STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY
BRANCH 1

STATE OF WISCONSIN,

PLAINTIFF, PRE-TRIAL

vs. Case No. 05 CF 381

STEVEN A. AVERY,

DEFENDANT.

DATE: FEBRUARY 2, 2007

BEFORE: Hon. Patrick L. Willis
Circuit Court Judge

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

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

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

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

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

STEVEN A. AVERY
Defendant
Appeared in person.

TRANSCRIPT OF PROCEEDINGS

Reported by Diane Tesheneck, RPR

Official Court Reporter

I N D E X

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

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

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

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

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

There are a number of items for the

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

ATTORNEY GAHN: I will, your Honor.

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

THE COURT: Thank you. Mr. Gahn.

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

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

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

ATTORNEY BUTING: Yesterday.

THE CLERK: I don't have it.

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

ATTORNEY BUTING: Yes.

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

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

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

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

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

ATTORNEY GAHN: Yes, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

down this planting defense, at their peril.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Mr. Buting.

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

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

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

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

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

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

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

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

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

December 6 is when they were notified,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Mr. Gahn.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And I think everyone, and the Court read

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

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

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

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

THE COURT: All right.

ATTORNEY BUTING: Judge, I just have a --

THE COURT: Go ahead.

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

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

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

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

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

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

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

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

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

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

Given the relatively late notice to the

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

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

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

blood vial evidence for testing.

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

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

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

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

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

ATTORNEY BUTING: Your Honor.

THE COURT: Yes.

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

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

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

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

THE COURT: Response from the State.

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

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

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

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

And, again, they can take their sample.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ATTORNEY GAHN: Thank you, Judge.

(Recess taken.)

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

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

able to get that testing done in sufficient time.

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

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

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

THE COURT: Mr. Strang.

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

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

THE COURT: Mr. Gahn.

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

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

my understanding.

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

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

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

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

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

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

were we not in trial.

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

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

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

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

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

THE COURT: Anything else from the State?

ATTORNEY GAHN: No, your Honor.

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

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

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

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

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

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

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

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

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

that.

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

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

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

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

the FBI analyst.

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

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

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

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

ATTORNEY STRANG: How do we do that?

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

THE COURT: Mr. Fallon.

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

THE COURT: Go ahead.

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

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

ATTORNEY STRANG: Yes.

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

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

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

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

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

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

THE COURT: I'm sure there could be.

ATTORNEY GAHN: Could we work that out?

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

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

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

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

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

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

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

ATTORNEY GAHN: Your Honor, would you just,

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

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

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

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

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

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

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

ATTORNEY GAHN: Yes.

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

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

ATTORNEY STRANG: No, no, the State.

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

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

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

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

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

THE COURT: How many spot cards are there?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ATTORNEY GAHN: Okay.

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

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

THE COURT: Yes.

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

THE COURT: Yes.

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

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

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

State removes the blood vial for EDTA testing.

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

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

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

THE COURT: Yes.

ATTORNEY GAHN: Thank you, Judge.

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

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

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

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

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

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

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

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

THE COURT: All right. Mr. Strang.

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

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

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

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

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

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

THE COURT: So you have a five minute presentation?

ATTORNEY KRATZ: Even less, yeah.

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

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

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

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

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

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

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

(Watching the animation).

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

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

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

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

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

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

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

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

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

THE COURT: I do.

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

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

ATTORNEY BUTING: I have a copy.

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

THE CLERK: No.

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

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

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

THE COURT: Yes.

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

ATTORNEY FALLON: Thank you.

THE COURT: -- handling this?

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

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

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

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

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

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

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

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

ATTORNEY FALLON: His report is what it is.

THE COURT: Okay.

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

this Douglas Hares is going to say, fine.

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

THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: You are referring now to the --

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

THE COURT: Mr. Fallon, is that information

provided anywhere in submittals?

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

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

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

THE COURT: Okay.

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

ATTORNEY FALLON: Those are cranial pieces.

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

ATTORNEY FALLON: You know what we know?

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

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

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

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

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

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

ATTORNEY FALLON: Yes.

ATTORNEY BUTING: And as to that, we have

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

THE COURT: Mr. Fallon.

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

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

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

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

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

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

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

ATTORNEY BUTING: Are not?

