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STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY
BRANCH 3

STATE OF WISCONSIN,

PLAINTIFF,

MOTION HEARING

vs.

Case No. 06 CF 88

BRENDAN R. DASSEY,

DEFENDANT.

DATE: APRIL 5, 2007

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

BEFORE: HON. JEROME L. FOX
Circuit Court Judge

APR 10 2007

APPEARANCES:

CLERK OF CIRCUIT COURT

KENNETH R. KRATZ
District Attorney
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.

MARK R. FREMGEN
Attorney at Law
On behalf of the Defendant.

RAYMOND L. EDELSTEIN
Attorney at Law
On behalf of the Defendant.

BRENDAN R. DASSEY
Defendant
Appeared in person.

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TRANSCRIPT OF PROCEEDINGS

Reported by Jennifer K. Hau, RPR

Official Court Reporter

1 THE COURT: This is the matter of the State
2 of Wisconsin vs. Brendan R. Dassey, 06 CF 88.
3 Appearances, please.

4 ATTORNEY KRATZ: The State appears by
5 Calumet County District Attorney, Ken Kratz,
6 Assistant Attorney General, Tom Fallon, Assistant
7 D.A., Norm Gahn, all appearing as special
8 prosecutors.

9 ATTORNEY FREMGEN: Attorney Mark
10 Fremgen, Attorney Raymond Edelstein appear on
11 behalf and with Brendan Dassey.

12 THE COURT: All right. Today we're here
13 for a number of matters. Among them is a decision
14 on a request by the defense to, uh, have expert
15 testimony from a so-called false confession expert.

16 Uh, we have a number of motions that the
17 Court is going to consider today. Motions filed
18 both by the defense and by the prosecution. And
19 it's my understanding, gentlemen, just as a -- a
20 preliminary matter -- excuse me -- that you've
21 entered into a number of stipulations that will
22 be placed upon the record be -- before the -- the
23 end of court today; is that correct?

24 ATTORNEY KRATZ: Judge, uh, we do have, uh,
25 the completed, uh, stipulations. There are, uh, 21

1 stipulations that have been entered into. This is a
2 document that is signed by myself and, uh,
3 Mr. Fremgen, both as lead counsel, and also by, uh,
4 Mr. Dassey. I would just ask the Court just take a
5 very brief moment to, uh, enter into a colloquy with
6 Mr. Dassey to ensure that, uh, these decisions, that
7 is, the decisions to agree to, uh, these facts and,
8 uh, admissibility of evidence as set forth in this
9 document, does, in fact, bear his signature and is a
10 free and voluntary choice.

11 THE COURT: All right. Mr. Dassey, you've
12 heard Mr. Kratz; haven't you?

13 THE DEFENDANT: Yeah.

14 THE COURT: Could you move the microphone
15 over there, please, Mr. Edelstein?

16 THE DEFENDANT: Yes.

17 THE COURT: And did you understand him?

18 THE DEFENDANT: Yes.

19 THE COURT: Uh, have you had a chance to
20 go through this document? I'm -- I'm holding
21 something up called "trial stipulation." Your
22 counsel's showing you a copy of it.

23 THE DEFENDANT: Yeah.

24 THE COURT: And did you and your lawyers go
25 through it and were they read to you or did you read

1 them?

2 THE DEFENDANT: They read it to me.

3 THE COURT: Did they? And you understood
4 them?

5 THE DEFENDANT: Yeah.

6 THE COURT: You understood these to be
7 agreements that your counsel and the prosecution and
8 you were entering into?

9 THE DEFENDANT: Yeah.

10 THE COURT: And that these agreements
11 would, in some senses, uh, permit the, uh, admission
12 of certain facts without underlying testimony?

13 THE DEFENDANT: Yes.

14 THE COURT: And you agree to that?

15 THE DEFENDANT: Yeah.

16 THE COURT: You understand you didn't have
17 to agree to that?

18 THE DEFENDANT: No.

19 THE COURT: You understand that?

20 THE DEFENDANT: Yeah.

21 THE COURT: All right. And this is your
22 signature? And I'm -- you maybe can't see it from
23 here, but is that your signature on the final page?

