

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

25 What are the rules -- From the defense

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

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

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

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

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

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

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

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

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

16 THE COURT: Okay.

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

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

25 Because, quite frankly, it's

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

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

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

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

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

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

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

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

25 ATTORNEY STRANG: Forty-five minutes to an

1 hour.

2 THE COURT: 1:15, does that work.

3 ATTORNEY FALLON: Sure.

4 THE COURT: See you at 1:15.

5 (Noon recess taken.)

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

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

16 THE COURT: Any objection from the defense?

17 ATTORNEY BUTING: No.

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

21 ATTORNEY BUTING: Yes.

22 THE COURT: Very well, you may proceed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Mr. Steven Avery.

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

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

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

1 that outweighed the defense.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 on the key.

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

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

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

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

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

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

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

25 Paragraph 17, and this is an example of

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

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

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

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

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

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

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

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

25 And the evidence will also show that

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

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

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

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

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

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

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

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

25 They claim there would be an endless

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

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

15 I disagree that every witness they
16 discuss in here has to testify and that that's
17 going to take forever. At some point they may --
18 We don't need to offer them, if they feel like
19 they need to, if they think that interviewing
20 witnesses 15 months later, when they could have
21 done it right away, that relying on 15 year old
22 -- 15 month old memories is probative, so be it.
23 It would be their choice to waste the jury's
24 time, not ours.

25 So, for all of those reasons, I think

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

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

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

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

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

25 ATTORNEY BUTING: Yes, November 5th.

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

3 THE COURT: Okay.

4 ATTORNEY FALLON: But last seen on the
5 31st.

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

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

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

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

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

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

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

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

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

25 They have got flashlights with them and

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

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

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

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

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

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

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

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

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

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

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

1 in 1982.

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

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

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

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

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

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

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

1 Department employee.

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

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

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

7 They knew by virtue of the deposition
8 that their personal reputation was at stake, that
9 their personal actions were under scrutiny, and
10 that regardless of insurance coverage and what
11 insurer had what layer, or whether there was a
12 self-insured layer in there, or what the limits
13 of the top layer of policy coverage were;
14 regardless of all of that, do you think for a
15 moment that a Lieutenant Lenk or a Sergeant
16 Colborn wouldn't consider the fact that his
17 personal ambitions for promotion, or for
18 retaining his rank, or perhaps political
19 ambitions, and low and behold in the fall of
20 2006, Sergeant Colborn threw in his hat and ran
21 for sheriff in this county; do you think for a
22 moment they didn't consider the possibility that
23 their interests were affected by the actions of
24 their department at issue in that lawsuit and
25 potentially by their own personal actions being

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

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

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

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

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

9 THE COURT: I recall the answer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Richardson also alleged that the mother

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 Part two, that someone planted some of
4 that blood in Halbach's vehicle, sometime between
5 October 31st and November 5th, or if you like,
6 between November 3rd and November 5th.

7 Presumably that someone is a Sheriff's officer,
8 because it would be mighty difficult for a member
9 of the public to wander into that property and
10 somehow gain access to a locked vehicle under
11 cover of debris and brush and the like and
12 managed to plant blood.

13 The suspects, as we now have clearly
14 revealed, are apparently Lieutenant James Lenk
15 and Sergeant Andy Colborn. I suggested in the
16 State's reply to their proffer, Sergeant Colborn
17 did not even get to the property until 5, 5,
18 5:30 that evening on November 5th. Although he
19 certainly was on the Avery property on the 4th
20 and 5th for the consent searches previously
21 discussed in motions.

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

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

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

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

20 Crime Lab personnel arrived at 4:00 p.m.
21 and were attending back and forth. They didn't
22 stay with the vehicle. I think the testimony was
23 they weren't constantly there. But the Crime Lab
24 people, the field response unit arrived around
25 4:00 and did a number of things. Chiefly among

1 them was to take care of this vehicle.

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

8 So assuming that someone could have
9 got -- Well, we're led to make two assumptions:
10 Law enforcement found that vehicle on the 3rd or
11 4th and got it into it then, or they got into it
12 on the 5th. How did they do that? And if they
13 got in on the 3rd or the 4th, or the morning of
14 the 5th, then it stands to reason that they would
15 have had to have known that she was dead.

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

25 Well, I can assure you there's only one

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

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

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

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

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

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

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

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

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

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

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

25 But they weren't responsible for his

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 In terms of the practical considerations

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

7 And I point out that there was no reason
8 for any of that questioning. No reason for that
9 investigative purpose until the existence of this
10 vial of blood was revealed. There's no reason to
11 test what was in the car for preservatives.

12 There's no reason to test what was in the car for
13 cellular degradation, or any other type of test
14 one may suggest, until the vial of blood
15 presented itself. And likewise, there was no
16 reason to interview every member of the Clerk's
17 Office or interview the bailiffs where now we're
18 supposed to.

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

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

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

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

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

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

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

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

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

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

22 THE COURT: Okay.

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

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

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

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

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

25 And this institutional bias, or at least

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

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

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

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

1 conviction, not involved in the lawsuit.

2 Mr. Strang suggests that they are somehow pulled
3 into the lawsuit. The Court already knows to
4 what extent they are involved in this civil
5 lawsuit; that is, giving a very short deposition.

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

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

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

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

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

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

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

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

6 THE COURT: Thank you.

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

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

1 defense.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 ATTORNEY BUTING: Well, but that was

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

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

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

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

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

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

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

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

13 ATTORNEY BUTING: Yes.

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

17 ATTORNEY BUTING: Yes.

18 THE COURT: I know Lenk was, you said.

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

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

1 that's worth.

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

5 ATTORNEY FALLON: Right.

6 ATTORNEY BUTING: And again, the law
7 enforcement people and the head prosecutors were
8 gone from the scene by 2:00 -- no, between, I think
9 1:00 and 3:00. Rohrer, Mr. Kratz, Wiegert, Remiker,
10 they all left.

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

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

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

22 ATTORNEY BUTING: I understand.

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

25 ATTORNEY STRANG: Sure.

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

3 ATTORNEY BUTING: Okay.

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

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

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

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

1 Who do you call? The police.

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

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

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

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

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

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

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

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

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

3 ATTORNEY KRATZ: I did, Judge.

4 THE COURT: Is there anything else?

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

11 THE COURT: Anything further from the
12 State?

13 ATTORNEY KRATZ: The defense.

14 THE COURT: The defense, I'm sorry.

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

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

1 impression that the State was on Steven Avery's
2 side in that effort to exonerate this poor
3 wrongfully convicted man. Because, why, it was
4 the State Crime Laboratory that tested the DNA
5 for him and found that it was good, that it was
6 not his. And it was the State of Wisconsin
7 joined in securing the defendant's release in
8 2003.

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

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

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

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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.)

1 STATE OF WISCONSIN)
)ss
2 COUNTY OF MANITOWOC)

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

Dated this 29th day of January, 2007.

Diane Tesheneck, RPR
Official Court Reporter

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