

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

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3 STATE OF WISCONSIN,

4 PLAINTIFF, PRE-TRIAL

5 vs.

Case No. 05 CF 381

6 STEVEN A. AVERY,

7 DEFENDANT.

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8 **DATE:** FEBRUARY 2, 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

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1 THE COURT: At this time the Court calls  
2 State of Wisconsin vs. Steven Avery, Case No. 05 CF  
3 381. We're here today for a final pre-trial  
4 conference in this matter. Will the parties state  
5 their appearances for the record, please.

6 ATTORNEY KRATZ: Your Honor, the State  
7 appears by Calumet County District Attorney, Ken  
8 Kratz appearing as Special Prosecutor. Also  
9 appearing as Special Prosecutors include Tom Fallon  
10 from the Department of Justice and Norm Gahn from  
11 the Milwaukee District Attorney's Office.

12 ATTORNEY STRANG: Good afternoon. Steven  
13 Avery appears in person. Jerome F. Buting of Buting  
14 and Williams represents him, as does Dean Strang of  
15 Hurley, Burish and Stanton.

16 ATTORNEY KRATZ: Judge, I'm sorry, before  
17 we proceed with our agenda this afternoon, I had  
18 alerted the Court that I was going to make a  
19 technical change to the Information. That's been  
20 done to a four count Information as represented on  
21 Monday. I am prepared to file that original with  
22 the Court. Mr. Strang has already received a copy.

23 THE COURT: Very well, you may give the  
24 Clerk the original at this time.

25 There are a number of items for the

1 Court to address today. The first one I have on  
2 the list is the State's motion for release of  
3 blood vial evidence and blood spot cards for  
4 scientific testing. Who's going to be speaking  
5 on behalf of the State?

6 ATTORNEY GAHN: I will, your Honor.

7 ATTORNEY STRANG: Your Honor, if I may,  
8 before we get to that, the defense acknowledges  
9 receipt of the second Amended Information. Because  
10 actual objections to a jurisdictional and otherwise  
11 have been raised, I preserve those. We appear  
12 specially, to that extent, not waiving objections to  
13 the second Amended Information, but acknowledge  
14 receipt of it and waive reading.

15 THE COURT: Thank you. Mr. Gahn.

16 ATTORNEY GAHN: Thank you, your Honor. In  
17 our motion that we filed we are asking the Court to  
18 release the vial of blood that is currently under  
19 seal in the Clerk of Court's Office here in  
20 Manitowoc County. The defense has filed a response  
21 and that response levels allegations that we are  
22 trying to try this case by ambush, or at the  
23 minimum, trying to be cute --

24 THE COURT: All right. Let's stop right  
25 there, because if the defense has filed a written

1 response, I don't have it. When did it come in?

2 ATTORNEY BUTING: Yesterday.

3 THE CLERK: I don't have it.

4 THE COURT: Check with Robbie. Was an  
5 original filed with the Clerk?

6 ATTORNEY BUTING: Yes.

7 THE COURT: The clerk is indicating she  
8 doesn't have it.

9 ATTORNEY BUTING: I have a copy, and with  
10 the attached exhibits. We faxed that, it says it  
11 was received.

12 THE COURT: All right. At any rate, I have  
13 a copy at this time. And I trust, Mr. Gahn, from  
14 your comments, that the State has a copy.

15 ATTORNEY GAHN: I'm sorry, please, your  
16 Honor?

17 THE COURT: I trust from your comments,  
18 since you made response to the defendant's response,  
19 that you have a copy?

20 ATTORNEY GAHN: Yes, your Honor.

21 THE COURT: All right. I now have one, so  
22 you may proceed.

23 ATTORNEY BUTING: Do you want to take a  
24 moment, your Honor, and read it first before we  
25 proceed.

1 THE COURT: Just a minute. All right. I  
2 have a copy of this document, but I didn't  
3 understand that this document referred to the blood  
4 vial evidence.

5 ATTORNEY BUTING: Did I give you the wrong  
6 one? I gave you the wrong one.

7 THE COURT: All right. Mr. Gahn, you may  
8 proceed.

9 ATTORNEY GAHN: Thank you, your Honor. I  
10 would like to just recap a little bit the chronology  
11 of events and what brings us here today. On  
12 December 6, we were notified that this vial of blood  
13 existed in the Clerk of Court's Office. And on  
14 January 3rd, we filed our motion to exclude blood  
15 vial evidence, or in the alternative, would the  
16 Court grant continuance for us, to allow us to test  
17 that vial of blood.

18 By written decision and order on  
19 January 9th, this Court denied our motion for the  
20 continuance to test the vial and reserved ruling  
21 on our motion to exclude the blood vial evidence.

22 The following day, on January 10th, I  
23 was informed by law enforcement officers who were  
24 involved in this case that they had received a  
25 call from the U.S. Attorney's Office. And the

1 U.S. Attorney's Office had expressed concern over  
2 the decision not allowing us time to test this  
3 vial, and offered their services, shall we say  
4 their pull, or whatever, to expedite testing that  
5 we would like to see done with the resources  
6 available to them, namely the Federal Bureau of  
7 Investigation.

8 At that time, we made the decision that  
9 we would like to see what your ruling was,  
10 because we felt that we had a rather compelling  
11 and powerful argument for the Court to rule that  
12 the blood vial does not come in. And so we  
13 waited for your decision on that, on that issue.

14 And we also felt that we were in a good  
15 position and felt that that decision was likely  
16 because the Court had granted a continue --  
17 denied our motion for continuance. In any event,  
18 the decision came down last Tuesday and the Court  
19 has decided that the evidence of the blood vial  
20 is going to come in in this trial.

21 The Court ruled that although we found  
22 the probative value rather low for this evidence,  
23 I think the Court based its decision upon the  
24 Sixth Amendment right of the defendant to present  
25 a defense, and we understand that. But the Court

1 also noted in its decision that the Court would  
2 entertain any request, by the State, to test that  
3 blood, should we wish to pursue that. And that  
4 is precisely why we're here today. We're going  
5 to ask you, your Honor, to unseal that blood and  
6 we would like to send that off for chemical  
7 testing, or what other test that we deem  
8 appropriate.

9 Some of them, it's difficult to say how  
10 we want to test it, because we don't know the  
11 condition of the blood yet. And until that blood  
12 is examined and just determine what shape it is  
13 in, that will determine what test we will pursue.

14 But we will be able to pursue the  
15 testing for EDTA, which we originally asked the  
16 Court to give us the continuance. And we are  
17 told that the FBI will have that testing  
18 completed before the close of this trial. I  
19 think that speaks to the vast difference in  
20 influence that an Assistant District Attorney  
21 from Milwaukee County has with the FBI Lab and  
22 the U.S. Attorney. But we're told that that can  
23 be accomplished.

24 I would ask the Court to reconsider the  
25 thoughts that the Court put down in its decision



1 about the **Cooper** case. There are some vast  
2 differences with the situation that we have and  
3 that **Cooper** case. And I would ask the Court to  
4 recall that in my argument I thought that I laid  
5 out those differences well, I thought.

6 The **Cooper** decision was brought by the  
7 defense. It was a post-conviction hearing. And  
8 up until now, I don't know, I could not find a  
9 decision where the State brought a request for  
10 EDTA testing. It's generally brought by the  
11 defense. And in that case, they simply had stain  
12 samples. And the individual, the person, the lab  
13 that tested those was claiming that just the mere  
14 presence of EDTA in the sample, therefore,  
15 indicates it came from a vial of blood with EDTA.

16 I agree that there were some stretches  
17 made by the defense in the **Cooper** case. But this  
18 case is different. We have standards to compare  
19 to the EDTA levels, if there are any, in Teresa  
20 Halbach's SUV. We have the vial itself and we  
21 also have standards that are at Laboratory  
22 Corporation of America.

23 And this makes this a vastly, vastly  
24 different situation than what the **Cooper** case  
25 presented. And I believe that the testing that

1 would be done in this case, we would clearly,  
2 clearly meet the **Walstad** standard here and that  
3 whatever issues the defense has would go to the  
4 weight of the evidence and not to the  
5 admissibility. Because even a reading of the  
6 **Cooper** case, all the experts agree that the  
7 underlying scientific principles, the ability to  
8 test substances for the presence of various  
9 chemicals, is well established and has been for  
10 many, many years.

11 We believe that it is critical that we  
12 be given the opportunity to test this vial of  
13 blood and present those results at trial. I  
14 believe that the testing that we will be able to  
15 accomplish before the trial is over will clearly  
16 show that the blood in Teresa Halbach's SUV did  
17 not come from this vial of blood that is in  
18 this -- in this building.

19 Now, the defense does not like the case  
20 of **State v. Konkol**, but unfortunately for them,  
21 it's the law. We have the right to meet their  
22 defense in rebuttal and we really don't have to  
23 tell them how we're going to do it, but we're  
24 telling them today how we're going to do it. And  
25 they take their chances, if they are going to go

1 down this planting defense, at their peril.

2 The defendant's response to our motion  
3 for access to the blood vial evidence, in a way,  
4 I think strongly supports our position, that we  
5 be given the opportunity to conduct the  
6 scientific testing. If the Court would look on  
7 Page 6, Paragraph 4 of their response, the  
8 defense intends to use the vial as an exhibit and  
9 to bring it into the courtroom. And they state  
10 that they want to have it as an exhibit in court  
11 and display this and any alteration of the  
12 condition of the vial.

13 They talk about the amount of liquid,  
14 the condition of the top, in order to demonstrate  
15 the viability of the defense that the vial was  
16 tampered with by officers. And then they state  
17 directly, or through agents -- What concerns me  
18 here, is that this is flying right in the face of  
19 your decision to allow the blood vial in. But  
20 you did place limitations on how far they can go  
21 with this planting frame-up defense.

22 Who are the agents of these officers  
23 they are talking about? And it seems that we are  
24 now back with bailiffs in this courtroom, clerks,  
25 anyone who works in the Manitowoc County Clerk of

1 Court's Office, maintenance personnel, anyone who  
2 had a key to that office, anyone who had the  
3 combination to the door that you -- second door  
4 that you get in. All of these people now seem to  
5 be -- could they have been the agents of one of  
6 these deputy sheriffs.

7 Furthermore, to bring this vial into  
8 court and show it to the jury, to show the amount  
9 of liquid, the condition of the top, you are now  
10 again -- this seems to fly in the face of what  
11 your court order was in your decision to place  
12 limitations. Do we now have to call the North  
13 Carolina people to see how they put the stopper  
14 on; the nurse; the phlebotomist who pulled --  
15 that took the blood out into this vial, into this  
16 vacutainer; is that why the hole is in the purple  
17 top.

18 The information and the exhibits to the  
19 defendant's initial motion to seal this evidence  
20 indicates that the box was crushed in transit.  
21 Did that cause, perhaps, the stopper of the tube  
22 to be dislodged ever so slightly? These are just  
23 questions that we are going to be going off on,  
24 that I believe was not the intent of the Court  
25 when it rendered its decision.

1                   But more importantly, if they are  
2                   allowed to bring this vial into the courtroom and  
3                   start discussing quantity, how much is in it,  
4                   whether the stopper tube has been tampered with,  
5                   or whether there's been a breach by a needle  
6                   through the top, you are getting into, now,  
7                   scientific matters.

8                   And you are going to be looking at, the  
9                   jurors, the color that's there, the viscosity of  
10                  blood. There are so many, now we're getting into  
11                  areas that it cries out for chemical testing. If  
12                  this is what their intention to do, they are  
13                  basically bringing in science into the courtroom,  
14                  about that vial of blood, and that is not  
15                  correct. This can only be answered by testing  
16                  this vial of blood.

17                  Giving us the opportunity to test it and  
18                  show the defense, and show the world, what this  
19                  defense is, that these officers would plant blood  
20                  in Teresa Halbach's car, we have to have that  
21                  opportunity. The minute they bring that vial in,  
22                  we have to have had been given the opportunity to  
23                  test it, your Honor.

24                  I'm concerned for the Halbach family and  
25                  Teresa Halbach, that they get the trial that they

1           deserve. But also, just as importantly, I know  
2           from 22 years experience as an Assistant District  
3           Attorney, and 10 years in law enforcement with  
4           the Criminal Investigation Division of the United  
5           States Army, I always know that there is always a  
6           sort of a -- can be a tension between the police  
7           and the prosecutors.

8                         But the relationship we have is embraced  
9           by each other. And when two officers are accused  
10          of what they are being accused of, for the last  
11          week these two deputy sheriffs have been on the  
12          broadcast news, and on the print media, and  
13          painted as if they could do something like this.

14                        And as a prosecutor, we have a  
15          responsibility to do everything we can to also  
16          restore their good names. These deputy sheriffs  
17          have protected this community. They put their  
18          lives on the line. They get into situations that  
19          none of us want to deal with in life.

20                        They are both good solid decent family  
21          men. They are kind men. They are gentlemen.  
22          I'm sure everyone in this room knows them. They  
23          deserve to have their reputations protected. And  
24          we can best do that by allowing us the  
25          opportunity to test that vial of blood and

1 show -- and show the world that the blood that is  
2 in Teresa Halbach's car did not come from this  
3 vial of blood.

4 In the Wisconsin case of **State v.**  
5 **Migliorino**, 489 NW 2nd, 678, they quote from the  
6 United States Supreme Court. And they state  
7 that, absent a constitutional provision statute  
8 or evidentiary rule to the contrary, the law is  
9 entitled to every person's evidence.

10 As former Chief Justice Warren Burger  
11 emphasized, for a unanimous Supreme Court, the  
12 need to develop all relevant facts in the  
13 adversary system is both fundamental and  
14 comprehensive. The ends of criminal justice  
15 would be defeated if judgments were to be founded  
16 on a partial or speculative presentation of the  
17 facts.

18 The very integrity of the judicial  
19 system and public confidence in the system depend  
20 on full disclosure of all the facts within the  
21 framework of the rules of evidence to ensure that  
22 justice is done. It is imperative to the  
23 function of courts that compulsory process be  
24 available for the production of evidence needed  
25 by either the prosecution or by the defense. And

1           that's in *United States v. Nixon*, 418 U.S., 683,  
2           1974 decision.

3                       And a few years later, in *United States*  
4           *v. Robinson*, at 485 U.S. 25, 1988, the Supreme  
5           Court stated, The central purpose of a criminal  
6           trial is to decide the factual question of the  
7           defendant's guilt or innocence. To this end, it  
8           is important that both the defendant and the  
9           prosecutor have the opportunity to meet, fairly,  
10          the evidence and arguments of one another. And  
11          for us to meet, fairly, the allegation that these  
12          two deputy sheriffs, these sworn officers who  
13          have taken an oath of office, would do something  
14          so despicable, and so criminal, necessitates us  
15          to have the opportunity to show how uncorrect,  
16          and untrue, and vile that allegation is. That's  
17          all I have, Judge, thank you.

18                       THE COURT: Mr. Buting.

19                       ATTORNEY BUTING: Well, Judge, it seems to  
20          me we're having nothing more than a rehash of the  
21          State's previous motion, which this Court considered  
22          thoroughly and denied for good reason. We object to  
23          any testing at this time, other than fingerprint  
24          testing. We say that we have no objection to the  
25          State bringing in some fingerprint analyst to



1           examine the vial, as it is, in the Clerk's Office.  
2           But we do object, as I say in my response, at this  
3           late 11th hour, to any opening of the vial and doing  
4           tests on the vial of blood itself.

5                     If this motion had been filed long a  
6           ago, it may be different. But one thing that  
7           Mr. Gahn left out of his chronology here, they  
8           were notified, by the way, December 6th, that was  
9           two months before trial, that this blood existed.  
10          And no motion was forthcoming at that time. No  
11          EDT motions forthcoming.

12                    And I'm not usually in the habit of  
13          reading people's emails in Court, but it wasn't  
14          one sent to me, in any event. So I think the  
15          Court needs to recognize, that in the Crime Lab  
16          records is an email dated almost one year ago,  
17          February 6th of 2006, to the Crime Lab analyst.

18                    And at that time, a year ago, this email  
19          demonstrates the State was aware of and  
20          considering the possibility of EDTA tests. It  
21          says, quote, "Norm agreed that the bloodstains  
22          (or a couple anyway) should be tested for EDTA  
23          preservative to deflect the absurd suggestion  
24          that cops are carrying around vials of blood. I  
25          know your lab doesn't or can't test for it, but

1 Norm suggests the Lab of Hygiene might. Do you  
2 think that's a good idea, or should we go to a  
3 private lab?

4 One year ago they knew about this  
5 potential EDTA test. And I don't have the answer  
6 to that particular email, but the answer is, that  
7 they didn't do it. And they didn't test it  
8 because they were afraid they would find EDTA in  
9 the stains in the RAV-4, and that the defense  
10 would have another argument that this was planted  
11 evidence. That's what's going on here, Judge.

12 Just to make clear, Judge, this email I  
13 am referring to was in discovery. So it wasn't  
14 -- I received it legitimately. If the Court  
15 wants to see that paragraph, or the whole email  
16 is fine. But the point being here is that this  
17 has been a strategy, a -- a game of sorts, that  
18 the State has been playing, gambling that things  
19 would turn out the way they want, rather than  
20 doing the test.

21 Now that they have lost, they are trying  
22 to come back and do something, again. They are  
23 trying to reverse it. That's evident from  
24 Mr. Gahn's own comments.

25 December 6 is when they were notified,

1           officially, that there was a blood vial in the  
2           Clerk's office. No motion was made at that time.  
3           They wait a month, to January 4th, before they  
4           move to exclude it, or to continue the trial for  
5           testing. Now, he's telling us, for the first  
6           time, that when we were last discussing this, the  
7           Court and counsel for the defense were told that  
8           the FBI would take about three months, or four  
9           months, or whatever it was going to be, to retool  
10          and be able to do this test, because they do not  
11          even do EDTA tests anymore.

12                        They stopped doing them because they are  
13          not reliable. They haven't done them since the  
14          O.J. Simpson trial 10 years ago. They were going  
15          to have to recalibrate their entire chemical lab  
16          in order to be able to even do these tests for  
17          this one case. Why? Because now the State is  
18          desperate. So, now we hear, though, on  
19          January 10th, that Mr. Gahn was told, oh, the  
20          U.S. Attorney is involved. U.S. Attorney's  
21          Office now says they are going to get the FBI to  
22          be able to do it.

23                        Well, did we have a motion on  
24          January 10th? No. Did we have a motion on the  
25          11th, the 12th, or any of the succeeding days?

1 No. Because they gambled, they took a gamble  
2 that you were going to exclude the blood vial  
3 evidence and they lost. They took a chance. It  
4 was a strategic decision the State made. And  
5 everyone has got to live with it.

6 At this point, we have got jurors who  
7 have been on the verge of being selected. We  
8 have got everything ready for trial to begin on  
9 Monday. And this trial cannot begin on Monday if  
10 there are going to be any tests. Because as I  
11 point out, **State vs. Wold**, the Supreme Court  
12 decision, in my motion, it is very clear that if  
13 scientific tests are to be done, the other side  
14 has a right to its own sequential tests,  
15 surrebuttal tests.

16 On Page 4 of my motion, I quote from  
17 **Wold**, W-o-l-d, The need for full and fair  
18 disclosure is especially apparent with respect to  
19 scientific proof and the testimony of experts.  
20 This sort of evidence is practically impossible  
21 for an adversary to test or rebut at trial,  
22 without an advance opportunity to examine it  
23 closely.

24 We have a -- We would have a surrebuttal  
25 right to present our own evidence debunking

1           whatever the FBI comes up with here. Because as  
2           Mr. Gahn points out, every single reported case  
3           where EDTA has been tried -- has been offered as  
4           evidence, has been the defense doing it. And the  
5           State has presented witness after witness, expert  
6           witnesses, to say that it is not reliable and it  
7           should not even be admissible and they have  
8           debunked it.