ATTORNEY FALLON: Are not.

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

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

ATTORNEY FALLON: That's my understanding.

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

ATTORNEY FALLON: Correct.

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

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

ATTORNEY BUTING: I believe so.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of those counts have been dismissed.

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

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

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

ATTORNEY KRATZ: I will, Judge.

THE COURT: Mr. Kratz.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Anything else, Mr. Strang?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But the burden either rests on the

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

THE COURT: Anything further, Mr. Strang?

ATTORNEY STRANG: Not at the moment, I guess.

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

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

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

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

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

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

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

THE COURT: Do you wish to question Sheriff Pagel?

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

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

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

THE COURT: All right. Sheriff Pagel.

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

THE CLERK: Please be seated. Please state

your name and spell your last name for the record.

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

DIRECT EXAMINATION

BY ATTORNEY STRANG:

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

A. That is correct.

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

A. That's correct.

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

A. That is correct.

Q. Continuously?

A. Yes.

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

A. Yes.

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

your knowledge?
A. That is correct.
Q. You have overall operational responsibility for the Calumet County Jail?
A. Yes.
Q. But as a practical matter you get information from officers whose immediate job responsibilities are the jail and the jail only?
A. That would be correct.
Q. And the person we might describe as most directly or most immediately in charge of the jail over in Chilton is -- Is it Captain or Lieutenant Byrnes?
A. Lieutenant Byrnes.
Q. Am I right about his direct responsibility?
A. That would be correct.
Q. Okay. And then there is a Sergeant Hemauer who reports to Lieutenant Byrnes?
A. That is correct.
Q. Who has also got a good deal of direct responsibility for the jail?
A. Yes.
Q. Does most of your information come through either Lieutenant Byrnes or Sergeant Hemauer?
A. Would come from Lieutenant Byrnes as well as other individuals working within the jail.

Q. Okay. This, as I understand the rules of evidence, Sheriff Pagel, and for the Court's benefit, I think this is one of these proceedings to which the rules of evidence don't apply. So what I'm telling you is that I'm going to ask you for hearsay. I'm going to accept hearsay. We don't have a problem with hearsay here as long as it's reliable. It would be helpful if you could tell me when you know something personally and when you are relying on word from Lieutenant Byrnes or someone else.
A. That will be done, yes.
Q. Okay. Did you have the good sense to bring your January 28 letter with you?
A. Yes, I did.
Q. All right. We should probably mark that as an exhibit. Is that an extra copy?
A. Yes, it's not signed, but it's a copy.
Q. That's fine.
(Exhibit 1 marked for identification.)
Q. All right. And we have marked this as Exhibit 1. It is now stapled. But is that your January 28, 2007 letter to Judge Willis?
A. Yes, it is.
Q. I understand that's an unsigned copy, but the

substance of the letter is what you wrote?
A. That is correct.
Q. Let's go to Paragraph 1, if you would. To whom has Mr. Avery made the statements that you ascribe to him in Paragraph 1?
A. Those were statements that were heard being discussed in phone conversations that Mr. Avery had and was relayed to me by the investigators working this case.
Q. Do you remember when those statements were made?
A. No, I do not know when they were made.
Q. Do you remember how many times Mr. Avery made such statements?
A. No, I would have to defer that to the investigators.
Q. Mark Wiegert or Tom Fassbender?
A. That would be correct.
Q. Okay. And did you -- You haven't set out here the verbatim statements that you are describing being told about, have you?
A. No, these were -- this was information that was provided to me by the investigators who indicated that they heard these conversations or heard words mentioned by Mr. Avery during these conversations.

Q. To this effect?
A. Yes.
Q. Okay. Do you remember about -- about when one or the other of these investigators told you about these conversations?
A. They had mentioned it to me prior; however, when I was informed that there had been a motion filed, I specifically went and spoke with them and they, again, furnished me with the information that is contained within this letter.
Q. Okay. When you say they told you about it prior, can you give me a time frame how --
A. No, I cannot. It was just generally spoken to me and comments were made to insure that I was made aware of these comments, to ensure, again, that action, or specific information, would be provided to the staff running the jail, to ensure their safety, and to ensure that he, meaning Mr. Avery, would not do anything to try to jeopardize their safety, or to escape from jail.
Q. Can you put a year on when you first heard about this?
A. I would imagine it would have been last year.
Q. 2006?
A. Yes.