24 THE DEFENDANT: Yes.

25 THE COURT: All right. Anything else on

1 that?

2 ATTORNEY KRATZ: Not on the stipulation,
3 Judge. Thank you.

4 THE COURT: From -- from defense?

5 ATTORNEY FREMGEN: I would just, for the
6 record, Judge, I did read the stipulations to
7 Mr. Dassey. He did not read them himself.

8 THE COURT: Correct.

9 ATTORNEY FREMGEN: Um, he also -- when he
10 signed the stipulations, we discussed why we're
11 doing this, and I explained it would basically
12 streamline the trial somewhat, eliminate witnesses
13 that weren't necessarily that significant for either
14 the defense or, for the most part, for the State,
15 and I believe he understands that as well.

16 THE COURT: Uh, is it your belief that he
17 freely and voluntarily signed that, uh, set of
18 stipulations?

19 ATTORNEY FREMGEN: I believe so.

20 THE COURT: And that was after you had
21 read the matter to him and explained it; is that
22 correct?

23 ATTORNEY FREMGEN: Correct.

24 THE COURT: All right. Uh, the first
25 matter I'd like to take up today is the offer of

1 proof made by the defense. Uh, the defense is
2 seeking to have admitted testimony from Dr. Robert
3 Gordon on the suggestibility of witnesses that could
4 or may or, uh, might lead to what he terms a false
5 confession.

6 Uh, the Court has reviewed the DVDs that
7 the defense had supplied, uh, providing, in
8 effect, a -- a direct examination of Dr. Gordon
9 on his background, on his education, on his
10 professional qualifications.

11 Uh, additionally, uh, Special Prosecutor
12 Kratz had an opportunity to cross-examine, uh,
13 Dr. Gordon last week at a -- at a hearing in this
14 courtroom. Uh, and the Court has reviewed its
15 notes on that cross-examination as well.

16 I've had an opportunity to read, uh,
17 briefs submitted by both parties. I read a
18 number of cases. Uh, Wisconsin has yet to have a
19 published case -- or I should say a reported
20 case -- on whether or not false confessions or
21 suggestibility in the context of false
22 confessions are admissible in -- in court at
23 trial.

24 Um, defense has provided me with some
25 information. I found some, as well, myself on

1 cases in other jurisdictions. State has provided
2 information on cases in which this kind of
3 testimony was not permitted. Uh, I think there's
4 a -- a -- an article at 82 ALR 5th, concerning
5 expert testimony on the reliability of -- of, uh,
6 confessions. I've had a chance to review that.

7 Uh, based on my review, based on, uh, my
8 opportunity to take a look at, uh, uh, the
9 testimony of Dr. Gordon, uh, this is what my
10 ruling is:

11 On February 27, 2006 and March 1, 2006,
12 Brendan Dassey was interviewed by police
13 authorities concerning the disappearance and
14 murder of Teresa Halbach. The statements he made
15 during those interviews were the subject of the
16 suppression hearing for -- before this Court on
17 May 4, 2006.

18 On May of 12, 2006, the Court announced
19 that, based on the totality of the circumstances,
20 it found Mr. Dassey's statements to be voluntary
21 and, thus, admissible in the trial of this
22 matter.

23 Subsequent to this -- to that ruling,
24 Mr. Dassey apparently gave an additional
25 statement to the police. I say, "apparently,"

1 because I have not yet seen, read or ruled on the
2 admissibility of that statement.

3 On June 30, 2006, uh, the Court received
4 an undated letter, purportedly from Mr. Dassey,
5 retracting any admissions he made in his prior
6 statements, which conceded his involvement in the
7 crimes with which he had been charged.

8 The defendant has retained, as an expert
9 witness, a clinical psychologist, Dr. Robert
10 Gordon, who is prepared to offer -- offer
11 testimony on the defendant's behalf on the
12 subject of suggestibility or, more appropriately,
13 witness suggestibility as it relates to false
14 confessions.