9                         Now, all those witnesses we would have a  
10           right to bring into this court and rebut whatever  
11           they would come up with, but we can't do that  
12           now. It's too late. Because they took a gamble  
13           and lost.

14                        As I understand it, this EDTA test is  
15           the only thing they are asking for now. And the  
16           Court has ruled on that. And there's no way at  
17           this point the Court can reverse that without  
18           postponing the trial, which we object to.

19                        Mr. Avery is in custody. He has a right  
20           to proceed. And he should not be punished or  
21           prejudiced because of some strategy, failed  
22           strategy, foolish strategy perhaps, in hindsight,  
23           but certainly a presumptuous one, to presume that  
24           this Court was going to rule in their favor and  
25           exclude it in the first place.

1                   Especially when we see now, that a full  
2 year ago, they knew that this was going to be an  
3 issue. They knew from the very beginning when he  
4 said it was planted. They have had plenty of  
5 time. This email proves that in February they  
6 were talking about doing these tests a year ago,  
7 and chose, deliberately chose, not to do that.

8                   So if these officers have to sit through  
9 a proceeding or news -- news reports that somehow  
10 make them seem vile, I think was the term,  
11 whatever, so be it. That's the strategy that the  
12 State took. That's the path that they took.  
13 That's where this trial is going.

14                   And it's a jury who is going to decide  
15 if they are good and decent people, solid decent  
16 people, or not. The jury who hears the evidence  
17 as to -- that shows what they did or didn't do in  
18 this case, will make that decision.

19                   They want to show the world that this  
20 blood in the RAV did not come from the vial.  
21 That's absurd. They call the defense absurd. If  
22 they were able to do that, we would have been  
23 hearing about this long before today.

24                   Still, after two months, they have not  
25 been able to present the Court with one single,

1           scientifically valid, reliable test that could be  
2           done at this point, on the vial of blood, that  
3           would somehow prove what they would love it to  
4           prove. It doesn't -- There are no tests.

5                       There will be EDTA in the stains in the  
6           RAV. There will be EDTA in the blood tube.  
7           There will be EDTA in the RAV because, according  
8           to the State's experts in every other case, EDTA  
9           is a common chemical that is found in the  
10          environment, especially in cleaning products,  
11          Armor All, automobile type products. It's there.

12                      So there are no tests, that I have  
13          heard, either before court or in court, or from  
14          Mr. Gahn, there are no tests that are going to  
15          prove what they want it to prove. That is,  
16          somehow -- it's not like they are going to be  
17          able to do some perfect fingerprint or DNA type  
18          of test and say this came from the vial, this  
19          couldn't have come from the vial.

20                      For them now to wait. The **Konkol** case,  
21          let me just talk about that for a minute. **Konkol**  
22          says that the State can, in rebuttal, they can  
23          use an expert. That case was an OWI case where  
24          the State presented, in rebuttal, a blood alcohol  
25          absorption expert, to rebut the defense that was

1 presented, which is, I couldn't have been a .12  
2 because I only had one drink. And several other  
3 witnesses were presented, said we saw him, he  
4 only had one drink.

5 The defense objected when this witness  
6 came in in rebuttal, saying this witness wasn't  
7 on the witness list. **Konkol** examined the statute  
8 that requires disclosure of witnesses. It's  
9 971.23 (1)(d). That's all **Konkol** did. And that  
10 does specifically say that there is an exception  
11 for rebuttal or impeachment witnesses.

12 This is entirely different. This  
13 request falls under (5) of 971.23, which would be  
14 a motion for scientific testing. And as I think  
15 the case law is clear, that motion could have  
16 been made earlier and we would have had no reason  
17 to object, or no right to object, because then  
18 there would have been time for sequential  
19 testing, for the defense to have a lab of its  
20 choosing, probably to call one of the State's  
21 former prosecution witnesses in many of these  
22 other cases, to say, this EDTA stuff is voodoo  
23 science, you can't prove anything. Yeah, we can  
24 test for EDTA, but it doesn't tell us anything.  
25 It can't prove one way or the other.



1                   And now we can't do that if they are  
2                   allowed to start testing now and suddenly spring  
3                   it on us in the middle of a trial. It would  
4                   require -- I just point out to the Court, look at  
5                   that **Cooper** case. Look at how long, how many  
6                   hearings they had, how many evidentiary lengthy  
7                   hearings with experts and battles of experts that  
8                   court had on that one issue.

9                   That's what we would be looking at here  
10                  if we go through this trial, suddenly they bring  
11                  up some test and they want to argue that it  
12                  somehow proves one thing, when other experts will  
13                  say, no, it doesn't. And we're going to have to  
14                  take a -- we're going to have to postpone the  
15                  trial, send the jurors home, and come back in a  
16                  few months. It's just -- it's impossible.

17                  And I point out in 971.23 (5), unlike  
18                  the witness list statute, which does make an  
19                  exception for rebuttal or impeachment witnesses,  
20                  there is no such exception in (5). It doesn't  
21                  say that you can present these in rebuttal, or  
22                  you can hold off and put in tests in rebuttal,  
23                  you know, in the middle of a trial.

24                  And, clearly, when you look at **Wold** and  
25                  you see, it's just common sense that the other

1 side has a right to respond. And when you are  
2 talking about scientific tests you can't just  
3 suddenly, after five weeks of trial, or six weeks  
4 of trial, find an expert who is going to come in,  
5 look at this, test it, and be available to rebut  
6 it. It's just too late.

7 And not only is it too late, the State  
8 has still, and this is very important, it's not  
9 like something is being -- going to be kept from  
10 the world, or something is going to be kept from  
11 the jury that would otherwise answer this  
12 question. There is no test that will prove  
13 whether this -- If there was a test that would  
14 prove it, I would have asked for it. Because  
15 then I believe it would show that the blood in  
16 the vial is the same blood that is in the RAV-4.

17 But I have done the research and  
18 Mr. Gahn has done the research too. And there  
19 are no tests that will prove that and that's why  
20 we haven't heard of any yet. So we're not  
21 holding anything back from the world or the jury  
22 by not doing these tests.

23 Mr. Gahn points out **Migliorino** and talks  
24 about how the law is entitled to every person's  
25 evidence. And I think **Nixon, United States vs.**

1           **Nixon**, talks about that as well, but there are  
2           limits, of course.  If the law -- If either side  
3           was allowed to present whatever evidence they  
4           want, then we would be presenting evidence at the  
5           trial of other suspects that could have committed  
6           this crime.  A number of them, we could have  
7           presented evidence of.

8                         Instead, we have to go to trial and we  
9           can't answer -- or we can't answer the questions  
10          of the jury, who did it if he didn't.  We tried.  
11          We offered a number of witnesses, but this Court  
12          ruled, under the law, as it was entitled to, that  
13          that evidence should not come in, similarly here.

14                        Not every piece of evidence that either  
15          side wants, gets to come in.  There are limits on  
16          it.  And this Court has ruled on them already in  
17          this case.  To do otherwise, now, would  
18          jeopardize a mistrial, having to retry this case  
19          all over, and simply because the State took a  
20          gamble and lost.

21                        So, for all those reasons, I move to --  
22          the Court to deny this motion, with one  
23          exception, that we have no objection to being  
24          able to present fingerprints -- a fingerprint  
25          test to the jury, whatever.  I'm assuming that

1 can be done in a way that won't alter the vial.  
2 They have Super Glue type things, that are more  
3 or less invisible, that won't detract from it.  
4 But we have a right to present this blood vial to  
5 the jury so that they can see it in the condition  
6 that it is, and then draw whatever reasonable  
7 inferences there are from that evidence. Thank  
8 you.

9 THE COURT: Mr. Gahn.

10 ATTORNEY GAHN: Very briefly, your Honor.  
11 I'm sorry, very briefly, your Honor. The timing was  
12 perfect in this case by the defense. They knew  
13 about this vial of blood at least in July, last  
14 July. And, of course, Mr. Avery knew about it on  
15 January 2nd of 1996, when the vial of blood was  
16 drawn from his arm in the prison system. So I  
17 suspect they have known about this from the very,  
18 very beginning.

19 They waited until December 6 to put this  
20 on us. It wasn't until the following week, I  
21 believe the 14th, that we actually all went and  
22 looked and actually determined that there was a  
23 vial of blood in the Clerk of Court's Office.

24 And as I explained to the Court, too,  
25 there's no games here. This is too serious of a

1 case. We don't play games here. To get the  
2 answers -- get the answers to the questions that  
3 I had, over that Christmas holiday period, was  
4 difficult, the professors at the universities,  
5 the science departments, the laboratories, and it  
6 wasn't until when I brought the motion on January  
7 3rd that we had the information that we felt was  
8 important to us and that we felt comfortable and  
9 confident that we would be able to present very  
10 valid reliable scientific evidence to this court.

11 As far as the email goes and that we  
12 knew about a year ago, yes, we did talk about it  
13 but the decision was made, and the very  
14 reasonable decision was made, as is shown in the  
15 **Cooper** case. We didn't know there was a vial of  
16 blood in existence. And to test the stains in  
17 the SUV, we knew about how ubiquitous in nature  
18 the EDTA is. And it probably wouldn't have been  
19 helpful or wouldn't have told us anything. And  
20 that's the difference between all the cases and  
21 the facts we have here.

22 Yes, the FBI does not routinely do this  
23 test, because it's rarely, if ever, asked for by  
24 the State. This is a defense motion that they  
25 want to bring in. But here we have standards to

1 compare it to. Certainly it isn't like a DNA  
2 test, but in principle it is like DNA.

3 You can have the bloodstains in the car,  
4 but it doesn't tell you anything unless you have  
5 a standard to compare them to. And we have blood  
6 stains in this car here and we have ED -- we have  
7 a vial of blood that is a standard. In a North  
8 Carolina, at the lab, there is a standard that  
9 makes this just a vastly different case.

10 I don't understand why they are so  
11 afraid of this testing. If their theory of  
12 defense is correct, I would think that they would  
13 also embrace this and welcome it. Don't they  
14 want to know whether the blood in the car came  
15 from the vial of blood.

16 Your Honor, I believe that this case is  
17 so different that we will meet the *Walstad*  
18 requirements in an admissibility hearing. The  
19 Court has indicated, I believe all along, that  
20 it's willing to release that evidence to parties  
21 if they wish to test it. I think that the  
22 decisions that we made are reasonable. They make  
23 sense.

24 And now that we know that this testing  
25 can be done and accomplished in the time frame

1           that I was told it could not be, but for the  
2           assistance of the U.S. attorney, the problem is  
3           that once that vial of blood is brought into the  
4           courtroom, and jurors are being told questions,  
5           or to look at the vial, and look at the color,  
6           and look at the amount that's in there, that's  
7           still in liquid form, look at the top, look at  
8           the stopper; you are now getting into areas of  
9           science and you are going to be -- and without  
10          having answers and science, the jurors will be  
11          forced to widely speculate.

12                         How much was in there? How much was  
13          used at Laboratory Corporation of America? How  
14          much was there in the SUV? Is there more blood?  
15          It just cries out for us to have that opportunity  
16          to test it and to answer all these questions,  
17          once and for all, put it to rest.

18                         And, again, we will preserve one half of  
19          that, whatever is in that tube. They can do  
20          testing concurrently. And this belief that, oh,  
21          they can't do anything about it now until they  
22          see our results, is not true. They know the  
23          exact same experts that were called in the **Cooper**  
24          case.

25                         And I think everyone, and the Court read

1 the case, all the scientists that were called  
2 agreed on the underlying scientific  
3 underpinnings, the instrumentation, and the  
4 ability of the scientific chemistry labs,  
5 toxicology labs, whatever they are, to test for a  
6 particular substance using the instrumentation  
7 that they have now.

8 The only question is, the interpretation  
9 of the data. They know who those experts are  
10 now. They can line someone up, the very second  
11 that the data comes off to us from the FBI can be  
12 shipped to them and they are ready to -- They can  
13 move on this. They don't have to wait to see it  
14 and then look for an expert. They can find one  
15 right now. And if they want to do their own  
16 testing, whatever that may be, they can also do  
17 it right now.

18 So I would ask the Court, as I said, I  
19 believe the Court has indicated all along its  
20 willingness to allow this testing. And I think  
21 that the most important thing here for the Court  
22 to recognize is that once that vial is brought  
23 into the courtroom and it's talked about in a  
24 scientific fashion, we must, we must have the  
25 opportunity to answer those scientific questions.



1 And, again, I just cannot, cannot emphasize too  
2 much asking you to give us the chance to restore  
3 the reputations of these fine deputy sheriffs.  
4 That's all I have. Thank you so much.

5 THE COURT: All right.

6 ATTORNEY BUTING: Judge, I just have a --

7 THE COURT: Go ahead.

8 ATTORNEY BUTING: -- response to that. Not  
9 a big response. We have still not heard from  
10 anybody, any expert, that will say that such a test  
11 exists that can restore the reputation of these  
12 officers or whatever. This is -- Mr. Gahn is being  
13 disingenuous if he is comparing this in any way to  
14 DNA where you can look at one, look at the other,  
15 and say, yes, there is a match.

16 There is no such test. If there was  
17 such a test, we would have heard about it  
18 already. We would have had something presented.  
19 We would have an expert here today who would be  
20 opining, yes, we can do that. But we haven't  
21 heard anything. We're just hearing these wild  
22 assumptions that maybe there might be such a  
23 thing.

24 The -- They ask, don't we want to know,  
25 wouldn't we like to know if there was? Well, we

1 already know from all the experts we have talked  
2 to, that there is no such test that can do that  
3 comparison. But if they want us to know so much,  
4 then let Mr. Avery out on bail. He's the one who  
5 is sitting in solitary confinement for 15 months  
6 while they made a choice not to test earlier,  
7 when they could have. It's too late to do that  
8 now without postponing the whole trial.

9 The argument that we can do concurrent  
10 tests is totally disingenuous because Mr. Gahn  
11 knows, as the Court knows, there are no other  
12 labs that do this that are reliable or -- other  
13 than the one that was -- reputation has been  
14 battered in two cases, including the **Cooper** case.

15 There, frankly, are no labs to do it at  
16 all, not even the FBI, until right now, for this  
17 one test. So how are we going to go find someone  
18 else to do it. We would have to go outside the  
19 country somewhere, assuming there is even anybody  
20 else anywhere who does. We can't do that.

21 The Court indicated a willingness to  
22 entertain some sort of testing. But I don't  
23 think the Court entertained a willingness to  
24 reconsider the whole issue of whether we should  
25 allow an EDTA tests. If there was some sort of

1 easily done type of test, that wouldn't delay the  
2 proceedings, that's what I understood the Court's  
3 willingness to do. And that's what we would have  
4 been willing to do two months ago, if there was  
5 any such test.

6 I haven't found any. Mr. Gahn hasn't  
7 found any. There are none. The answer is going  
8 to have to be left up to the jury in this case,  
9 as to whether it came -- whether the stains came  
10 from the vial or not. And nothing that could be  
11 done before, probably nothing even after, is  
12 going to answer that question, one way or the  
13 other. And I think that's all. Thank you.

14 THE COURT: All right. Well, based on the  
15 developments as they have been presented to the  
16 Court over the last few weeks, it's obvious that  
17 both parties regard the blood vial evidence, as it's  
18 been referred to, as important in this case. The  
19 information provided to the Court, although there  
20 hasn't been an evidentiary hearing on the matter, is  
21 that the defense had some knowledge of the existence  
22 of the blood vial in the Clerk's Office last July.  
23 And the State indicates it was not notified of the  
24 existence of the vial until early December.

25 Given the relatively late notice to the

1 State, first of all, I'm not aware of anything  
2 that I would characterize as undue delay on the  
3 part of the State. From all indications, they  
4 were surprised to learn of the existence of the  
5 vial, and EDTA testing is not something that is  
6 as standardized even as DNA testing, to the  
7 extent you can call DNA testing standardized.  
8 That's also a development of recent years.

9 Ultimately, criminal trials are all  
10 about a search for truth. And at this point in  
11 the game, the Court is not being asked to  
12 determine whether any test results from the blood  
13 in the vial are admissible, but simply whether or  
14 not the State should be given the opportunity to  
15 attempt to test the blood in the vial in order to  
16 determine if there is admissible evidence that  
17 will assist the jury. I think that it's only  
18 fair in this case to permit the State to be given  
19 an opportunity to do that.

20 If there is probative evidence that can  
21 be derived from testing the blood in the vial, I  
22 think it's important to both parties that such  
23 evidence be presented to the jury, regardless of  
24 which party the evidence supports. So I am going  
25 to grant the State's motion to have access to the

1 blood vial evidence for testing.

2 In the course of the arguments from the  
3 parties, there were a couple of things that  
4 became apparent to the Court. First of all, the  
5 defense has a legitimate interest in determining  
6 any -- the existence of any fingerprint evidence  
7 on the vial. And the vial will have to be  
8 secured in order to test for fingerprint  
9 evidence, before any blood is withdrawn to do a  
10 blood sample.

11 I also believe that the defense should  
12 have the right to have the sample split, in the  
13 event the defense finds a lab that can do EDTA  
14 testing, or any other testing that the defense  
15 may feel is meaningful in this case, so that they  
16 have an opportunity to conduct that testing.

17 The Court, in it's previous ruling,  
18 refusing to continue the trial, commented on the  
19 difficulties expressed in the **Cooper** case with  
20 determining the significance of levels of EDTA in  
21 blood. But the **Cooper** case didn't address the  
22 question of comparability. In this case, it's  
23 alleged, as part of the defense, as I understand  
24 it, that the blood in the victim's vehicle may  
25 have come from the vial in the Clerk's Office.

1                   And the Court is not prepared to say,  
2                   and has been presented with no evidence to  
3                   suggest that there may not be a meaningful  
4                   comparison of EDTA levels in the blood vial and  
5                   EDTA levels in the blood found in the victim's  
6                   vehicle. So I think at least the potential here  
7                   exists for admissible evidence.

8                   And until testing is done, the Court  
9                   simply isn't in a position to rule on it's  
10                  eventual admissibility. The only thing the Court  
11                  knows for sure is that if I deny access to the  
12                  blood vial at this time the Court would never  
13                  have a chance to consider such evidence. So I'm  
14                  going to grant the State's motion on that basis.

15                  ATTORNEY BUTING: Your Honor.

16                  THE COURT: Yes.

17                  ATTORNEY BUTING: If the Court is going to  
18                  do that, then the defense reluctantly moves to  
19                  postpone this trial, to continue it, because  
20                  otherwise we are being ambushed here. We will not  
21                  be able to respond to whatever the State comes up  
22                  with. It's just impossible, when you think about  
23                  the undertaking that we have to do between now and  
24                  the next four or five weeks, the number of  
25                  witnesses, we're going to be in court all day long.

1 We are not going to be able to respond to whatever  
2 it is they come up with. That's what **Wold** talked  
3 about.

4 In fairness to his constitutional right  
5 to have a fair trial, there's no way that we can  
6 possibly prepare to rebut whatever the State  
7 comes up with. Now, it may be that what the  
8 State comes up with is favorable to the defense.  
9 But we don't know that at this time point, that's  
10 the problem.

11 And the only remedy, if the State does  
12 dig up some sort of evidence that they think is  
13 helpful to them and hurtful to the defense, the  
14 only remedy will be to adjourn the trial at that  
15 point. And with this kind of a trial, we can't  
16 do that. We will have taken a months worth of  
17 testimony and then we will have -- we will be  
18 back in front of the Court moving to adjourn.  
19 And you will be risking a mistrial and reversal  
20 of this case on appeal, because this man wouldn't  
21 have a right to rebut whatever the State is  
22 doing. It's that simple.