Q. Okay. Early in the year, late in the year?
A. I can't tell you. I don't know.
Q. Did you take any specific action in the jail?
A. I know -- I know that the jail staff was informed. Lieutenant Byrnes was informed, just to be made aware of.
Q. All right. And one way to take these is that Mr. Avery might harm himself, correct?
A. Could be. Yeah, they could be taken that way.
Q. And, in fact, you are aware that Lieutenant Byrnes has gently inquired of Mr. Avery, on a number of occasions, whether he is inclined to harm himself?
A. Yes, that's correct.
Q. And you have been assured that he is not inclined to harm himself?
A. That is what I have been informed by Mr. Byrnes.
Q. Okay. Indeed, other than one brief period in which I know Mr. Avery has not been confined in a segregation cell or a cell you can watch someone 24 hours a day, correct, he's been in a regular pod or cell?
A. Yeah, he's been in his cell block.
Q. Okay. As to comments that he needs to get out of here, is that kind of thing all that uncommon for

people who are locked in a jail?
A. Well, you have to look at the seriousness of them and you have to -- also you have to take them as a general comment, but you have to be also concerned about those type of comments.
Q. Sure. And I understand that. And if -- When you think someone really may be planning a jail break, an escape, there are some measures you can take, correct, within the jail?
A. Yes, there would be.
Q. You could cut off all visitation, correct?
A. Yes.
Q. You have never done that with Mr. Avery?
A. No.
Q. You could frisk contact visitors, defense lawyers, or probation agents, police officers for that matter, just to make sure that they are not passing anything, physically, to Mr. Avery, correct?
A. That would be.
Q. You have never seen a need to do that?
A. No.
Q. You could put someone in segregation if you suspected an escape attempt?
A. You could, but it might not always be the best

thing to do for that type of situation either.
Q. Okay. Have you had an experience, as sheriff, when you were aware of an actual escape attempt by any inmate of the jail, convicted, or pretrial, anybody at all?
A. Prior to discovery of something, is that what you are referring to?
Q. Right. Right.
A. Not that I'm aware of.
Q. Awareness of a plan to try to escape?
A. No, I can't say that since I have been sheriff I have, no.
Q. Do you have contingency plans for that if it were to happen?
A. There would be some plan put in place, yes.
Q. Okay. But no such plan has been implemented as to Mr. Avery at any time?
A. No, there has not.
Q. As a routine matter, in the jail, even though he is not convicted of anything, administratively you folks, I don't want to say regularly, as if it's a fixed cycle, but with some frequency jailers come in and examine the entire cell without the inmate in it?
A. Yes, they would do searches.

Q. And that's been done in Mr. Avery's case, correct?
A. I would hope so.
Q. Okay. Do you know so or?
A. It's a general practice for them to do that and I would assume that they have done that, yes.
Q. Right. You have no reason to think that the habit of occasional cell checks hasn't been followed with Mr. Avery?
A. That's correct.
Q. Has anybody told you that they, you know, found a cake with a nail file in it or, you know, bed sheets tied together, or anything that suggested an escape?
A. No, I have not been told.
Q. And I don't mean to be cute about that, but whatever it is that inmates might do suggesting escape?
A. That has not been given to me, no. That has not been provided to me.
(Attorney and witness talking over each other.)
Q. Nothing's been found in Mr. Avery's cell?
A. No, I'm not aware of anything like that, yes.
Q. Any homemade weapons been found in his cell at any time?

A. No.
Q. Something that might be used to hurt a guard?
A. Nothing was found.
Q. Okay.
A. While he was in our custody.
Q. All right. Has he acted out violently at any time while he's been in your jail?
A. Not that I'm aware of. I have not been told that he has.
Q. Do you think you probably would have been told if it had happened?
A. Yes.
Q. So he hasn't -- he hasn't been segregated for behavior problems at any time?
A. No he has not.
Q. He has been kept alone, if you will, or without cellmates or even pod mates for most of the time there, correct?
A. Per your request, yes.
Q. And that's where I was going. I mean, part of that was driven by my request, correct?
A. That is correct.
Q. And you have been kind enough to honor that with a proviso that if you got real full, you might have to move people in, correct?