15 To that end, his counsel have brought a
16 motion seeking to permit Dr. Gordon to testify at
17 trial. As an offer of proof, Mr. Dassey's
18 counsel have submitted DVDs, to the Court and the
19 special prosecutor, of Dr. Gordon testifying on
20 direct examination and discussing his
21 credentials, his interviews of Brendan Dassey and
22 the battery of tests given to him and the
23 scientific basis for the theory of suggestibility
24 about which he wishes to testify.

25 Additionally, the defense has submitted

1 a five-page written report by Dr. Gordon of his
2 findings. At a hearing on March 26, 2007, the
3 special prosecutor had an opportunity to
4 cross-examine Dr. Gordon.

5 Since then, the parties have each
6 submitted briefs on their respective positions.
7 Under Wisconsin law, expert testimony is
8 generally admissible if it is relevant, the
9 testimony will assist the trier of fact, in this
10 case the jury, the expert witness is qualified to
11 provide the scientific, technical or other
12 specialized knowledge, and the expert's testimony
13 is not superfluous or a waste of time. **State v.**
14 **Walstad**, 119 Wis. 2d 483 at 515 and 516.

15 Even if the proposed testimony could not
16 cross the evidentiary threshold of **Walstad** in the
17 Wisconsin Rules of Evidence, it may qualify as
18 admissible if the Court find its -- if the Court
19 finds its exclusion would impermissibly infringe
20 on the defendant's right to present a defense. A
21 right guaranteed under the Sixth Amendment of the
22 United States Constitution and Article 1 Section
23 7 of the Wisconsin Constitution. **State v.**
24 **St. George**, 252 Wis. 2d 499.

25 To be admitted under what I'll call the

1 Doctrine of Constitutional Necessity, the
2 defendant must show the testimony met the
3 statutory standard governing expert testimony.
4 Uh, and this is from Section 9-0-7-0-2 of the
5 Wisconsin Statutes.

6 The testimony is clearly relevant to a
7 material issue in the case.

8 The testimony is necessary to the
9 defendant's case.

10 Its probative value outweighs any
11 prejudicial effect.

12 If these four factors are satisfied, the
13 evidence can be admitted so long as the
14 defendant's right to present the evidence is not
15 outweighed by a compelling state interest.

16 Let me apply what I believe to be the
17 appropriate test.

18 First, is the prop -- is the proposed
19 witness possessed of specialized knowledge, skill
20 or expertise?

21 Uh, Robert Gordon has a Ph.D. in
22 clinical psychology from Washington University,
23 St. Louis. He has been licensed as a clinical
24 psychologist in Wisconsin since 1977, and, I
25 believe, in Illinois since 1980 or '82.

1 His Curriculum Vitae lists ten
2 publications in which he has an authorship
3 interest. He has lectured or spoken on a large
4 number of occasions on psychology or psychology
5 and the law-related subjects.

6 Currently, the majority of his practice
7 is as a consulting and forentincs -- forensic
8 psychologist.

9 He says he has testified in 750 to a
10 thousand legal cases, but admits to recalling
11 only one case in which he gave in-court testimony
12 on witness suggestibility in making a confession.

13 In his clinical and forensic practice,
14 Dr. Gordon has made extensive use of the battery
15 of tests which he administered to the defendant;
16 The Kaufman Brief Intelligence Test, the MMPI, I
17 think, uh, Edition 2, the 16 PF, and the
18 straight -- or the State-Trait Anger Expression
19 Inventory, among the tests.

20 He also gave the defendant tests known
21 as the Gudjonsson Suggestibility Scales, which
22 are designed to evaluate a subject's propensity
23 to yield or shift answers when confronted with
24 negative feedback or interpersonal pressure.

25 From the results of these types of

1 intelligence tests, these types of personality
2 trait tests, and the Gudjonsson Suggestibility
3 Scales, as well as interviews with a test
4 subject, a trained examiner can opine on how
5 susceptible a subject would be to suggestible in
6 a police interview.

7 Based on his education, his clinical
8 evaluative and forensic experience, this Court
9 believes Dr. Gordon, a clinical psychologist, has
10 sufficient expertise to offer opinions on how
11 suggestible Brendan Dassey would be when
12 subjected to a police interrogation.