23 THE COURT: Response from the State.

24 ATTORNEY GAHN: Yes, your Honor. Again,  
25 they made this tactical and strategic decision last

1 July not to tell us about it and wait until  
2 December. This is what their decision was. And  
3 this is what **Konkol** is all about, and what rebuttal  
4 evidence and rebuttal testimony is all about.

5 I do take issue with their saying they  
6 can't do anything about this. There's plenty  
7 they can do. And this Court has read that **Cooper**  
8 decision. We know who the experts are and we  
9 know what the issues are. They can prepare right  
10 now getting an expert lined up. I have talked to  
11 experts who said you can -- once the data comes  
12 off from the FBI, send the data. It's not going  
13 to take long to look it over and say is this  
14 valid or is it not valid. The issues here are  
15 the interpretation of the data.

16 No one is going to come in and question  
17 the underlying scientific principles here. They  
18 can start working on this now, lining someone up,  
19 lining up their arguments. And it will be the  
20 same type of arguments that were in the **Cooper**  
21 case, the ubiquitousness of this type of a  
22 chemical in the community, and society, and the  
23 environment. They can start working on that  
24 right this moment.

25 And, again, they can take their sample.



1           There are other tests that I believe can be done,  
2           that they could do if they wished not to do EDTA  
3           testing. Just the fact of, you know, quantifying  
4           it, how much is in that vacutainer? How much did  
5           Meghan Clement use at Laboratory Corporation of  
6           America. There are other things. What is the  
7           breakdown? We are looking into things, even the  
8           nature of is there an irreversible effect of  
9           hemoglobin in the blood, at some point does it  
10          turn a different color.

11                         These are things that they also, I'm  
12          sure, have been looking at and discussing among  
13          themselves. So I don't think -- they are not  
14          being caught off guard on this. We're giving  
15          them an awful lot of information. And I,  
16          obviously, will tell the Court the very moment we  
17          get this information from the FBI. It will be  
18          sent to them, immediately, and as soon as we  
19          possibly can. And I will be checking with the  
20          FBI on a regular basis and hoping, you know, can  
21          we get it, to get it as soon as we possibly can.

22                         THE COURT: All right. You know, I'm  
23          hearing different things from the parties today. I  
24          know in the defense's earlier argument, defense  
25          counsel I believe indicated that no one, perhaps, is

1           capable of doing this testing, or no one at least  
2           other than the FBI. So, if that would be true, the  
3           question could be asked, what would be the benefit  
4           of granting an adjournment after the FBI results  
5           came in, if nobody else is capable of doing the  
6           testing. And it's a little hard for me to accuse  
7           the State of ambushing the defense, when the defense  
8           knew of the existence of the vial of blood in July,  
9           but didn't inform the State until December.

10                   Those comments aside, at this point the  
11           Court is not ruling on the admissibility of the  
12           test results, the Court is simply being asked to  
13           give the State an opportunity to do the testing.  
14           And given the relatively late stage in the game  
15           in which the State acquired knowledge of the  
16           blood vial evidence, I believe it's fair to give  
17           them a chance to do so and that's what I'm going  
18           to do. Mr. Strang.

19                   ATTORNEY STRANG: Well, the motion for  
20           continuance reluctantly is offered because, in fact,  
21           the Court is being asked to do more than give the  
22           State an opportunity for testing. Tacitly, but  
23           unavoidably, when the question is EDTA testing, the  
24           Court also is being asked to deny the defense an  
25           opportunity to do independent EDTA testing.

1           It is true, I suppose, that we could go  
2 now, if we had -- didn't have a trial to start on  
3 Monday, we could go and find experts who would  
4 testify in general about the reliability of EDTA  
5 testing. We could, in theory, do that, if we  
6 weren't starting a trial on Monday.

7           But the Court well knows, and counsel  
8 has acknowledged in the hearing in Chilton, to  
9 the Court, that there are two labs, and two labs  
10 only, in this country, that have ever done EDTA  
11 testing. One of them thoroughly discredited in  
12 North Carolina, the other the FBI, which  
13 apparently is recalibrating and is willing to  
14 undertake that now.

15           The only way, as we have discussed  
16 before, and as I think this Court's decision  
17 recognized, the only way that we could do  
18 independent testing, as opposed to bringing in a  
19 cat bird to criticize the FBI testing, would be  
20 to obtain from the FBI, if it will yield its  
21 protocols, obtain the FBI protocols and then try  
22 to find a university lab with an analytic chemist  
23 who is willing to try to follow the FBI protocol  
24 and undertake independent testing, assuming that  
25 that university was equipped with the same gas

1 chromatograph or infrared spectrometry machine,  
2 or whatever the FBI uses.

3 I have no idea what the protocol is.  
4 And, indeed, we were given to understand that the  
5 FBI is recertifying and reexamining its own  
6 protocol. So there is no way to do defense  
7 testing here at a reputable lab, or with  
8 reputable scientists, other than sequentially,  
9 none.

10 And it is, therefore, a motion to deny  
11 the defense a chance to meet, with independent  
12 testing, the State's rebuttal offering. And I  
13 understand the Court's ruling and the impulse to  
14 say, eventually this is going to get tested, so  
15 let's have it out, let's thrash it out, it's  
16 admissible or it's not, it helps the defense or  
17 it helps the State. I understand that.

18 And as I have said from the beginning,  
19 if I didn't have a client in custody, I would  
20 have joined the motion for adjournment. I'm  
21 curious too, and I realize that as a practical  
22 matter, some day the blood vial is going to be  
23 tested for EDTA. Partitioning the sample is not  
24 in itself prejudicial, we have acknowledged that.  
25 The testing is going to be done some day.

1                   But when it's done during trial, with  
2                   nothing more than a promise, heard today for the  
3                   first time that, no, it's not three to four  
4                   months, we can get the results from the FBI  
5                   before the end of trial, the necessity here on  
6                   this test, for sequential testing, means  
7                   necessarily that we are being denied the  
8                   opportunity to do independent testing.

9                   That's a due process right and a fair  
10                  trial right that Mr. Avery has. And forced to  
11                  choose between sitting in jail for another six  
12                  months, or whatever it is, and a fair trial,  
13                  forced to that choice, I guess you will take the  
14                  fair trial and due process. And that's the  
15                  specific problem here.

16                 I'm not worried about fingerprints or  
17                 viscosity. Once EDTA is the rebuttal point, then  
18                 the surrebuttal point also is EDTA, and that may  
19                 require independent testing. And independent  
20                 testing on these circumstances cannot be done  
21                 until we have the FBI protocol and an opportunity  
22                 to find somebody willing to get into that  
23                 business, who hasn't been discredited as a  
24                 charlatan and a fraud, as have the people in  
25                 North Carolina. So, yes, it is a reluctant

1 motion for a continuance, but we don't have a  
2 realistic choice.

3 THE COURT: Anyone from the State wish to  
4 be heard?

5 ATTORNEY GAHN: This would have been a  
6 wonderful conversation to have last August. That's  
7 all I have to say.

8 THE COURT: Well, the Court denied the  
9 State's motion for a continuance in part because I  
10 ruled that if the State had wanted to do EDTA  
11 testing on the blood found in the victim's vehicle,  
12 it could have been done so earlier. I think the  
13 defense is somewhat in the same boat here. If they  
14 wanted to do EDTA testing on the blood in the vial,  
15 efforts for that could have been started earlier.

16 If it's possible, and I understand the  
17 defense may be telling me that there is no other  
18 lab, other than the FBI, that does such testing  
19 now. And maybe there will be one that does some  
20 some day. Maybe it will be one year, maybe it  
21 will be two years, maybe it will be five years  
22 from now. But I don't think the Court can simply  
23 postpone the trial to some point indefinitely in  
24 the hopes that some day there may be another lab  
25 that can do EDTA testing to double check whatever

1 results the FBI comes up with, if the FBI comes  
2 up with any results.

3 So, as I indicated, I'm not going to  
4 preclude the State from taking a chance at  
5 attempting to test the blood in the vial, simply  
6 because of possibilities that may or may never  
7 come about.

8 ATTORNEY STRANG: Your Honor, again, I  
9 don't have access to the FBI lab. I couldn't get  
10 going on EDTA testing earlier, couldn't if I wanted  
11 to. The defense has no access to the FBI lab. And  
12 the FBI is the only organization in this country --  
13 and I don't think Mr. Gahn will disagree with  
14 that -- that has a protocol for doing the testing he  
15 wants to do.

16 And, you know, the insinuation that we  
17 were late overlooks the fact we beat by nine days  
18 our deadline for disclosing exactly this type of  
19 information. And also overlooks the fact that  
20 this was in a public record that anybody in the  
21 world and apparently a bunch of different media  
22 organizations walked in and looked at from 2003  
23 on.

24 So, you know, we really are in a  
25 position where we are being denied a fair trial

1 and due process opportunity to do independent  
2 testing on the facts that this Court has in front  
3 of it here. I don't have a choice but to ask for  
4 a continuance and to object throughout here that  
5 we haven't had a chance to meet the State's  
6 proposed rebuttal.

7 THE COURT: I don't know if the State has  
8 weighed in yet on the request for a continuance.  
9 Let's do this, I'm going take a 10 minute break,  
10 since I don't think that request was known to  
11 anybody until now. And then I will hear from the  
12 State, if the State wishes to be heard after coming  
13 back.

14 ATTORNEY GAHN: Thank you, Judge.

15 (Recess taken.)

16 THE COURT: Does the State wish to be heard  
17 on the defense motion for a continuance of the  
18 trial?

19 ATTORNEY GAHN: Your Honor, I understand  
20 what the defense is saying that, you know, at one  
21 point we did ask for a continuance, and we did. But  
22 at that time, we were under the impression that the  
23 testing that we want done could not be completed in  
24 time. And that is why we asked it, and now, with  
25 the assistance of the United States Attorney, we are



1           able to get that testing done in sufficient time.

2                   I truly believe, and if I felt that  
3           there were anything unfair about this I would  
4           tell the Court and be candid, but I feel  
5           comfortable enough stating that I think they can  
6           prepare for this, for this EDTA testing. They  
7           know who the experts are. They know who, around  
8           the country, where they can go to. I just think  
9           that they can adequately prepare for these test  
10          results.

11                   I will tell the Court I will do  
12          everything I can to get whatever materials I can  
13          to them early on. I will start making my calls,  
14          if not today on Monday. And I will try to get as  
15          much material about the FBI and their protocol  
16          and their operation and get it to them as soon as  
17          I possibly can.

18                   But we believe that we are ready for  
19          trial. I believe that we owe it to the Halbach  
20          family to get this trial going, under way, and  
21          complete this trial. So we do not join in any  
22          request for any continuance of this matter.

23                   THE COURT: Mr. Strang.

24                   ATTORNEY STRANG: Perhaps the Court would  
25          be kind enough to put one very direct question to

1 Mr. Gahn, who's the acknowledged expert on  
2 scientific testing, and EDTA testing in specific  
3 here. And that question is this, is Mr. Gahn aware  
4 of one credible laboratory that presently, today,  
5 can do EDTA testing of the exact sort he proposes to  
6 do, other than the FBI.

7 THE COURT: Mr. Gahn.

8 ATTORNEY GAHN: No, your Honor, but I will  
9 say this much, they are making it sound like this is  
10 something that is so unusual. The FBI doesn't  
11 routinely and normally do this, nor does -- first of  
12 all, because it's rarely asked for by the State.  
13 Also, I suspect private laboratories do not engage  
14 in it because there's probably no money in it,  
15 because it is so rarely asked for on any occasion.

16 But that doesn't mean that a university  
17 research facility, or any other laboratory that  
18 has the machinery and instruments or gas  
19 chromatograph and all the instruments wanted,  
20 cannot ramp up for this test and tool -- retool  
21 their equipment. That's my understanding.  
22 Someone can. You can analyze any elemental  
23 substance. Any chemical, basically, can be  
24 analyzed with the instruments at any lab or  
25 research facility that a university has. That's

1 my understanding.

2 You know, your Honor, you see cases in  
3 the newspaper about someone suspects that someone  
4 was poisoned by some unique poison, this one  
5 recently in Britain or something. I'm sure that  
6 some laboratory had to ramp up and retool or  
7 something to test for this specific chemical.  
8 This isn't something that's so bizarre or  
9 unusual. This is normal, normal chemical  
10 substance analysis by any laboratory.

11 ATTORNEY STRANG: So this is where the  
12 Court finds itself on a continuance, as I understand  
13 it. Until an hour ago, all of us were under the  
14 understanding, that is the Court and the defense  
15 table, were under the understanding, that even the  
16 FBI, which has done EDTA quantitation testing in the  
17 past, would need three or four months to do it.

18 Now, we're told that before the end of  
19 this trial, so presumably sometime between now  
20 and the middle of March, through the fortuitous  
21 intervention of the United States Attorney in  
22 Milwaukee, the FBI can speed up the earlier  
23 timeline that all of us were given. I have no  
24 statutory right to call on the FBI. Neither can  
25 I expect the United States Attorney, or anyone

1 else, to help me find a new lab that has never  
2 done this sort of testing, to do it in six weeks,  
3 or five weeks, let alone the three to four months  
4 that even the FBI initially was saying it needed.

5 There are exactly two lawyers  
6 representing Mr. Avery. Both of them will be in  
7 Chilton five days a week, beginning on Monday.  
8 And the Court also will have to entertain, before  
9 we can do any testing, a motion under **Ake**, A-k-e,  
10 **vs. Oklahoma**, because I expect that it is likely,  
11 it seems to me and I have not checked this, I  
12 haven't gotten quotes, but where you are asking  
13 somebody to spool up, from the start, to do  
14 independent testing that they have not done  
15 before, once they get FBI protocols, I suspect  
16 that the cost of that will be well beyond the  
17 cost that my firm can bear. Because this isn't  
18 coming out of Mr. Avery's pocket, long ago were  
19 his resources exhausted.

20 And so the Court will have that due  
21 process consideration under **Ake vs. Oklahoma** to  
22 consider as well. Although, the process of  
23 getting quotations and casting about North  
24 America for universities that might be willing to  
25 get into this business, in theory, could begin,

1           were we not in trial.

2                       So that that's where the Court finds  
3           itself functionally. We are being denied here to  
4           do independent testing on EDTA or its  
5           quantitation. I object to that on constitutional  
6           grounds, fair trial, and due process. A  
7           continuance of some months would remedy that.

8                       There's the issue of Mr. Avery's right  
9           to a speedy trial and his custodial status.  
10          Perhaps that could and should be revisited  
11          because it was, after all, the Court's reliance  
12          on the new charges in the Amended Information  
13          that caused this Court, in large part, as I  
14          recall, to raise the bail by \$250,000, last  
15          spring.

16                      And now, of course, the most serious of  
17          those three new charges in the Amended  
18          Information are no longer. And perhaps what goes  
19          around comes around on that, but that's not for  
20          today.

21                      What is for today is a reluctant request  
22          on due process and fair trial grounds, on the  
23          record we have made, for a continuance and an  
24          opportunity, realistic opportunity, to assess the  
25          FBI results, to meet them, to have an evidentiary

1 hearing under **Walstad** on the admissibility of  
2 those results, whether they are favorable or  
3 unfavorable to the defense. And to do  
4 independent testing as by our best lights, in the  
5 defense of Mr. Avery, and in presenting his case,  
6 as the Court has allowed it with the contours of  
7 its rulings, to a jury, so that he will have a  
8 fair trial the first time. And those are the  
9 bases for my motion for continuance.

10 THE COURT: Anything else from the State?

11 ATTORNEY GAHN: No, your Honor.

12 THE COURT: Well, as I indicated earlier,  
13 the Court feels it's getting conflicting messages  
14 here about the extent to which anyone, other than  
15 the FBI, can do the testing. If it can be done  
16 within a matter of a few months, it seems to me the  
17 State -- or the defense has known of the existence  
18 of the blood vial since last July, and I'm not sure  
19 I fully understand at this point why the testing  
20 could not be done.

21 It appears that the defense is asking to  
22 do the testing in response to whatever results  
23 the FBI might come up with, but in any event, the  
24 defense did not disclose to the State the  
25 existence of the blood vial until early December.

1 With that timeline, the Court finds it unlikely  
2 that the results of the FBI testing would have  
3 come before today, or at least much before today,  
4 soon enough before today to give the defendant an  
5 opportunity to do other testing, if it's even  
6 possible. And if it is possible, and if the  
7 Court splits the samples today, each party would  
8 have the same opportunity to have the same amount  
9 of time to get test results in.

10 So I am not going to adjourn the trial.  
11 I am going to grant the State's motion for access  
12 to the blood vial. The one item that I did not  
13 address originally, I indicated that the defense  
14 could have a split sample of the blood in the  
15 vial, that the vial would have to be tested for  
16 fingerprints before any analysis of the blood was  
17 done. I do not know if the defense at this point  
18 has enough photos of the vial to -- for whatever  
19 the defense may want to show with respect to the  
20 vial as part of its case here.

21 ATTORNEY STRANG: We could use more photos  
22 because, of course, the vial, when it's shown to the  
23 jury, physically, will be missing, presumably, about  
24 half the blood that's in it now. You know, the  
25 State, in a cocaine delivery case, doesn't go

1 forward to a jury on photos, it brings in the  
2 cocaine. And a felon in possession of a firearm  
3 case, the State brings in the gun.

4 We're functionally allowed to bring in  
5 only the altered vial to show this jury. We have  
6 argued that in the motion -- or in the response  
7 that Mr. Buting filed, which again goes to  
8 fairness of the trial. The next best alternative  
9 is to take good photos showing the current  
10 quantity of the blood and video footage, or  
11 moving footage, showing that the blood is in a  
12 liquid form today.

13 So that would be our alternate request,  
14 without abandoning any of the arguments that I  
15 have just made, of course. And then there's also  
16 the matter of the blood spot cards that the Court  
17 has not yet addressed.

18 ATTORNEY BUTING: Judge, I just want to  
19 clear up the record at one point, because you said  
20 you have been getting conflicting messages. What I  
21 want to make clear is, whenever we discovered that  
22 there may have been a blood vial in the court file,  
23 there were no labs, anywhere, that we could find  
24 that would test this. So it's not like we made a  
25 decision not to test it. Mr. Gahn will concur with



1           that.

2                        Because other than this one Ballard Lab,  
3           there was no -- which has been totally -- which  
4           was considered disreputable by all the reported  
5           courts, there were no other labs doing this test,  
6           including the FBI. The FBI is only doing this  
7           test now because of this case. So I just want to  
8           make it clear that this wasn't some strategic  
9           decision we made not to do the test, there was  
10          nobody we could go to.

11                      THE COURT: All right. How can the  
12          photographing of the exhibit suggested by the  
13          defense be accomplished and still allow the vial to  
14          be made available for testing?

15                      ATTORNEY GAHN: Well, I do know that they  
16          took plenty of photos when we were all together down  
17          in the Clerk's Office. Also had a film camera and  
18          took moving pictures, also, of the vial and still  
19          photographs.

20                      Let me just back up a moment and make  
21          this suggestion. I would ask the Court to rule  
22          that the fingerprinting of the vial, and the  
23          styrofoam box, and cardboard box be accomplished.  
24          But I would ask the Court to leave that to the  
25          discretion, of what order it would be done, with

1 the FBI analyst.

2 The reason is this, I don't want any  
3 type of superglue, any type of fuming used that  
4 perhaps may interfere with the chemical testing  
5 that will be done. It may be prudent and the FBI  
6 say, look, we would rather get the blood out of  
7 the vial first and would do it all gloved and  
8 then to do the fingerprinting, so as not to  
9 interfere with the chemical analysis. I don't  
10 know the answer to that, but I would ask that  
11 your ruling be that fingerprinting be  
12 accomplished and the order of it be left to the  
13 scientists.