A. That is correct, that was the agreement.
Q. Okay. So that wasn't -- that wasn't a measure that was implemented because you were afraid Mr. Avery might hurt a fellow inmate?
A. No.
Q. You did have some concern, as I recall, at some point, that because of his notoriety and the publicity attending his case, that another -- not a specific inmate -- but some other inmate conceivably might try to take a poke at him or hurt him at some point?
A. That would be a correct statement, yes.
Q. Okay. Steven Avery is about 5 foot 6?
A. I would say 5 foot 5, 5 foot 6, yes.
Q. And he's put on a little weight, I think, since -- sorry about that -- but -- but, I don't know, 200 pounds or something, roughly, probably?
A. Yeah, I would say so.
Q. Okay. He doesn't have access to free weights or exercise equipment in the jail, does he?
A. No, he does not.
Q. Could we go to Paragraph 2 in your letter.
A. Sure.
Q. You refer to several individuals who have been interviewed; are you relying here, again, on

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

A. That would be correct.

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

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

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

A. That would be correct.

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

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

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

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

Q. Sure. And that's -- This was not the first time that you, or people in your department, have had citizens or potential witnesses express concern about testifying in a criminal case?
A. That would be a correct statement, yes.
Q. In fact, it's not uncommon for that sort of concern to be raised with you?
A. That would be true, yes.
Q. This is in the general nature of that experience of yours as an officer?
A. Well, these individuals have expressed a sincere concern to have to testify. It's not like, well, I don't want to, or I wish I didn't have to. They are concerned. They have expressed their concern to be in court and to have to testify and to be in the same courtroom with him. So they have expressed a deep concern for their safety.
Q. Are these people who you know or have been told have -- have an aversion, or a revulsion for Mr. Avery, just as sort of a global matter, they just don't like him?
A. I don't know if it's that, or the fact that they know of his demeanor. I don't know how far you want me to go with that but. They, you know, again, it's a concern that they have expressed.

And that's why I placed that in the letter.
Q. Sure. And some of them may know him, or have had some past experience with him?
A. Yes.
Q. Okay. You are not aware of any threat that he's made to any witness, or potential witness?
A. Not that I'm aware of, no.
Q. Every -- every non-contact visit that Mr. Avery has in the Calumet County Jail is tape recorded?
A. Every non?
Q. Non-contact visit?
A. Yes, as it is with other inmates.
Q. With everybody else?
A. Yes.
Q. Right. This isn't a special measure for Mr. Avery?
A. No, it is not.
Q. Every telephone call that he makes out of the jail is recorded just as every telephone call that every inmate in the jail is recorded?
A. That is correct.
Q. In this case, if there's any difference at all, the investigators on the case assiduously listen to Mr. Avery's tapes, correct?
A. That is correct.

Q. So you would expect that if he had made threats to specific witnesses, those would have been reported to you in your capacity as sheriff?
A. They probably would have been. I would have been informed of them, yes.
Q. Number -- Paragraph 4 --
A. Yes.
Q. -- refers to a specific conversation or conversations, a telephone dialogue between Mr. Avery and his father?
A. That is correct.
Q. All right. When did that happen?
A. Again, I can't give you a specific date; I know it was, again, I believe in 2006.
Q. But whether it was the beginning of the year, the middle, or the end, you don't know?
A. I would have to refer that to Investigator Wiegert.
Q. All right. Do you know the nature of the comments as to Mr. Fassbender and Mr. Wiegert?
A. Yes, I do.
Q. What is that?
THE WITNESS: You want me to elaborate, your Honor?
THE COURT: Yes.

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?