13 The Court understands Dr. Gordon has
14 limited experience in providing this testimony at
15 trial. That fact goes to the weight the jury
16 affords the testimony, not its admissibility.

17 Secondly, is the testimony relevant?

18 Section 9-0-4-0-1 of the Wisconsin
19 Statutes defines -- defines relevant evidence as
20 evidence having any tendency to make the
21 existence of any fact that is of consequence to
22 the determination of the action more probable or
23 less probable than it would be without the
24 evidence.

25 As an expert in clinical psychology,

1 Dr. Gordon is qualified to interpret the test
2 scores, assess the personality traits of the
3 defendant as real -- uh, as revealed in his
4 interviews, and offer an opinion as to how the
5 defendant would react in a police interview.

6 The issue is the defendant's statement
7 to the police or statements to the police.
8 Dr. Gordon's testimony will, presumably, give a
9 profile of the defendant who, because of his age,
10 lower cognitive functioning and personality
11 traits, presents as a person more likely to be
12 suggestible during police questioning.

13 I believe that this proposed testimony
14 is directly relevant to the material issue of the
15 statements given to the police in this case.

16 Third, will the testimony assist the
17 trier of fact?

18 Dr. Gordon's testimony would be helpful
19 to the jury by showing that an individual with a
20 certain psychological profile may be more
21 susceptible than other members of the population
22 in making a false confession.

23 Will also allow the jury to see that
24 false confessions can occur, and the testimony
25 will aid them in deciding whether the facts of

1 this case fall wholly or partially within the
2 category of a false confession.

3 Ultimately, this Court believes that
4 Dr. Gordon's testimony could assist the jury in
5 evaluating the evidence.

6 Fourth, is the testimony superfluous or
7 a waste of time?

8 Court believes that the testimony to be
9 neither superfluous nor a waste of time. In
10 fact, the testimony goes to the heart of the
11 theory of the defense. That is, that the
12 defendant gave, in whole or material part, a
13 false confession because he was vulnerable to
14 police suggestion because of his age, limited
15 cognitive functioning and certain personality
16 traits.

17 In short, uh, the Court finds that the
18 testimony of Dr. Robert Gordon meets the
19 applicable Wisconsin standards set forth in
20 **Walstad**. Specifically, that he qualified as an
21 expert who possesses specialized knowledge that
22 is relevant because it will assist the trier of
23 fact to understand the evidence and determine a
24 fact in issue. Accordingly, his testimony is
25 admissible.

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Because I do find the testimony admissible under the relevancy test, I need not consider whether the constitutional right to pres -- prevent -- or present a defense here is implicated.

One further word. Dr. Gordon will not and cannot offer an opinion on whether the defendant's statement or statements or any part of them are true or false. That is the sole province of the jury. It, alone, will make that determination.

Also, as he noted in his direct examination testimony, Dr. Gordon is not a social scientist, and, therefore, is not an expert on police interrogation techniques or coercive questioning. On those matters he cannot offer expert opinions. Therefore, he will not be permitted to offer any expert opinions on whether or not he believes the questioning of the defendant was coercive.

The Court notes, as it did at the beginning of this decision, that on May 12, 2006, it decided that the defendant's statements given to police on February 27, 2006 and March 1, 2006, were as measured by the totality of the

1 circumstances, voluntary admissions.

2 Involuntary admissions are, by
3 definition, the product of, quote, coercive or
4 improper police conduct, end quote. This is
5 **State vs. Hoppe**, 261 Wis. 2d 294 at page 309.

6 Since the Court has already made the
7 finding of voluntariness, Dr. Gordon is not
8 allowed to refer to statements made by the
9 defendant as coerced.

10 Lastly, as part of this order,
11 Dr. Gordon, or his counsel, shall turn over to
12 the special prosecutor as soon as practicable,
13 and in no event later than April 10, 2007, all
14 materials he relied on, including, but not
15 limited to, test scores, notes, statements of the
16 defendant and anything else in formulating his
17 opinion.

18 All right. That's, uh, my ruling on the
19 admissibility of Dr. Gordon's testimony.
20 Mr. Fremgen, I ask that you draft an order
21 embracing that.