14 THE COURT: The FBI is going to do the  
15 fingerprinting?

16 ATTORNEY GAHN: What I was thinking of  
17 doing was that the FBI is going to be doing the  
18 packaging of the vial for us. I was going to have  
19 one of our officers involved in this to be present  
20 and take custody, immediately, of the cardboard box  
21 and the styrofoam box. And then the actual  
22 fingerprinting of the vial, I would ask the FBI to  
23 accomplish, you know, when they think it is the  
24 better time to do that. And that's how I would like  
25 to see the order be.

1 THE COURT: If the defense is allowed on  
2 Monday to take whatever photos or video of the vial  
3 it wants, you can have it on Monday; would that  
4 work?

5 ATTORNEY STRANG: How do we do that?

6 ATTORNEY GAHN: Judge, we'll make it work.  
7 We would prefer to take it -- I will tell you this,  
8 I will ask the FBI, and I would hope and, I mean,  
9 they have never denied other requests before, would  
10 they have their photography unit make very, very  
11 good still photographs of it for us, that I'm sure  
12 would be better than any of us could do. I would  
13 ask that be accomplished beforehand, once they get  
14 the vial. I will ask that, I don't think they will  
15 deny that. If they do, then we'll make other  
16 arrangements.

17 THE COURT: Mr. Fallon.

18 ATTORNEY FALLON: If I may have a moment  
19 with counsel?

20 THE COURT: Go ahead.

21 ATTORNEY GAHN: I have just been informed  
22 that we have available video camera that we could  
23 make available to them this afternoon and they could  
24 take all the pictures they want of the blood vial,  
25 this afternoon.

1 THE COURT: I know the defense has some  
2 photos already.

3 ATTORNEY STRANG: Yes.

4 THE COURT: I'm not sure what else is --

5 ATTORNEY STRANG: We do have some photos  
6 already, not intended at the time to be a  
7 replacement for having the physical evidence at  
8 trial. This is an exhibit in the custody of the  
9 Court and it's now being handed over to a party and  
10 the jury won't have it. So that's been the Court's  
11 ruling and the next best alternative is to allow us  
12 to photograph, with the idea of alternate evidence  
13 being offered to the jury, video and still.

14 I object to fingerprint testing being  
15 done after this vial has been handled for testing  
16 and there's an obvious spoliation problem with  
17 destroying or smudging fingerprints that  
18 otherwise may be identifiable. But, again, a  
19 Court exhibit is being turned over, over our  
20 objection, to the other side. And now a course  
21 of action is being proposed that presents the  
22 real risk of spoliation of fingerprint evidence.

23 THE COURT: Well, what opportunity to  
24 photograph or video the exhibit is the defense  
25 requesting?

1                   ATTORNEY STRANG: Before it goes, we need a  
2 chance to photograph it still and videotape it. I'm  
3 not sure what video equipment the State has. I'm  
4 not opposed to using their video equipment. I know  
5 we're in court this afternoon and we're starting a  
6 trial on Monday morning so.

7                   ATTORNEY GAHN: Is there access to this  
8 building on Saturday or Sunday, that they could do  
9 it?

10                  THE COURT: I'm sure there could be.

11                  ATTORNEY GAHN: Could we work that out?

12                  ATTORNEY STRANG: Your Honor, look I'm  
13 moving from Madison up to trial tomorrow and I'm  
14 starting trial on Monday. I'm not anticipating, nor  
15 do I have time, resources, or personnel to be  
16 arranging for trips to Manitowoc the weekend before  
17 a trial.

18                  ATTORNEY GAHN: Your Honor, may I just have  
19 another suggestion. How about this, how about  
20 release it to our representatives here from Calumet  
21 County Sheriff's Department and DCI will take it  
22 back to Calumet County where they have an office set  
23 up and where they will be this weekend and they can  
24 do their photographing at the Sheriff's Office in  
25 Calumet County this weekend.

1                   We won't open it. We'll wait until they  
2                   are present and they can photograph it from  
3                   taking it out of the cardboard box and then  
4                   opening up the styrofoam box and photograph  
5                   there.

6                   THE COURT: Who is going to be doing the  
7                   photography work for the defense?

8                   ATTORNEY STRANG: I have no idea, probably  
9                   one of the two people here, unless we can get our  
10                  defense investigator, and I don't know his  
11                  availability for this tomorrow. I didn't expect  
12                  this.

13                  ATTORNEY FALLON: Your Honor, we would note  
14                  that there was a extensive video shot on  
15                  December 14th, so this would be an adjunct or a  
16                  supplement to previous video and photographs.

17                  THE COURT: Well, everybody is going to be  
18                  back here on Monday, it's perhaps unfair to the  
19                  defense, if they weren't planning on doing  
20                  photography today, which they may well not have been  
21                  doing, so I will give them until the end of Monday  
22                  to make arrangements to do whatever photographing or  
23                  videoing of the exhibit they wish and then I will  
24                  release it -- order it released to the State.

25                  ATTORNEY GAHN: Your Honor, would you just,

1 to conform your decision with the written order,  
2 that this also includes the spot cards that are in  
3 North Carolina?

4 THE COURT: Actually, I haven't heard  
5 anything about the spot cards. I don't know if  
6 there's an objection to those. I, frankly, don't  
7 know what they are because until your motion, I  
8 didn't really hear them referred to.

9 ATTORNEY GAHN: When -- If the original  
10 testing was done in 1996, my understanding is the  
11 blood was drawn from Steven Avery on January 2nd.  
12 And on January 4th of 1996, Laboratory Corporation  
13 of America received the blood vial in question.  
14 They did the initial Innocence Project DNA testing  
15 and came up with inconclusive results.

16 As part of their testing protocol, upon  
17 receipt of a vial of blood, they open up the  
18 vial, and they put it on what are called spot  
19 cards. Spot cards preserve the blood sample, as  
20 best they can. And that is what they do their  
21 testing from, these spot cards. My  
22 understanding, there's a number of them.

23 When I talked to the FBI, they thought  
24 those would be helpful in interpreting the EDTA  
25 data, because here you have samples of that blood

1 vial, which were taken two days afterwards.  
2 Presumably Laboratory Corporation of America has  
3 maintained them, better than a liquid blood vial  
4 sitting in the Clerk of Court's Office. These  
5 were maintained in a different setting, and one  
6 could see if there's any type of degradation to  
7 them and they would be important.

8 THE COURT: So the blood from the cards  
9 came from the vial that's downstairs in the Clerk's  
10 Office?

11 ATTORNEY GAHN: Yes.

12 ATTORNEY BUTING: Judge, maybe, I'm  
13 misunderstanding the theory here, but if the blood  
14 that was in the vial is what was used to plant -- or  
15 was planted in the vehicle, then the relevance will  
16 be what was the -- what's the EDTA in the vial, not  
17 what it was 11 years ago. I don't see how -- how  
18 that's going to have any relevance to this test.

19 THE COURT: Well, at this point, given the  
20 fact the Court is not an EDTA expert, frankly, I  
21 don't know what relevance it has, but I'm not being  
22 asked to rule on it's admissibility today, the Court  
23 is just being asked to allow the defense to test it.

24 ATTORNEY STRANG: No, no, the State.

25 THE COURT: Or the State, to test it. And



1 I can't think of a reason not to allow that.

2 ATTORNEY STRANG: Well, if you want the  
3 defense to be heard, Laboratory Corporation of  
4 America was a defense hired consultant in 1996.  
5 This was defense testing, done at the defense  
6 request, not jointly with the State. So, what we're  
7 being asked now is for the Court to order, on the  
8 1985 file, that defense expert in North Carolina be  
9 required to yield to the State of Wisconsin work  
10 product that was done at the defense request and at  
11 the defense expense at the time. So that the State  
12 and the State alone can do EDTA testing here to the  
13 exclusion of the defense.

14 It's probably not relevant given what's  
15 been ordered so far. You know, I'm -- I'm not  
16 inclined to stand in the way of the march of  
17 knowledge but, again, this is -- this is just  
18 sort of a power play and a grab for a chance to  
19 do testing that we won't be able to repeat, or  
20 meet, or consider doing independently. I think  
21 the record, including on January 4, 2007 really  
22 is very clear about the fact that there is  
23 presently, today, no one in the business of doing  
24 EDTA testing that the State apparently is  
25 prevailing upon the FBI to do for it and it only.

1                   To preserve, you know, our options,  
2                   whatever they may be, long after this trial is  
3                   over, I suppose, if the Court is going to order  
4                   the defense to give up work product of a defense  
5                   expert then -- and, you know, also order that  
6                   half of those spot cards be preserved inviolate,  
7                   in the hope that some day there will be money,  
8                   and time, and another lab to do defense testing,  
9                   and prove that the State's tests shouldn't have  
10                  been considered in isolation at this trial.

11                  THE COURT:   How many spot cards are there?

12                  ATTORNEY GAHN:  I don't know, your Honor.  
13                  I believe there are more than one.  And I -- When I  
14                  read the laboratory notes -- and although the --  
15                  Mr. Strang is portraying this as a work product,  
16                  this was by order and by stipulation of the parties.  
17                  And as my understanding when I read it was --

18                  ATTORNEY STRANG:  No, the testing was not,  
19                  the withdrawal of the blood for the purpose of  
20                  defense testing was by court order of Judge  
21                  Hazlewood and by stipulation of the State of  
22                  Wisconsin, the testing was not joined.  That's  
23                  simply the fact, as I understand it.

24                  ATTORNEY GAHN:  But, again, that case is  
25                  over with now, it's a public record.  And I do

1 believe that we did prepare an order for Judge Fox  
2 to ask him to relinquish whatever jurisdictional  
3 control he may have over it. We're prepared to go  
4 to that Court and ask him to sign that and that you  
5 be given the authority to make decisions on the  
6 blood evidence.

7 ATTORNEY STRANG: And to that, we don't  
8 object, but the blood spot cards are not a public  
9 record, never have been, it's defense work product.  
10 We object to the whole road on which the State and  
11 the Court have embarked today, this included.

12 THE COURT: Well, I would agree that the  
13 spot cards, as they have been characterized for the  
14 Court today, are different from the blood vial in  
15 the sense that it's not part of the court record.  
16 I'm not -- What I don't understand and what I'm not  
17 sure the parties have addressed is the significance  
18 of that. And when I say that, I say that I have not  
19 ever been requested before to issue an order that  
20 the contractor of the defense, if you will, turn  
21 information over to the State. It's not the same as  
22 simply ordering that something in a court file be  
23 released.

24 ATTORNEY STRANG: But, you know, the  
25 position we're in here, of course, is that if we

1 don't agree to it, and the State eventually  
2 convinces this Court to allow the FBI's results,  
3 with no opportunity for us to rebut them, then we  
4 will also hear testimony that we tried to prevent  
5 the FBI from having access to something that might  
6 have been relevant to its testing, so --

7 THE COURT: I don't think the Court would  
8 allow that if I didn't order the information  
9 disclosed. I'm not sure -- I don't believe that  
10 would be proper for a jury.

11 ATTORNEY GAHN: I guess I would quote,  
12 again, from the *Migliorino* case that I cited before,  
13 this is every man's evidence. And the State and  
14 defense is entitled to it. This is going to be  
15 important evidence.

16 THE COURT: I think, though, that the  
17 defense is entitled -- and this is difficult without  
18 knowing how many cards there are -- the defense  
19 would be entitled to retain some, for their own  
20 purposes, either at this point or some point in the  
21 future. That doesn't seem an unreasonable request  
22 to the Court.

23 ATTORNEY GAHN: I suspect that if there's  
24 one spot card, I would request the -- her name is  
25 Meghan Clement, who is in charge of the forensic

1 unit there, cut it in half. We'll preserve one  
2 half. If there are two spot cards, we'll take one,  
3 and save one for the defense.

4 THE COURT: I'm going to want to know more  
5 information about the spot cards before I rule on  
6 that part of the request. So I'm not going to rule  
7 on that part today.

8 ATTORNEY GAHN: Okay.

9 THE COURT: I will just rule on the blood  
10 vial.

11 ATTORNEY GAHN: So, are we waiting till  
12 Monday that we can take the blood vial --

13 THE COURT: Yes.

14 ATTORNEY GAHN: -- Monday afternoon, or  
15 upon their completion of whatever.

16 THE COURT: Yes.

17 ATTORNEY GAHN: Okay. Thank you, Judge, we  
18 will prepare another order.

19 THE COURT: All right. The next item is  
20 the defense motion to exclude computer generated  
21 animations.

22 ATTORNEY STRANG: I'm sorry, before we go  
23 to that, I think we need a ruling from the Court on  
24 whether it's reconsidering its earlier order that  
25 fingerprint testing had to be completed before the

1 State removes the blood vial for EDTA testing.

2 THE COURT: I'm going to allow the FBI to  
3 make that decision for the reasons that I don't have  
4 the scientific knowledge to know the significance of  
5 one being done before the other. If the FBI acts in  
6 some way that either the fingerprint evidence or the  
7 blood evidence results are compromised, I assume  
8 that the defense expert can address that.

9 We do have notice of defense experts  
10 that will be testifying and criticizing, in some  
11 respects, the methods that were used by the State  
12 to produce test results. So I'm not going to  
13 specify the order -- the order in which the tests  
14 are conducted.

15 ATTORNEY GAHN: Your Honor, I must get back  
16 to Milwaukee, may I have leave of the Court to go.

17 THE COURT: Yes.

18 ATTORNEY GAHN: Thank you, Judge.

19 THE COURT: All right. We'll move on,  
20 then, to the defense motion to exclude computer  
21 generated animations.

22 ATTORNEY KRATZ: Judge, from a timing  
23 standpoint, I do recognize that we have six or seven  
24 different matters to hear. We have witnesses -- or  
25 a witness that is standing by from the State Patrol.

1 He's also been kind enough to prepare for the  
2 defense and for the Court documents which sets forth  
3 his methodology in the creation of demonstrative  
4 evidence.

5 Those include the scene models that we  
6 talked about, include the -- both interior models  
7 of the defendant's trailer and garage, as well as  
8 the exterior overviews of the Avery property. He  
9 also deals in a second set of explanations for  
10 the Court, some information regarding skeletal  
11 models, and is prepared to provide testimony as  
12 to animations.

13 I believe that Mr. Strang had expressed  
14 at least the most serious objection -- and I'm  
15 sure he will correct me if I'm wrong, but the  
16 most serious objection to actual moving images.  
17 But having made those prefatory comments, Judge,  
18 since Mr. Austin's testimony is not only likely  
19 to mirror that that I provided the Court now in  
20 writing, although there maybe some additional  
21 information, Mr. Strang and I, in correspondence  
22 before this hearing, recognize that final  
23 decisions on admissibility will need to come  
24 closer in time to -- to the trial or during the  
25 trial.

1 I'm wondering if the Court wishes to  
2 review the written submissions. I can make for  
3 the Court and Mr. Strang, copies of the DVD's,  
4 that is the animations themselves. That will  
5 give the Court a fair understanding of what we're  
6 talking about. And perhaps in the interest of  
7 getting through some of these other issues that,  
8 frankly, need to be decided before Monday, it's  
9 my recommendation that we do that.

10 Because this -- even with Mr. Strang's  
11 opinion and, please, Mr. Strang, correct me if  
12 you think I'm wrong, but this is something that  
13 probably can wait until we get into trial or  
14 closer to trial. And necessarily, in some  
15 instances must, must wait for that. I will do it  
16 now, Judge, and I'm happy to present this.

17 In all candor, this may take the better  
18 part of an hour to present the offer of proof and  
19 our explanation of these demonstrative exhibits.  
20 And I'm, certainly, as I mentioned, happy to  
21 proceed. But I do note on our agenda there are  
22 things that, quite frankly, have to be decided  
23 today before we move into the balance of jury  
24 selection on Monday.

25 THE COURT: All right. Mr. Strang.



1                   ATTORNEY STRANG: In the main, Mr. Kratz is  
2 right, we can't conclude this issue today, even if  
3 we start it, because the Court will need to take  
4 some testimony from Trooper Austin while he is  
5 physically here, present, and able to show things to  
6 me, at least, and to the Court, at least the two of  
7 us. He's probably shown these things to counsel for  
8 the State before, so we could get started by  
9 telephone, but couldn't finish.

10                   I also note that in the three new  
11 memoranda that Mr. Kratz just gave us, and I  
12 think I gave the Court, dated -- each of the  
13 three, dated January 29, 2007. The thinnest of  
14 those memoranda is entitled new model renderings.  
15 And this includes things that are altogether new,  
16 that I haven't seen before, and didn't know were  
17 coming.

18                   The most -- Probably the most  
19 significant being No. 3 on Page 1 of the  
20 January 29, 2007 memorandum entitled new model  
21 renderings. So, you know, if it would take an  
22 hour of testimony for the State to do its direct  
23 examination and its proffer, we're probably  
24 talking about an hour of cross-examination, and  
25 wouldn't finish the issue today, in any event.

1           So, I think I land where Mr. Kratz does, just  
2           probably the better thing to do is to move to  
3           other issues today and address this, I guess,  
4           during trial or --

5                    ATTORNEY KRATZ:  What I could also do --  
6           I'm sorry to interrupt Mr. Strang.  What I could  
7           also do, Judge, is perhaps show the Court and  
8           counsel the animation that's been performed.  That  
9           is something that you don't have, and that's the  
10          moving part, so that at least you can get an idea of  
11          what we're going to be talking about.

12                   I will be happy to make both the Court  
13          and counsel copies of those finished products,  
14          and would have anyway, before we seek to admit  
15          them.  That will only take probably five minutes,  
16          or even less.  And then my suggestion is to move  
17          on to the next item on the agenda.  I will call  
18          Trooper Austin and apologize since he's been  
19          waiting since 1:00, but that just seems practical  
20          to me.

21                   THE COURT:  So you have a five minute  
22          presentation?

23                   ATTORNEY KRATZ:  Even less, yeah.

24                   THE COURT:  All right.  Well, it will -- I  
25          have already looked at the looseleaf you gave me

1 before, on the computer screen, which I assume  
2 duplicate the information in the looseleaf. I will  
3 take a look at this now, and then we'll move on to  
4 the next item.

5 ATTORNEY KRATZ: While the projector is  
6 warming up, Judge, I will tell the Court that the  
7 animation, as I told the Court previously, was  
8 prepared by Trooper Austin. This animation, there's  
9 two of them, the first is the scene model, that is,  
10 a view of the Avery salvage property, and what the  
11 State believes are important landmarks and items of  
12 evidence. It also includes a skeletal animation for  
13 which Mr. Strang expressed at least less objection,  
14 but something that he may -- he may talk about.

15 The animation that I'm going to be  
16 showing the Court here contains -- it's a  
17 composite, if you will, of 4,000 or so individual  
18 images, all computer generated, but put together  
19 to create the animation. And Mr. Austin will  
20 eventually talk about that. This animation is a  
21 15 frame per second animation. The final version  
22 would be, I believe it's 30 frames per second,  
23 but would most likely look very much the same.

24 So the record should reflect then that  
25 I'm showing the Court something called a scene

1 overview animation, which again is that -- the  
2 composite of the computer generated animations.  
3 Is there any way to turn down the lights at all,  
4 or would you like not to do that? As we watch  
5 this, Judge, if I may, Trooper Austin indicated  
6 the 15 frame per second rather than the 30 frames  
7 per second will have the most impact on things  
8 like the gravel road, it won't be as sparkly. It  
9 will be a smoother -- a smoother version.