A. Yes.
Q. Are law -- Are sworn law enforcement officers allowed to carry their sidearm weapons in court in Calumet County, if you know?
A. Yes, they are.
Q. Both of these men are in the prime of life, for want of a better word?
A. Yes.
Q. I mean, they are young. I mean, they are in their 30's, 40's, whatever it is they are?
A. Yes.
Q. Okay. And they, in fact, were also the two officers who arrested Mr. Avery on November 9, 2005, weren't they?
A. Yes, they would have been involved, I'm sure, in the arrest.
Q. It's probably been awhile, so I'm going to offer you an exhibit, just to help refresh your recollection.
(Exhibit No. 2 marked for identification.)
Q. I have marked this as Exhibit 2. And what it is is a DCI report, looks like Special Agent Fassbender is the author of this one. And it details a meeting with Mr. Avery on November 9 2005, and his arrest pursuant to an arrest

warrant?
A. Okay.
Q. Yeah, and then, you know, continues from there. My -- The copy I have given you sort of helpfully has what we call a Bates Stamp Number on the bottom right corner, begins State?
A. Okay.
Q. And the first page is State 0536?
A. Yes, okay.
Q. If you go to State 0546?
A. Okay.
Q. At the top, what we have is -- and I think this is Mr. Fassbender authoring the report, yes. Yeah, the reporting law enforcement officer on the front is Thomas Fassbender. And what he is doing starts at the bottom of the preceding page. He is describing here Investigator Wiegert and himself informing Steven Avery about 12:47 in the afternoon that they had an arrest warrant for him.
A. Okay.
Q. And they are out at Earl Avery's house, which is where they found Mr. Avery that -- Steven Avery that day. And as I read it, what Investigator Wiegert told Steven, that in arresting him he

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

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

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

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

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

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

Q. Right.

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

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

A. That is correct.
Q. Or maybe someone is very aged, or has bad arthritis, or whatever it is?
A. Yes, there's a number of things that would be taken into consideration --
Q. Sure.
A. -- or could be.
Q. Someone, an arrestee, might be well known to the officer and, you know, the officer figures he knows this person's character well enough to make that judgment call, correct?
A. Yes, that would be something that they could, but again, the whole situation has to be weighed.
Q. Right. And -- And whatever the considerations were, what we know here is that Investigator Wiegert and Mr. Fassbender felt comfortable coming down on the side of not handcuffing Steven Avery when they arrested him on this case?
A. According to this report, yes.
Q. Transporting him in a car, correct?
A. Yes.
Q. That was a DCI car, right?
A. I don't know.
Q. I think it says that. I'm sorry, and it's further down that page, the middle paragraph that

says at 12:50 p.m.?
A. Okay.
Q. So they're -- They are driving Mr. Avery off to get his DNA taken?
A. Okay. Well, yes, okay, would have been Mr. Fassbender's vehicle, yes.
Q. You are familiar with that car, aren't you?
A. Yes, I am.
Q. It's not a cage car?
A. No, it's not.
Q. You haven't heard anything about Mr. Avery taking that opportunity, when freshly put under arrest, to try to hurt Mr. Wiegert, or try to hurt Mr. Fassbender, have you?
A. No, I have not.
Q. Do you think you would have heard that?
A. I'm sure I would have.
Q. Finally, Paragraph 5, I think I have heard about this person, but I want to make sure that I'm thinking of the same one you are.
A. Okay.
Q. There's a woman who holds herself out as a pastor, or a minister, who comes to visit Mr. Avery, correct?
A. That is correct.

Q. All right. And she has a pastoral assistant, or an assistant minister, or someone with her often, correct?
A. That is correct.
Q. Also a woman?
A. Yes.
Q. Have you met both these women?
A. Yes, I have.
Q. These two ministers?
A. Mm-hmm.
Q. Without insulting anyone, are these two women both at least 70 years old if they are a day?
A. They would be elderly, yes.
Q. Okay. And I'm not suggesting you know exactly how old they are?
A. That is correct, I do not.
Q. Elderly women who are apparently ministers by vocation?
A. Yes, that's what I have been informed.
Q. And they also minister to, or have played some pastoral role, apparently, with Jodi Stachowski?
A. Okay. I'm not aware if --
Q. Oh, okay. Maybe -- Then let me go at it this way.
A. Okay.

Q. Was Jodi Stachowski the first -- the third person in the car on this incident?
A. Yes.
Q. All right. So there's these two elderly female ministers and Jodi Stachowski in the car?
A. Yes.
Q. And as I understand, the car comes up alongside, or stops at the same red light or something as a Sheriff's Department van or car in which Mr. Avery was being taken to court?
A. Yes, in Manitowoc. But they had noticed that this vehicle had been following them from the City of Chilton.
Q. Probably going to the same court appearance Mr. Avery was going to, right?
A. Yes.
Q. Okay. And the best way from Chilton to Manitowoc is Highway 151?
A. That would be correct.
Q. And I'm not going to get into your routes of travel, but in any event, Mr. Avery was going to Manitowoc, from Chilton, for a court appearance?
A. That is correct.
Q. Okay. Did these three women wave to Mr. Avery, or what exactly did they do when their car was

nearby?
A. I know they made contact, but again, I know that the officers felt uncomfortable with this vehicle following them and also felt very uncomfortable when the vehicle pulled up beside them and they realized who it was.
Q. All right. When you say contact, there was no physical contact made?
A. No. Visual.
Q. Visual contact. Okay. So Mr. Avery is in the Sheriff's car and the three women are in one of their cars?
A. Right.
Q. All right. You are not aware of Mr. Avery saying anything at all in your custody to try to arrange this encounter, are you?
A. We haven't been able to determine how the arrangement was made. All we were informed of is that they waited for the vehicle to pass while they were parked at the Kwik Trip in Chilton and then proceeded to follow the vehicle from that location to Manitowoc.
Q. All right. If there were arrangements, and if Mr. Avery had been a party to them, you would have a recording of that, wouldn't you?

A. I would hope so, yes.
Q. All right. And those have been listened to and there's been no evidence that Mr. Avery was part of any arrangements there may have been, right?
A. That I'm aware of, yes.
Q. Okay. Did Mr. Avery try to escape when he saw these two elderly women and Jodi Stachowski in the car?
A. No, he did not.
Q. Did he do anything inappropriate at all?
A. Not that I'm aware of.
Q. Do you think someone would have told you if he had?
A. Yes.
Q. Did the two elderly ministers brandish weapons, or try to run the car off the road, or do anything overt?
A. No. No.
Q. Okay. Was just --
A. But we -- they were --
Q. A feeling of discomfort.
A. Yes. They were informed that we did not look favorably upon that, and that it would not happen again or action would be taken.
Q. And they were informed of that later, but not

much later, correct?
A. Not much later, no.
Q. Right.
A. It was within a day or so.
Q. Somebody spoke to the minister or the minister's assistant, said huh-uh, that -- you are not going to be coming up and waving at Mr. Avery, right?
A. Yes. Lieutenant Byrnes took care of that, yes.
Q. Okay. That didn't result in an arrest or anything like that, just a warning?
A. A warning, yes.
Q. All right. Mr. Avery didn't have to be warned about the incident because he didn't do anything, right?
A. He was in custody and he was not warned, no. I can't say that he wasn't told that we didn't appreciate that. He may have, and I'm not aware if he was.
Q. Oh, sure, I understand, but I mean, he didn't take any action that required any sort of discipline or warning of him?
A. That is correct.
Q. Um, do you understand -- Just so that we're on the same page, you understand that nothing in my motion is intended to have any impact at all on

your jail, correct?
A. That is correct.
Q. Or on transport of Mr. Avery anywhere?
A. That is correct.
Q. Okay. You understand that my motion is talking only about things that happened in the courtroom?
A. Yeah, I understand that.
Q. Okay. Thank you.

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

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

ATTORNEY KRATZ: Just two points of clarification.

CROSS-EXAMINATION

BY ATTORNEY KRATZ:
Q. As I understand, Sheriff, you have brought somebody with you here today who can describe in better terms than you the use of the stun belt, and if there's any questions of the Court as to how that might, not only in theory but in practice, work in this case?
A. That is correct. The deputy that I have brought with me has been trained by the company in the use of the stun belt. And he in turn is a

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

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

A. That is accurate.

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

THE COURT: You may be seated.

THE WITNESS: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

relatives.

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

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

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

But, you know, the reality is here, this

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

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

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

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

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

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

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

but for a long time after.

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

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

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

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

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

THE COURT: All right. Anything from the State?

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

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

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

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

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

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

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

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

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

THE COURT: That's my understanding or my

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.)

STATE OF WISCONSIN)
)ss
COUNTY OF MANITOWOC)

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

Dated this 19th day of February, 2007.

_____
Diane Tesheneck, RPR
Official Court Reporter