10 Trooper Austin also indicated any of the  
11 text that he's placed into this animation can  
12 obviously be deleted, should that be necessary.  
13 And as I mentioned to the Court, this was brought  
14 in lieu of any jury view or scenes.

15 (Watching the animation).

16 ATTORNEY KRATZ: The record should then  
17 reflect, your Honor, that the scene overview has  
18 concluded. The Court has been instructed that the  
19 anthropologist in this case will be testifying as  
20 to -- excuse me -- as to some cranial defects which  
21 she and the pathologist describe to the jury as  
22 entrance wounds.

23 The location of those will be obviously  
24 of interest from this animation that I'm showing,  
25 although created by Mr. Austin, was under the

1           immediate direction of Anthropologist Leslie  
2           Eisenberg.  It's about 30 seconds long, Judge.  
3           And, again, the theory of its admissibility and  
4           underlying modeling technique will be described  
5           for the Court, as mentioned, before beginning  
6           this part of our presentation.  I will be  
7           providing the Court with copies therefrom, as  
8           well as additional testimony from Mr. Austin at  
9           the time of the submission of these trial  
10          exhibits.  With that, Judge, the State is happy  
11          to move on to our next matter on the agenda.

12                    THE COURT:  Mr. Strang, is there anything  
13                    you wanted to add before we move on?

14                    ATTORNEY STRANG:  Only that I note two  
15                    things for the Court's consideration.  One, as to  
16                    neither of these, apparently, do we still have the  
17                    final version, the version the State proposes to use  
18                    at trial.  And two, as to the cranial defects  
19                    animation at least, this would also be true of the  
20                    other skeletal representations when one reads  
21                    Trooper Austin's report closely, these are, in fact,  
22                    reports of Leslie Eisenberg.  And they are well past  
23                    untimely under the Court's October 19, 2006  
24                    scheduling order for disclosure of expert witness  
25                    reports.

1 THE COURT: All right. Anything else on  
2 that today?

3 ATTORNEY KRATZ: Not for today, thank you,  
4 Judge.

5 THE COURT: Next, we'll move on then to the  
6 defendant's motion to preclude expert witness  
7 testimony and compel disclosure of potentially  
8 exculpatory evidence. Mr. Buting, is that yours?

9 ATTORNEY BUTING: Yes, Judge. Did the  
10 Court get a copy of that one?

11 THE COURT: I do.

12 ATTORNEY BUTING: Unfortunately, I can't  
13 find mine. Did I take it back?

14 THE COURT: You gave it to me earlier, but  
15 I think I gave it back to you.

16 ATTORNEY BUTING: I have a copy.

17 THE COURT: Well, I take it back, I have  
18 got the original here. I don't know if this is the  
19 one that's supposed to go to the Clerk of Court's.  
20 Do you have one?

21 THE CLERK: No.

22 ATTORNEY BUTING: Judge, I attached two  
23 exhibits to it. The State has complained that  
24 defense wasn't specific enough with their reports,  
25 and I attached these two reports to show you, at

1 least with regard to these two FBI reports, these  
2 are incredibly sketchy. There's two different ones.

3 The first one, Exhibit 1, is very  
4 recent, dated January 12th. Actually, we just  
5 received it, I believe, on the 29th of January.  
6 Again, way past the expert witness disclosure  
7 deadline, so two days ago we get this report.  
8 And it talks about three different shipments of  
9 specimens received. Are you at the right -- Are  
10 you on Exhibit 1?

11 THE COURT: Yes.

12 ATTORNEY BUTING: November 8, 14th and  
13 December 27th. It labels them as just -- gives them  
14 two identification numbers, but there's nothing to  
15 tell us what they are, other than bone fragments.  
16 There's bone fragments -- there's 1, 2, 3, 4, and  
17 then 31 in another shipment. They identify these as  
18 Q-11, Q-12, and so on up to Q-45. But these reports  
19 tell us nothing about what they are, where they came  
20 from, whether they came from the burn pit, whether  
21 they came from one or more burn barrels, whether  
22 they came from a completely different location, a  
23 quarry, or what, or whether even they are human.

24 So this report tells us nothing, really,  
25 other than to say that we can't do any

1 mitochondrial DNA from it. So that's the first  
2 concern.

3 Second concern is, the very last  
4 paragraph says, if you turn to that second page,  
5 it says that, the processed DNA generated from  
6 these samples is being returned to the Crime Lab.  
7 Well, if they processed these items for DNA, they  
8 must have some results, and these results are not  
9 being turned over. So we don't know whether they  
10 are exculpatory or not at this point. But  
11 obviously some testing was done, if it wasn't  
12 mitochondrial, what was it, and where are those  
13 results? Okay.

14 THE COURT: Okay.

15 ATTORNEY BUTING: All right. So those are  
16 the two concerns with regard to that particular one.  
17 And I also noted that attached is Exhibit 2, is  
18 actually the earlier report from this particular DNA  
19 Unit of the FBI. And you will see that it lists  
20 item Q-1 as charred remains, but that's it. That's  
21 all we received from this unit.

22 So there is a gap missing between items  
23 Q-2 and Q-10, apparently another nine items have  
24 been tested by the FBI, this unit, and we have  
25 never received any results. Are they



1           exculpatory? Are they inconclusive? We don't  
2           know, except it's obvious that they are done and  
3           we haven't been -- those reports weren't turned  
4           over along with the other reports of the experts.  
5           So if this expert is going to testify then,  
6           obviously, we would need to know the results of  
7           all of his tests, not just selected ones.

8                        So, again, if they have done tests on  
9           the 35, whatever it is, bone fragments, most  
10          recently, and gotten something that's not  
11          exculpatory, then it's -- I'm sorry -- that's not  
12          inculpatory, then it is exculpatory, by  
13          definition, to us.

14                       Same thing here, if those items Q-2 to  
15          Q-10 were tested and nothing inculpatory was  
16          found then, again, in this case, by definition,  
17          they are exculpatory and should have been turned  
18          over. And then, finally, on that particular  
19          report, Exhibit 2, the only finding that's given  
20          is that Teresa Halbach cannot be excluded -- this  
21          is on the second page -- cannot be excluded as  
22          the source of the Q-1 charred remains.

23                       But then it goes on and it lists some  
24          data base, but there is no opinion provided about  
25          what that data base is, what the relevance is,

1           whether it matters.  There's no further opinions,  
2           or conclusions, or findings drawn from that.  So  
3           again, I mean both of these reports are very  
4           cryptic, far more cryptic than anything we have  
5           turned over that the Court found was not  
6           sufficient compliance with the statutory  
7           obligation of turning over findings, summary of  
8           testimony, and what not of experts.  So for that  
9           reason, these should either be excluded or the  
10          State should file amended ones that do satisfy  
11          the statute and, further, they should turn over  
12          immediately the potential exculpatory results.  
13          Thank you.

14                    THE COURT:  All right.  Mr. Fallon, are  
15          you --

16                    ATTORNEY FALLON:  Thank you.

17                    THE COURT:  -- handling this?

18                    ATTORNEY FALLON:  Yes.  Well, once again,  
19          I'm here arguing to the Court that just because  
20          counsel chooses to label something exculpatory,  
21          doesn't make it so.  I wish the world were as simple  
22          as counsel would suggest, that if it's not  
23          inculpatory it must be exculpatory, or vice versa.

24                    With respect to the reports, let's take  
25          Exhibit No. 1 first.  Exhibit No. 1, I find

1           rather interesting because it is a report  
2           prepared by FBI Analyst Douglas Hares or --  
3           excuse me -- I'm taking them in reverse order,  
4           Exhibit No. 2, a report by Douglas Hares.

5                       The report is dated January 17th, 2006.  
6           And only now is there apparently a question  
7           regarding the sufficiency of that report. In  
8           answer to that, I would offer this information to  
9           the Court, and counsel is certainly aware of it.  
10          Quite some time ago the entire protocol of the  
11          FBI, with respect to this analysis, was provided  
12          to the defense. A CD with the data generated,  
13          during the course of the analysis, has been  
14          provided, much like the genotype or geno scan  
15          information which was turned over pursuant to the  
16          Wisconsin Crime Laboratory's DNA analytical  
17          procedures and protocols and data generated.

18                      Finally, we have the report itself of  
19          Mr. Hares. And I think, simply answered, it is  
20          what it is, that Teresa Halbach cannot be  
21          excluded. It uses the counting method, which is  
22          pretty much accepted in all laboratories. And  
23          it's rather interesting to hear a concern about  
24          the counting method, which is usually offered by  
25          the defense as a means to supposedly undermine,

1 for whatever reason in their minds, the  
2 significance of the results or the findings  
3 there.

4 The report has been provided. All of  
5 the underlying data has been provided. And the  
6 opinions that will be rendered by Mr. Hares are  
7 contained in the exhibit. That's it. There --  
8 As I say, there ain't no more. It is what it is.  
9 Those are the only opinions, if in fact we even  
10 have an opinion, offered by Mr. Hares with  
11 respect to the statistical counting.

12 THE COURT: Let me stop you there. There's  
13 a sentence in Mr. Buting's brief, on Page 4, that  
14 says, Mr. Avery, this moves the Court to prevent any  
15 testimony from the DNA analyst and Exhibit 2,  
16 Douglas Hares, other than his opinion that Teresa  
17 Halbach cannot be excluded as a source of the  
18 charred remains. I take it that at least to the  
19 extent Mr. Hares would testify about this report,  
20 you are telling me that's exactly right.

21 ATTORNEY FALLON: His report is what it is.

22 THE COURT: Okay.

23 ATTORNEY BUTING: And that's all -- that's  
24 the only opinion that would be rendered from this  
25 report? See that's what's not clear. If that's all

1           this Douglas Hares is going to say, fine.

2                    ATTORNEY FALLON:  In my discussions with  
3           co-counsel, Mr. Gahn, that's my understanding.  I  
4           mean, if that should somehow change in the next 24  
5           hours, I would be happy to let Court and counsel  
6           know.  But as Mr. Gahn advised me, the opinions  
7           expressed in the report are the opinions which are  
8           going to be offered.

9                    THE COURT:  All right.

10                   ATTORNEY FALLON:  And as I said, they have  
11           all the data.  And here it is a year and two weeks  
12           after the report was generated and it's probably 10  
13           months since provided in discovery.

14                    With respect to the other exhibit, this  
15           one I can speak to with even greater detail and  
16           surety.  I have had discussions with the analyst  
17           here, Mr. Les McCurdy, and I guess I would  
18           preface my remarks here by indicating that  
19           Mr. McCurdy's findings are already reflected in  
20           Dr. Leslie Eisenberg's report, which has been  
21           provided to the defense.

22                    For whatever reason, the FBI was late in  
23           providing their written report of the oral  
24           findings that they already provided to  
25           Dr. Eisenberg.  But, nonetheless, I did ask

1 Mr. McCurdy about the language that counsel finds  
2 so troubling. And I learned that the last  
3 paragraph, which begins on Page two, the  
4 submitted items will be returned under separate  
5 cover etcetera, is language that is apparently  
6 standard language in all FBI reports, regardless  
7 of whether DNA is generated or not.

8 I would direct the Court's attention to  
9 the preceding paragraph. It says, due to the  
10 condition of the submitted bone fragments, no  
11 mitochondrial DNA examinations were conducted. I  
12 verified that with Mr. McCurdy on the phone, both  
13 yesterday and this morning.

14 Knowing that counsel has had problems  
15 and has been doubtful of representations that the  
16 State made in the past, I asked him, would you  
17 provide an amended report further explaining that  
18 no DNA extractions were occurred. And he did, in  
19 fact, provide us with an amended report, taking  
20 care of that, and I provided two copies to the  
21 defense.

22 No DNA was extracted from those bones,  
23 because it wasn't possible. Their condition had  
24 deteriorated as a result of the fire, to such a  
25 degree that DNA could not be extracted.

1                   And, finally, I'm troubled by, again,  
2                   the insinuation and representations that we must  
3                   be hiding things. So, for counsel's benefit,  
4                   because we don't have to do this, but in the  
5                   interest of providing the information and getting  
6                   this trial going, I will offer this information  
7                   to counsel.

8                   The FBI uses the letter Q, capital Q,  
9                   designation for items submitted, and we have  
10                  items 1 through 45. Items 1 and 2, were Calumet  
11                  Sheriff's tag numbers 7926 and 7927. Q-3, which  
12                  counsel finds mysterious, and I would only  
13                  suggest that he review previous discovery, was  
14                  the Sure Shot Camera. Q designation 4 through 10  
15                  were the cell phone parts. Q-11 and 12 was Item  
16                  No. 9597, cranial pieces from the burn pit behind  
17                  the defendant's garage. And I believe -- and I'm  
18                  not sure of the circumstances, but it was  
19                  originally tagged 8318.

20                  ATTORNEY BUTING: Which one was that, I'm  
21                  sorry?

22                  ATTORNEY FALLON: Q-11 and 12. Q-13  
23                  through 38 were items in 7964, from Burn Barrel 2.  
24                  Items Q-39 through 45 were designated Items 8675.  
25                  And we believe that's referred to in many places in

1 the discovery as the Radandt debris pile. So I  
2 think that clears up the information which is -- all  
3 has been provided, and examined, and discussed at  
4 length.

5 So I'm at a loss, quite frankly, to  
6 explain further the purpose of this motion. I  
7 think we have resolved, I think to all  
8 satisfaction, what the circumstances here. So  
9 without any further comment I will rest.

10 ATTORNEY BUTING: Judge, one last matter is  
11 still not clear. On Page 3 of my motion, I point  
12 out, it is not clear whether any of these items that  
13 were sent to the FBI have been determined to be  
14 human or not. Because there's many, many non-human  
15 bones that were in these barrels, pits, and  
16 everything else. So I don't know if counsel knows  
17 that, but this report, one of my concerns is the  
18 report doesn't say that. We don't know whether  
19 these are human or not human, in fact, until he told  
20 me today what these were, the report wouldn't tell  
21 you that. So that's still an additional concern.

22 THE COURT: You are referring now to the --

23 ATTORNEY BUTING: Exhibit 1 that has items  
24 Q-11 through Q-45.

25 THE COURT: Mr. Fallon, is that information



1 provided anywhere in submittals?

2 ATTORNEY FALLON: Can't be identified,  
3 that's the whole idea. There was an attempt at  
4 mitochondrial DNA, or any DNA for that matter. They  
5 are still suspected possible.

6 THE COURT: Q-11, 12, 13, 14, through  
7 Q-14.8 and Q-15 through 45, none of those were able  
8 to be identified.

9 ATTORNEY FALLON: That wasn't the question  
10 counsel asked. Counsel asked on items I believe 13  
11 through 45. I believe the other items have been  
12 identified.

13 THE COURT: Okay.

14 ATTORNEY BUTING: Well, the simple question  
15 is, Q-11 and Q-12, if those have been identified as  
16 the cranial; is that what you are saying?

17 ATTORNEY FALLON: Those are cranial pieces.

18 ATTORNEY BUTING: Okay. So those have been  
19 identified as human. But as to the others, for  
20 instance, Q-39 through 45, labeled as Radandt debris  
21 pile, simple question is, were those human or were  
22 they not?

23 ATTORNEY FALLON: You know what we know?

24 ATTORNEY BUTING: Well, what opinion will  
25 be expressed by an expert?

1                   ATTORNEY FALLON: Well, the opinions are  
2 set forth in the laboratory reports from the FBI  
3 analyst that mitochondrial DNA was not possible to  
4 determine that. And Dr. Eisenberg has already  
5 indicated in her reports, suspected or possible, and  
6 the question is, is that even admissible. But  
7 that's for another day.

8                   ATTORNEY BUTING: That's fine. So these  
9 experts will not render any opinion on that; is that  
10 right?

11                   ATTORNEY FALLON: As I understand it. I'm  
12 confirming that with Dr. Eisenberg.

13                   THE COURT: There was a reference on Page 5  
14 of Mr. Buting's brief to other experts for whom he  
15 indicates the defense has not received reports, Carl  
16 Adrian, Eric Smith and Robin Cotton. Are those --  
17 As I understand it, those are witnesses that the  
18 State named, but no reports were provided?

19                   ATTORNEY BUTING: Correct. Judge, I -- the  
20 Carl Adrian one I believe is -- he is the one who  
21 did a similar kind of recreate laser measurements of  
22 the RAV 4, if I stand corrected. Am I right,  
23 counsel?

24                   ATTORNEY FALLON: Yes.

25                   ATTORNEY BUTING: And as to that, we have

1 still not seen any reports. Eric Smith, I'm not  
2 sure who he is, what his report is. Robin Cotton, I  
3 know who she is and I have definitely not received  
4 any report from her. She's in Boston, a former DNA  
5 expert at Cellmark. So if they have gotten -- if  
6 they are intending to put in another DNA expert,  
7 there have been zero reports from her.

8 THE COURT: Mr. Fallon.

9 ATTORNEY FALLON: With respect to Robin  
10 Cotton, I guess counsel should consider himself  
11 fortunate that he has one potential rebuttal  
12 witness. Mr. Gahn has not advised me as to whether  
13 or not she will be appearing and/or whether she's  
14 even written a report relative to this particular  
15 case.

16 THE COURT: And Mr. Adrian and Mr. Smith?

17 ATTORNEY FALLON: Mr. Adrian is, as  
18 represented, he's an analyst who put together a  
19 computer generated animation of the SUV. I will let  
20 Mr. Kratz speak to that. He's more familiar with  
21 Mr. Adrian.

22 ATTORNEY KRATZ: I'm sorry, Judge, Mr.  
23 Adrian -- the Court has already received the SUV  
24 animation in anticipation of that. Defense counsel  
25 received a disc of all the measurements that were

1           created from Mr. Adrian's work product. There is no  
2           report, other than the item itself, that is, the  
3           computer animation itself.

4                    ATTORNEY FALLON: I would have to check,  
5           that was the one thing that I ran out of time trying  
6           to run down, but I believe the last gentleman, may  
7           very well be simply one of the many agents from the  
8           FBI who may have had a hand in the chain of  
9           evidence.

10                   Counsel has reminded me that Mr. Smith  
11           is the tool mark analyst at the FBI. We're not  
12           planning on calling him.

13                   ATTORNEY BUTING: Are not?

14                   ATTORNEY FALLON: Are not.

15                   ATTORNEY BUTING: Well, as to Mr. Adrian  
16           then, if he has no report, and I guess the summary  
17           of his testimony would be the animation that is  
18           being offered to -- as a substitute. Certainly,  
19           there's nothing like that for Robin Cotton. So,  
20           we're way past the deadline and I would move the  
21           Court to exclude any testimony from Robin Cotton.

22                   THE COURT: I understood the State to be  
23           saying they would not be offering any testimony from  
24           her in their case-in-chief.

25                   ATTORNEY FALLON: That's my understanding.

1 THE COURT: I also understand the State to  
2 be reserving the right to introduce her in rebuttal  
3 under *Konkol*.

4 ATTORNEY FALLON: Correct.

5 ATTORNEY BUTING: So she will not be  
6 allowed to testify in the State's case-in-chief.

7 THE COURT: In the case-in-chief, right.  
8 Mr. Buting, does that address the concerns that you  
9 have raised in that motion?

10 ATTORNEY BUTING: I believe so.

11 THE COURT: I'm not sure if you require an  
12 order, but if you wish an order to -- reduced to  
13 writing, the indications that the State made, you  
14 may do so and submit it to Mr. Fallon for his  
15 approval, and you can submit it to the Court for  
16 signature.

17 All right. The next item is from the  
18 defendant's motion to dismiss of last week. The  
19 Court addressed the three counts. The State  
20 moved to dismiss two of them. The Court denied  
21 the defense motion to dismiss the third. But,  
22 Mr. Strang, I believe there was another portion  
23 of that motion which you wish to bring up again.

24 ATTORNEY STRANG: Right. This is -- This  
25 is an issue that I have raised in several different

1 forms or settings since the spring of 2006. And at  
2 its core, or germ, are the March 1 and March 2, 2006  
3 news conferences that the State conducted laying out  
4 on March 1 the purported statements of, at that  
5 point, an unnamed relative of Steven Avery in a live  
6 televised news conference format. The Court has the  
7 DVD of that news conference and I think has viewed  
8 it.

9 And then the following day, March 2, and  
10 this is the news conference that was preceded by  
11 the warning of its graphic content and urging  
12 that young people under a certain age, and  
13 friends and relatives of Ms Halbach not watch,  
14 because of the graphic content. And in that news  
15 conference the State identified Brendan Dassey  
16 and gave a very gripping narrative, chilling and  
17 horrifying narrative, of what the State imagined  
18 to have occurred at the Avery property, based on  
19 what was then Brendan Dassey's purported version  
20 of events.

21 The March 10 Amended Information  
22 followed directly from Mr. Dassey's version at  
23 the time, and the version laid out on March 1 and  
24 March 2, 2006. Mr. Dassey himself disavowed that  
25 version in large part not later than May 13,

1           2006. The physical evidence disproved most of  
2           the gory details that the State presented on  
3           March 1 and March 2, in particular.

4                     But in the public mind, we have had 10  
5           months of seepage of those details. Ten months  
6           of the public believing that Steven Avery is an  
7           alleged rapist in this case, and alleged to have  
8           kidnapped Teresa Halbach in addition to murdering  
9           her.

10                    And the fruit that that 10 months and  
11           that those two press conferences have born, is  
12           there for all to see in the 144, something fewer  
13           than that, jury questionnaires, where time and  
14           again jurors are telling us that their opinions,  
15           many of them unalterable, according to the jurors  
16           -- prospective jurors reports, are traceable, not  
17           just to publicity, but many of these prospective  
18           jurors say -- cite in particular Brendan Dassey's  
19           supposed confession, and the power of it,  
20           although inadmissible, the power of it in the lay  
21           mind, as to Mr. Avery.

22                    The questionnaires now are, of course,  
23           are a part of the court record. Court, I assume,  
24           has reviewed those, as have I. At least one  
25           prospective juror specifically cites Mr. Kratz's

1 statements about Brendan Dassey's confession, as  
2 the source of her opinions.

3 And, you know, I don't remember now what  
4 language the juror used in response to question  
5 43, or question 69, question 74, and just how  
6 unalterable that opinion was. But that, again,  
7 is now a matter in the Court's record that could  
8 be reviewed if necessary.

9 There may have been more than one juror.  
10 I read these questionnaires very quickly because  
11 of the work that all of us have confronted this  
12 week as we prepare for trial on Monday. The  
13 presumption of innocence has been lost here. And  
14 it happened -- that -- that dissipation happened,  
15 I think, about March 1, March 2, or as a result  
16 of those comments.

17 And now 10 months later, of course,  
18 Mr. Avery is not facing a rape charge at all, not  
19 facing a kidnapping charge, the State has elected  
20 to go forward on a false imprisonment charge that  
21 I think cannot make it to a jury, unless there's  
22 evidence that the State has, of which I'm unaware  
23 through the discovery process, and I have posed  
24 that problem in my motion to dismiss the false  
25 imprisonment count and the other two counts.



1                   And I have expressed it here in court,  
2                   the risk we will run if the State, in fact, has  
3                   insufficient evidence of false imprisonment here,  
4                   in the context of the highly inflammatory, highly  
5                   prejudicial news conferences, together, running  
6                   on March 1 and March 2 alone, setting aside the  
7                   other six televised news conferences, just those  
8                   two together running to 56 minutes or more,  
9                   followed by the 10 months of the drumbeat in the  
10                  media on this case, reiterating the State's  
11                  allegations.

12                  So dismissing those two counts isn't  
13                  enough. Dismissing the third, false imprisonment  
14                  count, isn't enough here to restore the  
15                  presumption of innocence to which Mr. Avery  
16                  constitutionally is entitled. The Court needs to  
17                  do something more. And the jury questionnaires  
18                  that we have now reviewed bear that out.

19                  I will make a further record, I'm sure,  
20                  on Monday, in moving to strike for cause a number  
21                  of additional jurors -- I'm sorry -- prospective  
22                  jurors, people who filled out jury questionnaires,  
23                  on which the State and the defense did not agree  
24                  that there was cause to strike. I will move to  
25                  strike a number of additional jurors as having

1 unalterable opinions and, therefore, not being  
2 fit for service as a juror in this case.

3 But I would like to see this Court take  
4 some firm action to try to save at least 30  
5 members of this panel, if they can be saved, as  
6 appropriate, open-minded, potential jurors who  
7 are willing to follow the Court's instructions  
8 and, indeed, the constitutional rules of criminal  
9 procedure in this country.

10 The Court is going to have to do  
11 something to restore that presumption of  
12 innocence. I suggested a curative instruction.  
13 I laid it out. There is no particular magic to  
14 my language, but it would have to be a strong  
15 instruction, and more than once repeated, just as  
16 the message about Brendan Dassey's accusation  
17 against Steven Avery has been more than once  
18 repeated. And the message about the first degree  
19 sexual assault charge and the kidnapping charge  
20 have been more than once repeated.

21 The Court faces -- I realize the Court  
22 can't give a counteracting instruction as many  
23 times or as powerfully as the initial message was  
24 heard. But the Court has got to try, here, to  
25 erase that prejudicial effect of the last 10

1 months, now confirmed in its unfairness by the  
2 fact that the State did not commit to calling  
3 Brendan Dassey by the deadline that we had agreed  
4 and the Court had set, may not and is not going  
5 forward on two of the charges that are brought,  
6 on March 10, 2006.

7 Lest there be any question at all about  
8 the power of those accusations, now dismissed,  
9 and at their time, resting only on the  
10 inadmissible claims of Brendan Dassey, lest there  
11 be any question about the power of those at all,  
12 this Court, an experienced judge, a skilled  
13 lawyer for many years before that, this Court was  
14 moved by those allegations to say that \$500,000  
15 bail for this man is not enough, and that there  
16 is a stronger case against him now, greater  
17 incentive to flee, or to fear conviction, and  
18 increased the bail, as I recall, by \$250,000 to  
19 \$750,000 citing the new charges in the Amended  
20 Information, that at the time I believed rested  
21 only on the inadmissible claims of Brendan  
22 Dassey, and the time now has confirmed the State  
23 cannot corroborate and cannot advance to a jury  
24 even in opening statement, unless it commits to  
25 call Brendan Dassey. And that's why at least two

1 of those counts have been dismissed.

2 When those kinds of accusations and  
3 those new charges, move a Court to raise by  
4 50 percent an accused's bail, I have a pretty  
5 good sense of what they do in the lay mind, among  
6 this jury pool, in terms of persuading that jury  
7 pool that the case looks much stronger against  
8 Mr. Avery than, in fact, it turned out to be.

9 But that's what we're up against. And  
10 I'm asking this Court to take strong curative  
11 action, whether it's my instruction, or one of  
12 the Court's own writing, or some other curative  
13 step designed to restore to Mr. Avery the  
14 presumption of innocence that due process and a  
15 fair trial require.

16 THE COURT: Who will be addressing this  
17 matter for the State?

18 ATTORNEY KRATZ: I will, Judge.

19 THE COURT: Mr. Kratz.

20 ATTORNEY KRATZ: I am quite certain that  
21 Mr. Strang does not want to enter into a debate at  
22 this time as to the relative strength of the State's  
23 case. I would argue with Mr. Strang and his  
24 conclusion that the State does not have as strong a  
25 case now as it did on March 1st. Obviously, the

1 State believes it has a much stronger case now than  
2 it did on March 1st, given the physical evidence  
3 that's been detailed.

4 And we have become familiar with, that  
5 not withstanding, Judge, that the jurors who have  
6 been unable, for whatever reason, to presume  
7 Mr. Avery innocent, or the jurors who have  
8 indicated to this Court an unwillingness to  
9 follow instructions, have already been stricken.  
10 We'll be making a record of that on Monday.

11 But as far as the risk of jurors who  
12 cannot follow instructions, or who have some  
13 preconceived notion, that's already taken into  
14 account in the jury process. And that's not  
15 unique to the Avery case, that is a process that  
16 this Court engages in each and every time we try  
17 to pick a fair and impartial jury.

18 Mr. Strang's suggestion of some curative  
19 instruction necessarily requires this Court to  
20 place some blame upon the State; that is, that  
21 there was some unfair publicity in this case. I  
22 will remind the Court that that very motion was  
23 brought by Mr. Strang many, many months ago.

24 This court made specific findings that  
25 the State did not engage in any behavior that

1 violated Supreme Court Rule 20:3.6, that the  
2 State, through its comments, that this Court, I  
3 believe made findings, included invited response  
4 and other reasons for those comments, did not  
5 preclude, and do not preclude, the defendant of a  
6 fair trial. And so, to suggest at this point,  
7 that even after making those findings months and  
8 months ago, that the defense is now somehow  
9 entitled to some damning instruction, some  
10 instruction that suggests that the State's  
11 behavior, or the State's comments in this case  
12 were improper, is just not warranted.

13 This Court has cautioned counsel, that  
14 is, counsel for the State and counsel for the  
15 defense, as to extra judicial comments. And to  
16 my knowledge one party has abided by that; that  
17 is the State, that since March 2nd, no extra  
18 judicial statements of any significance have been  
19 made in this case. I can't say that for  
20 Mr. Buting or for the defense, but the State has  
21 certainly abided by this Court's admonition.

22 Let me also suggest, Judge, that to  
23 engage, or to go down this road of curative  
24 instructions, would necessitate the Court  
25 explaining the nuance of use immunity and the

1 reasons why a prosecutor may decide what charges  
2 to go forward with, or what charges to not go  
3 forward with. Mr. Dassey's inconsistent  
4 statements, again, are hardly unique to a  
5 criminal defendant like Mr. Dassey, but certainly  
6 are not of the substance that some curative  
7 instruction is made of.

8 Let me close, Judge, in saying that, as  
9 I argued earlier this week, the State could have  
10 proceeded on the rape and kidnapping charges.  
11 The fact that we have chosen not to, the fact  
12 that we have chosen to either save Mr. Dassey  
13 for, if not case-in-chief, a rebuttal witness,  
14 and the conference of use immunity is solely  
15 within the province of the State, not something  
16 that the Court or the defense has any say so in.  
17 And with that having been said, any curative  
18 instruction is improper, would prejudice the  
19 State, would ask the Court reject that  
20 possibility. Thank you, Judge.

21 THE COURT: Anything else, Mr. Strang?

22 ATTORNEY STRANG: Well, the notion that the  
23 State ending its extra judicial comments after  
24 March 2nd solves the problem is a little bit like  
25 the away team in a baseball game saying, well, I had

1 my at bats in the top of the first, I hit a home  
2 run, and now the remedy is not to allow the home  
3 team to come to the plate in the bottom of the first  
4 and not to play the rest of the innings.

5 We, in fact, haven't given a single news  
6 conference, or called people to our office, or  
7 set of up a bank of microphones, or given a  
8 warning about graphic content, let alone given  
9 eight news conferences. And, functionally, we  
10 have been unable to reclaim the presumption of  
11 innocence here. And the Court need only look at  
12 the jury questionnaires we have to see just  
13 exactly which side here has had its impact on  
14 public opinion before this case gets tried.

15 THE COURT: All right. The parties will  
16 have an opportunity in individual voir dire to  
17 further explore what opinions the jurors have, what  
18 they may have seen or heard, what they come into  
19 this case with. The Court will listen to the  
20 comments of the jurors during voir dire.

21 And if I feel a need to address anything  
22 in the form of an instruction to the jury, the  
23 Court generally at the start of the trial gives  
24 the jurors some preliminary instructions,  
25 including information on the substantive charges.



1           And I will make my ruling on the motion  
2           explicitly, or implicitly, at that time, with the  
3           instructions to the jurors.

4                     The next item is a motion from the  
5           defense regarding courtroom security. Mr.  
6           Strang.

7                     ATTORNEY STRANG: I think we were also  
8           going to address the second motion in limine.

9                     THE COURT: Oh, I'm sorry, you're right, I  
10          passed over that one, that was the next one.

11                    ATTORNEY STRANG: But that turns out, I  
12          think, to be fairly easy. After some conversations  
13          with Mr. Kratz, I'm satisfied that I now can  
14          reconstruct the information I was seeking as to the  
15          first part of that motion in limine.

16                    And as the second part, concerning some  
17          converted telephone calls, I will simply make a  
18          record of what I think we discussed in chambers,  
19          or my recollection of what we discussed in  
20          chambers is that the State is working on some  
21          conversions. I know what it means by conversion  
22          now.

23                    When it has those done, it will offer to  
24          the defense the opportunity to see the closed  
25          captioning, so to speak, for the realtime

1 transcription that it proposes to offer as to  
2 some recordings. We'll have a chance, I assume,  
3 to assure ourselves that the recordings  
4 themselves were not altered or redacted in a way  
5 that would make them less than complete, and that  
6 the transcription is accurate.

7 And I also understand from our  
8 discussion in chambers that I should not expect  
9 any objection from the State, or any resistance  
10 from the Court, to giving an appropriate jury  
11 instruction on transcripts being aids to  
12 understanding evidence, but not evidence in  
13 themselves, that the recordings themselves are  
14 the evidence.

15 So, if I understood our conversation  
16 about part two of my second motion in limine  
17 correctly, then at this point the Court simply  
18 can hold the issue in abeyance.

19 THE COURT: All right. Maybe I missed it,  
20 the \*67 issue. Do I understand --

21 ATTORNEY STRANG: That's part one. And I  
22 think we're squared away on that.

23 THE COURT: Okay. All right. At this time  
24 the Court will move on then to the defendant's  
25 motion concerning courtroom security. Mr. Strang.

1                   ATTORNEY STRANG: Yes, your Honor, the  
2 State hasn't responded, but I have been provided by  
3 the Court, and I think counsel for the State have as  
4 well, the January 28, 2007 letter from Sheriff Jerry  
5 Pagel of Calumet County. And I guess the inference  
6 I draw from Sheriff Pagel's letter is that he  
7 believes that security measures at trial ought  
8 include what I have called a stun belt. I guess  
9 Sheriff Pagel uses the same term in his letter.

10                   So, as I understand it here, it falls to  
11 the Court to decide whether there's manifest  
12 necessity for such a security measure. And the  
13 case law is pretty thin in Wisconsin, although  
14 there is some, not on this particular restraint,  
15 there's a good deal of case law both in other  
16 states and in federal courts around the country.

17                   And I have provided the Court a  
18 smattering of it, not -- I couldn't possibly  
19 provide all of it. I have relied in particular  
20 here on the neighboring state of Illinois, both  
21 because of the recency of the Illinois Supreme  
22 Court's decision on this type of restraint and  
23 because its detail and usefulness of the factors  
24 it suggests trial courts take into consideration.

25                   But the burden either rests on the

1 Court, or on the State, to justify such a  
2 restraint as necessary and consistent with the  
3 defendant's Sixth and Fourteenth Amendment rights  
4 to a fair trial, the assistance of counsel,  
5 confrontation, and to testify in his own defense,  
6 if he chooses. The burden, I'm sure, does not  
7 rest on the defense here, and that's between the  
8 Court and the State. I'm not sure exactly where  
9 it does rest. But there would have to be an  
10 evidentiary providing, I think, and some findings  
11 by the Court, on necessity, if the Court is  
12 considering deferring to Sheriff Pagel's apparent  
13 wishes.

14 THE COURT: Anything further, Mr. Strang?

15 ATTORNEY STRANG: Not at the moment, I  
16 guess.

17 THE COURT: Okay. This, as Mr. Strang  
18 indicated, it's -- this issue is not necessarily a  
19 prosecution versus defense type motion. It's a  
20 matter for the Court to determine, based on  
21 considerations for courtroom security, but does the  
22 State wish to be heard?

23 ATTORNEY KRATZ: Yes, very briefly, Judge.  
24 The State echos the Court's feeling that this is not  
25 a prosecution issue. I do have a personal opinion

1 as the person who would be seated 5 feet from  
2 Mr. Avery during this trial, as to whether some  
3 security is necessary.

4 But from the prosecution's standpoint,  
5 the only comment we have as to Mr. Strang's  
6 suggestions that this raises to a due process  
7 right, is how does the defendant wearing a stun  
8 belt a fact -- affect, excuse me, his ability to  
9 participate, how does it affect his ability to  
10 speak with his attorney, or in any other way to  
11 participate in the proceedings?

12 This is a security issue. I don't tell  
13 the sheriff how to run his jail, or how to do  
14 courtroom security, and we have got a deal that  
15 he doesn't tell me how to run my office, at least  
16 not very often. So, with that having been said,  
17 Judge, we'll leave it to the Court and to Sheriff  
18 Pagel as to a decision on the courtroom security  
19 issues. Thank you.

20 THE COURT: All right. I have the letter  
21 from Sheriff Pagel in front of me. I'm not sure,  
22 Mr. Strang, if the defense is in agreement with the  
23 Court making its decision based on the reasons given  
24 by Sheriff Pagel for his request, or whether you  
25 wish to question Sheriff Pagel.

1                   ATTORNEY STRANG: I am not in agreement  
2 with that. Because at a minimum some of these  
3 issues would need elaboration. The letter's a  
4 helpful starting point and, indeed, in my motion I  
5 have conceded that these are serious crimes.  
6 There's no gainsaying that. It is the most serious  
7 crime with which one can be charged in the State of  
8 Wisconsin, so that -- that -- you know, that factor  
9 weighs in favor of restraint, standing by itself.  
10 Some of these others, as I say, at a minimum would  
11 need evidentiary development.

12                   THE COURT: Do you wish to question Sheriff  
13 Pagel?

14                   ATTORNEY STRANG: Yes, by doing so I'm not  
15 taking on a burden, I gather?

16                   THE COURT: No, you are providing  
17 information to the Court to assist the Court in  
18 making its decision.

19                   ATTORNEY STRANG: Very well, I'm happy to  
20 do that.

21                   THE COURT: All right. Sheriff Pagel.

22                   **SHERIFF GERALD PAGEL**, called as a  
23 witness herein, having been first duly sworn, was  
24 examined and testified as follows:

25                   THE CLERK: Please be seated. Please state

1           your name and spell your last name for the record.

2                       THE WITNESS: Gerald Pagel, P-a-g-e-l.

3                               **DIRECT EXAMINATION**

4 BY ATTORNEY STRANG:

5 Q.    Just as a matter of background here, we all know  
6        the answers to the questions I'm going to ask,  
7        preliminarily, but someone else reading the  
8        transcript later may not.  Quickly, you have been  
9        the Calumet County Sheriff for some time, and at  
10       all times since November 5, 2005 through today?

11 A.    That is correct.

12 Q.    You are responsible both practically and  
13        statutorily for administration of the Calumet  
14        County Jail?

15 A.    That's correct.

16 Q.    Mr. Avery has been detained in the Calumet County  
17        Jail since November 9, 2005?

18 A.    That is correct.

19 Q.    Continuously?

20 A.    Yes.

21 Q.    So you have been his keeper, in effect, here as a  
22        pre-trial detainee?

23 A.    Yes.

24 Q.    He hasn't been serving any sentence or on any  
25        probation or parole hold, during that time, to

1           your knowledge?

2       A.    That is correct.

3       Q.    You have overall operational responsibility for  
4           the Calumet County Jail?

5       A.    Yes.

6       Q.    But as a practical matter you get information  
7           from officers whose immediate job  
8           responsibilities are the jail and the jail only?

9       A.    That would be correct.

10      Q.    And the person we might describe as most directly  
11           or most immediately in charge of the jail over in  
12           Chilton is -- Is it Captain or Lieutenant Byrnes?

13      A.    Lieutenant Byrnes.

14      Q.    Am I right about his direct responsibility?

15      A.    That would be correct.

16      Q.    Okay.  And then there is a Sergeant Hemauer who  
17           reports to Lieutenant Byrnes?

18      A.    That is correct.

19      Q.    Who has also got a good deal of direct  
20           responsibility for the jail?

21      A.    Yes.

22      Q.    Does most of your information come through either  
23           Lieutenant Byrnes or Sergeant Hemauer?

24      A.    Would come from Lieutenant Byrnes as well as  
25           other individuals working within the jail.



1 Q. Okay. This, as I understand the rules of  
2 evidence, Sheriff Pagel, and for the Court's  
3 benefit, I think this is one of these proceedings  
4 to which the rules of evidence don't apply. So  
5 what I'm telling you is that I'm going to ask you  
6 for hearsay. I'm going to accept hearsay. We  
7 don't have a problem with hearsay here as long as  
8 it's reliable. It would be helpful if you could  
9 tell me when you know something personally and  
10 when you are relying on word from Lieutenant  
11 Byrnes or someone else.

12 A. That will be done, yes.

13 Q. Okay. Did you have the good sense to bring your  
14 January 28 letter with you?

15 A. Yes, I did.

16 Q. All right. We should probably mark that as an  
17 exhibit. Is that an extra copy?

18 A. Yes, it's not signed, but it's a copy.

19 Q. That's fine.

20 (Exhibit 1 marked for identification.)

21 Q. All right. And we have marked this as Exhibit 1.  
22 It is now stapled. But is that your January 28,  
23 2007 letter to Judge Willis?

24 A. Yes, it is.

25 Q. I understand that's an unsigned copy, but the

1 substance of the letter is what you wrote?

2 A. That is correct.

3 Q. Let's go to Paragraph 1, if you would. To whom  
4 has Mr. Avery made the statements that you  
5 ascribe to him in Paragraph 1?

6 A. Those were statements that were heard being  
7 discussed in phone conversations that Mr. Avery  
8 had and was relayed to me by the investigators  
9 working this case.

10 Q. Do you remember when those statements were made?

11 A. No, I do not know when they were made.

12 Q. Do you remember how many times Mr. Avery made  
13 such statements?

14 A. No, I would have to defer that to the  
15 investigators.

16 Q. Mark Wiegert or Tom Fassbender?

17 A. That would be correct.

18 Q. Okay. And did you -- You haven't set out here  
19 the verbatim statements that you are describing  
20 being told about, have you?

21 A. No, these were -- this was information that was  
22 provided to me by the investigators who indicated  
23 that they heard these conversations or heard  
24 words mentioned by Mr. Avery during these  
25 conversations.

1 Q. To this effect?

2 A. Yes.

3 Q. Okay. Do you remember about -- about when one or  
4 the other of these investigators told you about  
5 these conversations?

6 A. They had mentioned it to me prior; however, when  
7 I was informed that there had been a motion  
8 filed, I specifically went and spoke with them  
9 and they, again, furnished me with the  
10 information that is contained within this letter.

11 Q. Okay. When you say they told you about it prior,  
12 can you give me a time frame how --

13 A. No, I cannot. It was just generally spoken to me  
14 and comments were made to insure that I was made  
15 aware of these comments, to ensure, again, that  
16 action, or specific information, would be  
17 provided to the staff running the jail, to ensure  
18 their safety, and to ensure that he, meaning  
19 Mr. Avery, would not do anything to try to  
20 jeopardize their safety, or to escape from jail.

21 Q. Can you put a year on when you first heard about  
22 this?

23 A. I would imagine it would have been last year.

24 Q. 2006?

25 A. Yes.

1 Q. Okay. Early in the year, late in the year?

2 A. I can't tell you. I don't know.

3 Q. Did you take any specific action in the jail?

4 A. I know -- I know that the jail staff was  
5 informed. Lieutenant Byrnes was informed, just  
6 to be made aware of.

7 Q. All right. And one way to take these is that  
8 Mr. Avery might harm himself, correct?

9 A. Could be. Yeah, they could be taken that way.

10 Q. And, in fact, you are aware that Lieutenant  
11 Byrnes has gently inquired of Mr. Avery, on a  
12 number of occasions, whether he is inclined to  
13 harm himself?

14 A. Yes, that's correct.

15 Q. And you have been assured that he is not inclined  
16 to harm himself?

17 A. That is what I have been informed by Mr. Byrnes.

18 Q. Okay. Indeed, other than one brief period in  
19 which I know Mr. Avery has not been confined in a  
20 segregation cell or a cell you can watch someone  
21 24 hours a day, correct, he's been in a regular  
22 pod or cell?

23 A. Yeah, he's been in his cell block.

24 Q. Okay. As to comments that he needs to get out of  
25 here, is that kind of thing all that uncommon for

1 people who are locked in a jail?

2 A. Well, you have to look at the seriousness of them  
3 and you have to -- also you have to take them as  
4 a general comment, but you have to be also  
5 concerned about those type of comments.

6 Q. Sure. And I understand that. And if -- When you  
7 think someone really may be planning a jail  
8 break, an escape, there are some measures you can  
9 take, correct, within the jail?

10 A. Yes, there would be.

11 Q. You could cut off all visitation, correct?

12 A. Yes.

13 Q. You have never done that with Mr. Avery?

14 A. No.

15 Q. You could frisk contact visitors, defense  
16 lawyers, or probation agents, police officers for  
17 that matter, just to make sure that they are not  
18 passing anything, physically, to Mr. Avery,  
19 correct?

20 A. That would be.

21 Q. You have never seen a need to do that?

22 A. No.

23 Q. You could put someone in segregation if you  
24 suspected an escape attempt?

25 A. You could, but it might not always be the best

1 thing to do for that type of situation either.

2 Q. Okay. Have you had an experience, as sheriff,  
3 when you were aware of an actual escape attempt  
4 by any inmate of the jail, convicted, or  
5 pretrial, anybody at all?

6 A. Prior to discovery of something, is that what you  
7 are referring to?

8 Q. Right. Right.

9 A. Not that I'm aware of.

10 Q. Awareness of a plan to try to escape?

11 A. No, I can't say that since I have been sheriff I  
12 have, no.

13 Q. Do you have contingency plans for that if it were  
14 to happen?

15 A. There would be some plan put in place, yes.

16 Q. Okay. But no such plan has been implemented as  
17 to Mr. Avery at any time?

18 A. No, there has not.

19 Q. As a routine matter, in the jail, even though he  
20 is not convicted of anything, administratively  
21 you folks, I don't want to say regularly, as if  
22 it's a fixed cycle, but with some frequency  
23 jailers come in and examine the entire cell  
24 without the inmate in it?

25 A. Yes, they would do searches.

1 Q. And that's been done in Mr. Avery's case,  
2 correct?

3 A. I would hope so.

4 Q. Okay. Do you know so or?

5 A. It's a general practice for them to do that and I  
6 would assume that they have done that, yes.

7 Q. Right. You have no reason to think that the  
8 habit of occasional cell checks hasn't been  
9 followed with Mr. Avery?

10 A. That's correct.

11 Q. Has anybody told you that they, you know, found a  
12 cake with a nail file in it or, you know, bed  
13 sheets tied together, or anything that suggested  
14 an escape?

15 A. No, I have not been told.

16 Q. And I don't mean to be cute about that, but  
17 whatever it is that inmates might do suggesting  
18 escape?

19 A. That has not been given to me, no. That has not  
20 been provided to me.

21 (Attorney and witness talking over each other.)

22 Q. Nothing's been found in Mr. Avery's cell?

23 A. No, I'm not aware of anything like that, yes.

24 Q. Any homemade weapons been found in his cell at  
25 any time?

1 A. No.

2 Q. Something that might be used to hurt a guard?

3 A. Nothing was found.

4 Q. Okay.

5 A. While he was in our custody.

6 Q. All right. Has he acted out violently at any

7 time while he's been in your jail?

8 A. Not that I'm aware of. I have not been told that

9 he has.

10 Q. Do you think you probably would have been told if

11 it had happened?

12 A. Yes.

13 Q. So he hasn't -- he hasn't been segregated for

14 behavior problems at any time?

15 A. No he has not.

16 Q. He has been kept alone, if you will, or without

17 cellmates or even pod mates for most of the time

18 there, correct?

19 A. Per your request, yes.

20 Q. And that's where I was going. I mean, part of

21 that was driven by my request, correct?

22 A. That is correct.

23 Q. And you have been kind enough to honor that with

24 a proviso that if you got real full, you might

25 have to move people in, correct?



1 A. That is correct, that was the agreement.

2 Q. Okay. So that wasn't -- that wasn't a measure  
3 that was implemented because you were afraid  
4 Mr. Avery might hurt a fellow inmate?

5 A. No.

6 Q. You did have some concern, as I recall, at some  
7 point, that because of his notoriety and the  
8 publicity attending his case, that another -- not  
9 a specific inmate -- but some other inmate  
10 conceivably might try to take a poke at him or  
11 hurt him at some point?

12 A. That would be a correct statement, yes.

13 Q. Okay. Steven Avery is about 5 foot 6?

14 A. I would say 5 foot 5, 5 foot 6, yes.

15 Q. And he's put on a little weight, I think,  
16 since -- sorry about that -- but -- but, I don't  
17 know, 200 pounds or something, roughly, probably?

18 A. Yeah, I would say so.

19 Q. Okay. He doesn't have access to free weights or  
20 exercise equipment in the jail, does he?

21 A. No, he does not.

22 Q. Could we go to Paragraph 2 in your letter.

23 A. Sure.

24 Q. You refer to several individuals who have been  
25 interviewed; are you relying here, again, on

1 information from Mr. Wiegert, or Mr. Fassbender,  
2 or other investigators?

3 A. That would be correct.

4 Q. Do you have any -- any -- I guess the specifics  
5 are that these were all things included in  
6 Mr. Kratz's other acts motion?

7 A. Part of it, yes, part of his motion.

8 Q. Okay. So the Court -- the Court already has  
9 before it some more details about the information  
10 you are describing in general in Paragraph 2?

11 A. That would be correct.

12 Q. Okay. Paragraph 3, in general, you are saying,  
13 look, we have got information that witnesses are  
14 concerned about testifying and have indicated  
15 that they are fearful?

16 A. Yes, this has been given, again, to the lead  
17 investigators, that they are fearful, concerned  
18 for their safety, having to testify against  
19 Mr. Avery in court.

20 Q. Okay. And what you have done is reassure those  
21 people that their safety is an important  
22 consideration to you?

23 A. Yes, that was done by, again, the lead  
24 investigators when they spoke with them, that  
25 their safety would be of utmost concern.

1 Q. Sure. And that's -- This was not the first time  
2 that you, or people in your department, have had  
3 citizens or potential witnesses express concern  
4 about testifying in a criminal case?

5 A. That would be a correct statement, yes.

6 Q. In fact, it's not uncommon for that sort of  
7 concern to be raised with you?

8 A. That would be true, yes.

9 Q. This is in the general nature of that experience  
10 of yours as an officer?

11 A. Well, these individuals have expressed a sincere  
12 concern to have to testify. It's not like, well,  
13 I don't want to, or I wish I didn't have to.  
14 They are concerned. They have expressed their  
15 concern to be in court and to have to testify and  
16 to be in the same courtroom with him. So they  
17 have expressed a deep concern for their safety.

18 Q. Are these people who you know or have been told  
19 have -- have an aversion, or a revulsion for  
20 Mr. Avery, just as sort of a global matter, they  
21 just don't like him?

22 A. I don't know if it's that, or the fact that they  
23 know of his demeanor. I don't know how far you  
24 want me to go with that but. They, you know,  
25 again, it's a concern that they have expressed.

1           And that's why I placed that in the letter.

2       Q.    Sure.  And some of them may know him, or have had  
3           some past experience with him?

4       A.    Yes.

5       Q.    Okay.  You are not aware of any threat that he's  
6           made to any witness, or potential witness?

7       A.    Not that I'm aware of, no.

8       Q.    Every -- every non-contact visit that Mr. Avery  
9           has in the Calumet County Jail is tape recorded?

10      A.    Every non?

11      Q.    Non-contact visit?

12      A.    Yes, as it is with other inmates.

13      Q.    With everybody else?

14      A.    Yes.

15      Q.    Right.  This isn't a special measure for  
16           Mr. Avery?

17      A.    No, it is not.

18      Q.    Every telephone call that he makes out of the  
19           jail is recorded just as every telephone call  
20           that every inmate in the jail is recorded?

21      A.    That is correct.

22      Q.    In this case, if there's any difference at all,  
23           the investigators on the case assiduously listen  
24           to Mr. Avery's tapes, correct?

25      A.    That is correct.

1 Q. So you would expect that if he had made threats  
2 to specific witnesses, those would have been  
3 reported to you in your capacity as sheriff?

4 A. They probably would have been. I would have been  
5 informed of them, yes.

6 Q. Number -- Paragraph 4 --

7 A. Yes.

8 Q. -- refers to a specific conversation or  
9 conversations, a telephone dialogue between  
10 Mr. Avery and his father?

11 A. That is correct.

12 Q. All right. When did that happen?

13 A. Again, I can't give you a specific date; I know  
14 it was, again, I believe in 2006.

15 Q. But whether it was the beginning of the year, the  
16 middle, or the end, you don't know?

17 A. I would have to refer that to Investigator  
18 Wiegert.

19 Q. All right. Do you know the nature of the  
20 comments as to Mr. Fassbender and Mr. Wiegert?

21 A. Yes, I do.

22 Q. What is that?

23 THE WITNESS: You want me to elaborate,  
24 your Honor?

25 THE COURT: Yes.

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THE WITNESS: Okay.

A. There was a conversation between Mr. Avery and his father in which they -- Special Agent Fassbender and Wiegert -- comment was made that they wanted to cut off his testicles or cut off their testicles and drag them behind, or Investigator Wiegert behind a pickup truck.

Q. Just Mr. Wiegert?

A. I believe it was Mr. Wiegert, yes.

Q. And was it Allen Avery who made that comment or Steven Avery?

A. I believe it was Al towards -- I believe, Mr. Allen Avery was making the comment, to which Steven laughed, heartily.

Q. Okay. So this was a statement not made by Steven Avery, but he laughed in response to his father's statement?

A. That is correct. That's the way I have been told.

Q. All right. Both Mr. Wiegert and Mr. Fassbender are law enforcement agents, obviously?

A. Yes, that's correct.

Q. Both of them would be armed, ordinarily?

A. Yes.

Q. While on duty?

1 A. Yes.

2 Q. Are law -- Are sworn law enforcement officers  
3 allowed to carry their sidearm weapons in court  
4 in Calumet County, if you know?

5 A. Yes, they are.

6 Q. Both of these men are in the prime of life, for  
7 want of a better word?

8 A. Yes.

9 Q. I mean, they are young. I mean, they are in  
10 their 30's, 40's, whatever it is they are?

11 A. Yes.

12 Q. Okay. And they, in fact, were also the two  
13 officers who arrested Mr. Avery on November 9,  
14 2005, weren't they?

15 A. Yes, they would have been involved, I'm sure, in  
16 the arrest.

17 Q. It's probably been awhile, so I'm going to offer  
18 you an exhibit, just to help refresh your  
19 recollection.

20 (Exhibit No. 2 marked for identification.)

21 Q. I have marked this as Exhibit 2. And what it is  
22 is a DCI report, looks like Special Agent  
23 Fassbender is the author of this one. And it  
24 details a meeting with Mr. Avery on November 9  
25 2005, and his arrest pursuant to an arrest

1 warrant?

2 A. Okay.

3 Q. Yeah, and then, you know, continues from there.

4 My -- The copy I have given you sort of helpfully  
5 has what we call a Bates Stamp Number on the  
6 bottom right corner, begins State?

7 A. Okay.

8 Q. And the first page is State 0536?

9 A. Yes, okay.

10 Q. If you go to State 0546?

11 A. Okay.

12 Q. At the top, what we have is -- and I think this  
13 is Mr. Fassbender authoring the report, yes.

14 Yeah, the reporting law enforcement officer on  
15 the front is Thomas Fassbender. And what he is  
16 doing starts at the bottom of the preceding page.  
17 He is describing here Investigator Wiegert and  
18 himself informing Steven Avery about 12:47 in the  
19 afternoon that they had an arrest warrant for  
20 him.

21 A. Okay.

22 Q. And they are out at Earl Avery's house, which is  
23 where they found Mr. Avery that -- Steven Avery  
24 that day. And as I read it, what Investigator  
25 Wiegert told Steven, that in arresting him he



1 would not place him in handcuffs if Steven was  
2 cooperative and did not cause any problems. And  
3 Steven advised that he would not cause any  
4 problems. Do you see that at the top of  
5 Page 0546?

6 A. Okay. Yes. I see that, yes.

7 Q. Now, people like me wish that law enforcement  
8 officers would show that sort of humanity and  
9 judgment more often, but in point of fact, this  
10 is unusual to take someone into custody and not  
11 handcuff them, isn't it?

12 A. They are given discretion of whether or not they  
13 wish to handcuff individuals.

14 Q. Right. And in your experience, more often than  
15 not that discretion is exercised in favor of  
16 handcuffing someone who's just being arrested  
17 pursuant to an arrest warrant, correct?

18 A. Well, again, it's done for several different  
19 reasons; if they feel that individual needs to be  
20 handcuffed, they will.

21 Q. Right.

22 A. If they wish to possibly gain that individual's  
23 cooperation or gain rapport with that individual,  
24 they may not.

25 Q. Sure. And that's where the discretion comes in?

1 A. That is correct.

2 Q. Or maybe someone is very aged, or has bad  
3 arthritis, or whatever it is?

4 A. Yes, there's a number of things that would be  
5 taken into consideration --

6 Q. Sure.

7 A. -- or could be.

8 Q. Someone, an arrestee, might be well known to the  
9 officer and, you know, the officer figures he  
10 knows this person's character well enough to make  
11 that judgment call, correct?

12 A. Yes, that would be something that they could, but  
13 again, the whole situation has to be weighed.

14 Q. Right. And -- And whatever the considerations  
15 were, what we know here is that Investigator  
16 Wiegert and Mr. Fassbender felt comfortable  
17 coming down on the side of not handcuffing Steven  
18 Avery when they arrested him on this case?

19 A. According to this report, yes.

20 Q. Transporting him in a car, correct?

21 A. Yes.

22 Q. That was a DCI car, right?

23 A. I don't know.

24 Q. I think it says that. I'm sorry, and it's  
25 further down that page, the middle paragraph that

1           says at 12:50 p.m.?

2    A.    Okay.

3    Q.    So they're -- They are driving Mr. Avery off to  
4           get his DNA taken?

5    A.    Okay. Well, yes, okay, would have been  
6           Mr. Fassbender's vehicle, yes.

7    Q.    You are familiar with that car, aren't you?

8    A.    Yes, I am.

9    Q.    It's not a cage car?

10   A.    No, it's not.

11   Q.    You haven't heard anything about Mr. Avery taking  
12           that opportunity, when freshly put under arrest,  
13           to try to hurt Mr. Wiegert, or try to hurt  
14           Mr. Fassbender, have you?

15   A.    No, I have not.

16   Q.    Do you think you would have heard that?

17   A.    I'm sure I would have.

18   Q.    Finally, Paragraph 5, I think I have heard about  
19           this person, but I want to make sure that I'm  
20           thinking of the same one you are.

21   A.    Okay.

22   Q.    There's a woman who holds herself out as a  
23           pastor, or a minister, who comes to visit  
24           Mr. Avery, correct?

25   A.    That is correct.

1 Q. All right. And she has a pastoral assistant, or  
2 an assistant minister, or someone with her often,  
3 correct?

4 A. That is correct.

5 Q. Also a woman?

6 A. Yes.

7 Q. Have you met both these women?

8 A. Yes, I have.

9 Q. These two ministers?

10 A. Mm-hmm.

11 Q. Without insulting anyone, are these two women  
12 both at least 70 years old if they are a day?

13 A. They would be elderly, yes.

14 Q. Okay. And I'm not suggesting you know exactly  
15 how old they are?

16 A. That is correct, I do not.

17 Q. Elderly women who are apparently ministers by  
18 vocation?

19 A. Yes, that's what I have been informed.

20 Q. And they also minister to, or have played some  
21 pastoral role, apparently, with Jodi Stachowski?

22 A. Okay. I'm not aware if --

23 Q. Oh, okay. Maybe -- Then let me go at it this  
24 way.

25 A. Okay.

1 Q. Was Jodi Stachowski the first -- the third person  
2 in the car on this incident?

3 A. Yes.

4 Q. All right. So there's these two elderly female  
5 ministers and Jodi Stachowski in the car?

6 A. Yes.

7 Q. And as I understand, the car comes up alongside,  
8 or stops at the same red light or something as a  
9 Sheriff's Department van or car in which  
10 Mr. Avery was being taken to court?

11 A. Yes, in Manitowoc. But they had noticed that  
12 this vehicle had been following them from the  
13 City of Chilton.

14 Q. Probably going to the same court appearance  
15 Mr. Avery was going to, right?

16 A. Yes.

17 Q. Okay. And the best way from Chilton to Manitowoc  
18 is Highway 151?

19 A. That would be correct.

20 Q. And I'm not going to get into your routes of  
21 travel, but in any event, Mr. Avery was going to  
22 Manitowoc, from Chilton, for a court appearance?

23 A. That is correct.

24 Q. Okay. Did these three women wave to Mr. Avery,  
25 or what exactly did they do when their car was

1 nearby?

2 A. I know they made contact, but again, I know that  
3 the officers felt uncomfortable with this vehicle  
4 following them and also felt very uncomfortable  
5 when the vehicle pulled up beside them and they  
6 realized who it was.

7 Q. All right. When you say contact, there was no  
8 physical contact made?

9 A. No. Visual.

10 Q. Visual contact. Okay. So Mr. Avery is in the  
11 Sheriff's car and the three women are in one of  
12 their cars?

13 A. Right.

14 Q. All right. You are not aware of Mr. Avery saying  
15 anything at all in your custody to try to arrange  
16 this encounter, are you?

17 A. We haven't been able to determine how the  
18 arrangement was made. All we were informed of is  
19 that they waited for the vehicle to pass while  
20 they were parked at the Kwik Trip in Chilton and  
21 then proceeded to follow the vehicle from that  
22 location to Manitowoc.

23 Q. All right. If there were arrangements, and if  
24 Mr. Avery had been a party to them, you would  
25 have a recording of that, wouldn't you?

1 A. I would hope so, yes.

2 Q. All right. And those have been listened to and  
3 there's been no evidence that Mr. Avery was part  
4 of any arrangements there may have been, right?

5 A. That I'm aware of, yes.

6 Q. Okay. Did Mr. Avery try to escape when he saw  
7 these two elderly women and Jodi Stachowski in  
8 the car?

9 A. No, he did not.

10 Q. Did he do anything inappropriate at all?

11 A. Not that I'm aware of.

12 Q. Do you think someone would have told you if he  
13 had?

14 A. Yes.

15 Q. Did the two elderly ministers brandish weapons,  
16 or try to run the car off the road, or do  
17 anything overt?

18 A. No. No.

19 Q. Okay. Was just --

20 A. But we -- they were --

21 Q. A feeling of discomfort.

22 A. Yes. They were informed that we did not look  
23 favorably upon that, and that it would not happen  
24 again or action would be taken.

25 Q. And they were informed of that later, but not

1 much later, correct?

2 A. Not much later, no.

3 Q. Right.

4 A. It was within a day or so.

5 Q. Somebody spoke to the minister or the minister's  
6 assistant, said huh-uh, that -- you are not going  
7 to be coming up and waving at Mr. Avery, right?

8 A. Yes. Lieutenant Byrnes took care of that, yes.

9 Q. Okay. That didn't result in an arrest or  
10 anything like that, just a warning?

11 A. A warning, yes.

12 Q. All right. Mr. Avery didn't have to be warned  
13 about the incident because he didn't do anything,  
14 right?

15 A. He was in custody and he was not warned, no. I  
16 can't say that he wasn't told that we didn't  
17 appreciate that. He may have, and I'm not aware  
18 if he was.

19 Q. Oh, sure, I understand, but I mean, he didn't  
20 take any action that required any sort of  
21 discipline or warning of him?

22 A. That is correct.

23 Q. Um, do you understand -- Just so that we're on  
24 the same page, you understand that nothing in my  
25 motion is intended to have any impact at all on



1 your jail, correct?

2 A. That is correct.

3 Q. Or on transport of Mr. Avery anywhere?

4 A. That is correct.

5 Q. Okay. You understand that my motion is talking  
6 only about things that happened in the courtroom?

7 A. Yeah, I understand that.

8 Q. Okay. Thank you.

9 ATTORNEY STRANG: That's all I have, your  
10 Honor.

11 THE COURT: Mr. Kratz, do you have any  
12 questions?

13 ATTORNEY KRATZ: Just two points of  
14 clarification.

15 **CROSS-EXAMINATION**

16 BY ATTORNEY KRATZ:

17 Q. As I understand, Sheriff, you have brought  
18 somebody with you here today who can describe in  
19 better terms than you the use of the stun belt,  
20 and if there's any questions of the Court as to  
21 how that might, not only in theory but in  
22 practice, work in this case?

23 A. That is correct. The deputy that I have brought  
24 with me has been trained by the company in the  
25 use of the stun belt. And he in turn is a

1           trainer of other -- other jailers at the Calumet  
2           County Sheriff's Department.

3    Q.    Lastly, for point of clarification, since I'm not  
4           really asking questions to make a record, the  
5           arrest on the 9th of November of Mr. Avery, was  
6           that for what's called a status offense; that is,  
7           having been a convicted felon who had possessed a  
8           firearm, not an arrest for homicide or any  
9           related charges; is that right?

10   A.   That is accurate.

11                    ATTORNEY KRATZ:   That's all I've got,  
12           Judge, thank you.

13                    THE COURT:   You may be seated.

14                    THE WITNESS:   Okay.

15                    THE COURT:   Mr. Strang, are there any other  
16           witnesses you wish to question?

17                    ATTORNEY STRANG:   I don't need to question  
18           anybody else.  I will be happy to argue the point,  
19           and I would move the admission of Exhibits 1 and 2.

20                    THE COURT:   Any objection to the exhibits?  
21           Very well, they are admitted.  Mr. Strang.

22                    ATTORNEY STRANG:   Well, first of all,  
23           within the broad limits that the constitution or  
24           state law may require, I'm fully in agreement with  
25           the proposition that sheriffs should run jails and

1           sheriffs should have a good deal of latitude in  
2           being responsible in deciding how to handle prisoner  
3           or detainee movement.

4                     The motion really goes no further than  
5           proceedings in a court and, indeed, it's a little  
6           bit narrower than that, proceedings in a  
7           courtroom when the jury is present, or potential  
8           jurors may be present. So I'm not asking this  
9           Court to superintend security arrangements or the  
10          handling of Mr. Avery or anyone else in custody,  
11          beyond proceedings for which the Court itself,  
12          not the sheriff, is directly responsible.

13                    And I -- I have come to know a little  
14          casually, a little bit, Sheriff Pagel, in the  
15          last year, and have been impressed with his  
16          thoughtfulness, and his candor, and the way he's  
17          treated defense counsel.

18                    That said, I don't think that the record  
19          here rises anywhere near the level that would be  
20          necessary to justify a stun belt or any similar  
21          restraint being used, in this case, in a  
22          courtroom in which jurors, or potential jurors,  
23          are present. The Illinois Supreme Court's list  
24          of considerations, I'm sure not intended to be  
25          exhaustive, and not adopted at all by any

1 Wisconsin court so far as I know, nevertheless,  
2 are pretty useful and cover a lot of things that  
3 a court reasonably might consider here.

4 The seriousness of the present charge is  
5 given. It's a serious charge. The defendant's  
6 temperament and character, we have heard some  
7 general stuff about, nothing that suggests any  
8 specific risk in this case, or to any person in  
9 this case. And the Court itself has had an  
10 opportunity to observe Mr. Avery directly when he  
11 is in court.

12 Now, since November, 2005, and we have  
13 been here a number of times, and I'm certainly  
14 aware of nothing menacing, or inappropriate, or  
15 ill-behaved, that he's ever done in court. So I  
16 think that's a positive factor here on balance,  
17 or at very worst a neutral. The defendant's age  
18 and physical characteristics, he is not  
19 particularly young. He is not highly muscular,  
20 or sculpted, or physically huge, someone who's a  
21 great deal larger than the average law  
22 enforcement officer, or the average human being  
23 for that matter.

24 His past record, he has a past record.  
25 It's less lengthy than many people the Court sees

1 parade through here, or sit at counsel table,  
2 including many who are not restrained in a stun  
3 belt. There's no record of past escapes or  
4 attempted escapes by Mr. Avery. And, indeed,  
5 Sheriff Pagel was candid enough to tell us that  
6 since November 9, 2005, there doesn't seem to  
7 have been any planning, or any effort by him  
8 suggesting an intention to escape.

9 Any threats by the defendant to harm  
10 others or create a disturbance, there's nothing  
11 as to creating a disturbance. And the only  
12 threats we have, it turns out now, I guess, were  
13 made by the defendant's father, not by Steven  
14 Avery, and his response was to laugh.

15 That's hard to gauge as between father  
16 and son. We have all been -- or at least the men  
17 in the room have been in the position of being a  
18 son at some point in their lives. And for  
19 myself, I know I have -- during his lifetime I  
20 laughed at some of the things my father said  
21 rather than get into an argument or a  
22 confrontation.

23 So it's hard to put much weight on that  
24 conversation, particularly where the threat, if  
25 it, you know, if the threat it was meant to be,

1 as opposed to venting, or hyperbole, or just  
2 inappropriate show of support and anger on behalf  
3 of one's son. It's hard to put any real weight  
4 on that, particularly where the question is not  
5 whether Allen Avery should be in a stun belt, but  
6 whether Steven Avery ought be in a stun belt.

7 We don't have any evidence of  
8 self-destructive tendencies of the defendant.  
9 There doesn't seem to be any risk of mob violence  
10 or attempted revenge by others. And it's worth  
11 noting here that the Halbach family and their  
12 friends and supporters have been, at all times,  
13 while I've been around, entirely well-mannered,  
14 dignified.

15 Absolutely nothing coming from the  
16 Halbach family that would suggest that they have  
17 any intention, other than respecting the dignity  
18 of the Court, respecting the human dignity of the  
19 people in the courtroom, Mr. Avery included, and  
20 conducting themselves honorably as they have  
21 every minute they have been here, in these  
22 proceedings. And I would extend that to anybody  
23 I have seen sitting on their side of the  
24 courtroom, so to speak, whether those are  
25 friends, or friends of Teresa's, more distant

1 relatives.

2 I don't know who they are, but I haven't  
3 seen anybody in this courtroom, on either side,  
4 honestly, who has caused any problem, or behaved  
5 inappropriately in any way that I know. And I  
6 have been in past murder prosecutions and I'm, as  
7 this Court probably is aware, when that kind of  
8 tension is in the air, it just hasn't been here  
9 in this case.

10 There's nothing to suggest a possibility  
11 of rescue attempts by other offenders still at  
12 large. The only person the State contends to be  
13 another offender is himself in custody. The  
14 State has been pretty clear that at least as to  
15 third party actors, there's one and one only that  
16 they think there even would be appropriate  
17 evidence about, and as I say, he is in -- he is  
18 in custody.

19 I understand, I'm putting myself in the  
20 shoes of a law enforcement officer, I can  
21 understand why one might be uncomfortable about a  
22 car appearing to follow on the way to court. And  
23 in pulling alongside at the red light, or  
24 whatever it was.

25 But, you know, the reality is here, this

1 turns out to be the right Reverend Granny  
2 Clampett, and her septuagenarian sidekick, and  
3 Mr. Avery's girlfriend. And nobody does  
4 anything, apparently, other than wave or look at  
5 Mr. Avery, and he does nothing at all.

6 So, again, even if this were a showing  
7 sufficient to put Granny Clampett in the stun  
8 belt, it doesn't warrant putting Steven Avery in  
9 one. And it's worth noting there that, you know,  
10 Mr. Avery's every word is listened to. And as  
11 the Court knows from a prior motion, he is not  
12 having contact visits with either of these two  
13 ministers. These are through the glass and they  
14 are tape recorded. So the Calumet County  
15 Sheriff's Department or some investigator on this  
16 case would know if Mr. Avery had participated in  
17 some planning for this, you know, car incident on  
18 the way to court.

19 Size and mood of the audience, again, I  
20 already covered. It doesn't suggest restraining  
21 Mr. Avery. The nature and physical security of  
22 the courtroom is actually very good in Calumet  
23 County. The jail is right down the secured  
24 hallway. I expect there will be deputies in the  
25 courtroom. Spectators are going through a



1 magnetometer, so no one is going to pass a weapon  
2 to Mr. Avery, or use a weapon against him, not  
3 that a stun belt on him would help allay that  
4 concern in any event.

5 So I think, in the end, the adequacy and  
6 availability of the usual alternate remedies,  
7 which is to have bailiffs, and we have two case  
8 agents here rather than just one, both of whom I  
9 expect may well be armed during this trial,  
10 really more than suffices here.

11 And without going into the gruesome  
12 details of the cases, I include enough in my  
13 motion to make clear, I think, that what we're  
14 talking about with an 8 second, 50,000-volt jolt  
15 to the kidneys is electrocuting someone. It's  
16 not intended to be lethal, but similar devices  
17 have been.

18 The law review I cited collects some of  
19 that information. And it is almost common sense  
20 to understand that cardiac arrhythmia or other  
21 problems could be caused by this. People  
22 defecate involuntarily, not infrequently, when  
23 these things are activated. They urinate on  
24 themselves involuntarily. And they are  
25 incapacitated, not just for the time of the jolt,

1 but for a long time after.

2 You have a mistrial is what happens, I  
3 think, when these things go off, or at least you  
4 have a serious mistrial issue, which the Ohio  
5 Supreme Court had to deal with, and ultimately  
6 affirmed the trial court's decision not to grant  
7 a mistrial, but it was -- it was a serious issue.

8 And the manufacturer of the react device  
9 at least advertises it as something that gives  
10 law enforcement total psychological control over  
11 the person wearing the belt. Well, when he is on  
12 trial, facing life in prison, and trying to  
13 decide whether to testify, trying to assist  
14 counsel, trying to confront, in the  
15 constitutional sense, the witnesses against him,  
16 an accused has the right not to be under the  
17 total psychological control of his adversaries,  
18 and sitting there fearing that if he says  
19 something wrong, or does something that a  
20 sheriff's deputy doesn't like, or just by  
21 accident, since accidental activation of these  
22 devices are well reported in the cases, that this  
23 device will go off and incapacitate him.

24 So we're talking about a very serious  
25 device here and something that is intended and

1           only can be expected to have a very strong  
2           psychological impact on the person wearing them.  
3           Has a psychological impact on me wondering  
4           whether, if I happen to have my arm around him  
5           when this thing goes off whether I, too, will be  
6           knocked to the floor and lose control of my  
7           bowels.

8                        I just don't think there's a record here  
9           that warrants it in a courtroom. And a courtroom  
10          is the only thing we're talking about.

11                       THE COURT: All right. Anything from the  
12          State?

13                       ATTORNEY KRATZ: Very briefly, Judge,  
14          Mr. Pagel reminds me that the kind of belt that  
15          Mr. Strang is alluding to is not the kind used by  
16          the Calumet County Sheriff's Department and can be  
17          inquired further should the Court need to do that.

18                       I would ask the Court take judicial  
19          notice not only of Mr. Avery's criminal history,  
20          but the pleadings in this case, including our  
21          other acts motion, would note that not all  
22          factors that Mr. Strang has alluded to are of  
23          equal importance when considering this security  
24          issue. Obviously, the seriousness of the  
25          offense, the facts alleged in the Complaint, his

1 history of violence, all, the State believes, are  
2 more important than whether a 70 year old woman  
3 waved at Mr. Avery at some point in the past.

4 And, finally, would point the Court to  
5 the appellate decision of **State vs. Russ**,  
6 R-u-s-s, decided in 2005. And I know that's a  
7 shackle case not a stun belt case, but does, when  
8 at least complaining about some due process  
9 violations, place upon the defense a burden -- a  
10 burden of proof that there be some actual  
11 prevention of communicating with their clients in  
12 order to establish that there's been some  
13 deprivation on a constitutional or due process  
14 level. That's all the comments I have. And once  
15 again, Judge, we'll defer to the Court as to the  
16 court security issue. Thank you.

17 ATTORNEY STRANG: And I certainly have no  
18 objection to the Court taking judicial notice of the  
19 files in this case, or for that matter, of  
20 Mr. Avery's prior record.

21 THE COURT: All right. I'm going to take a  
22 minute -- I'm not going to take it today -- but I'm  
23 going to go back and look at the other acts motion.  
24 It's been a while since I looked at that, and I will  
25 give the parties a decision next week.

1                   I think that wraps up our agenda for  
2                   today, does it not, counsel?

3                   ATTORNEY FALLON:  If it does, I did want to  
4                   clarify one point.  I'm sitting here thinking, and I  
5                   don't remember how the final answer came out in our  
6                   discussion with Mr. Buting on the bones.  And I  
7                   don't know if he's going to prepare an order or not,  
8                   but just so it's clear that any opinions regarding  
9                   what's human or what's not human, or whatever, the  
10                  only opinion on that is going to come from  
11                  Dr. Eisenberg.  And that the only thing that the FBI  
12                  mitochondrial report says, that we weren't able to  
13                  determine any mitochondrial identification as that  
14                  may pertain to the issue of human or non-human, or  
15                  animal, or what have you.

16                  So, I mean, those are the only two  
17                  entities that could offer any evidence,  
18                  vis-a-vis, that particular question or issue.  
19                  And so it's whatever the reports say.  I mean --  
20                  So I just wanted to be sure.  I can't remember  
21                  how we left it, but I didn't want to leave  
22                  anybody with a misunderstanding of what may or  
23                  may not come down the road, it's all in  
24                  Dr. Eisenberg's report.

25                  THE COURT:  That's my understanding or my

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recollection, Mr. Buting; does that square with yours?

ATTORNEY BUTING: Yes.

THE COURT: All right. We're adjourned for today. Mr. Kratz.

ATTORNEY KRATZ: What time did you want us here on Monday, I had forgotten?

THE COURT: We're going to start at 8:30. So try and get here around 8:20. We'll start with bringing a juror in at 8:30.

ATTORNEY STRANG: Where is here?

THE COURT: Here is going to be this courtroom. We're adjourned for today.

ATTORNEY KRATZ: Thank you, your Honor.

(Proceedings concluded.)

1 STATE OF WISCONSIN )  
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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 19th day of February, 2007.

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

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