22 ATTORNEY FREMGEN: If I can get a copy of
23 the transcript as well, that might assist me in --

24 THE COURT: All right.

25 ATTORNEY FREMGEN: In regards to the

1 discovery, or the, uh, research and test results,
2 could we ask that the Court, uh, place some sort of
3 a condition on that? Since it is -- one item in
4 particular, the MMPI results, are proprietary,
5 that -- and I'm not -- I'm assuming the State's not
6 going to share this with the world, but if,
7 basically, uh, State agrees that whatever research
8 results in information they receive, that's
9 proprietary in nature be, uh, not shared with any
10 other parties?

11 THE COURT: You're asking for a protective
12 order --

13 ATTORNEY FREMGEN: Correct.

14 THE COURT: -- doing that? Any objection?

15 ATTORNEY FREMGEN: Other than an expert.
16 If they have experts, they can share with that.

17 THE COURT: Yeah. Yeah. That's
18 understood.

19 ATTORNEY KRATZ: Yeah. I probably wouldn't
20 be sharing with anybody anyway other than for court
21 purposes, Judge. The MMPI is in the public domain.
22 I don't believe that's proprietary. But,
23 nonetheless, for purposes of this trial, as long as
24 we get to use it at trial, and we get to show it to
25 our experts, um, that -- that's fine.

1 THE COURT: All right. Uh, let's move on
2 to the -- the motions that we have to be heard
3 today. Uh, the -- the first is a set of motions
4 that was filed by the defense. It's my
5 understanding that some of these may already have
6 been stipulated to between the parties, or that
7 there is -- certainly that there's no disagreement
8 about them.

9 I'm turning here to what is called the
10 second motion in limine, pretrial procedure
11 motions.

12 Um, the first motion there is a
13 sequestration motion, which is standard in any of
14 these cases. I suspect there's no objection to
15 that. Is that correct, Mr. Kratz?

16 ATTORNEY KRATZ: That's right, Judge.

17 THE COURT: The second is a -- a motion
18 prohibiting the introduction of evidence on, uh,
19 prior crimes or wrongdoings. So-called other acts
20 evidence of this defendant.

21 Uh, Mr. Kratz, is -- is that the -- the
22 subject of any contention at this point?

23 ATTORNEY KRATZ: It is not, Judge. Should
24 we seek to introduce any, uh, other acts evidence or
25 evidence under 9-0-4-0-4 (2), we will seek advance

1 ruling of the Court prior to, uh, engaging in that
2 kind of question.

3 THE COURT: All right. Uh, the third
4 motion talks about the individual voir dire of, uh,
5 prospective jury members. Uh, counsel and I will be
6 taking that, among other jury issues, up later --
7 later today. I've already told counsel it is my
8 present intention not to, uh, conduct a voir dire
9 that consists entirely of individual voir dire but,
10 rather, to do a -- a more standard voir dire with,
11 uh, occasional individual voir dire, depending upon
12 the, uh, responses of prospective jurors.

13 Uh, the next one is, uh, a request that
14 the court reporter take -- be requested to take
15 notes of the voir dire examination, opening
16 statements and all bench conferences. Uh, that
17 is pretty much standard practice with the
18 exception of the bench conference, um, request
19 here. And that is just simply a matter of the --
20 the geography of this courtroom and this bench.
21 Um, you want to be heard on that?

22 ATTORNEY FREMGEN: What I would simply ask
23 for is that at breaks we could go on the record and
24 somehow memorialize what may have gone on in a bench
25 conference.

1 THE COURT: That's fine. You have no
2 objection to that?

3 ATTORNEY KRATZ: No.

4 THE COURT: The next requested order is an
5 order limiting the State's use of photographs of the
6 deceased when alive, uh, on grounds of relevancy.
7 Uh, gentlemen, have you discussed that?

8 ATTORNEY KRATZ: We have. And I think
9 we've reached an agreement, Judge, as to all
10 photographs to be used, uh, in this case. I don't
11 want speak for Mr. Fremgen, but if that's not the
12 case, I think that he needs to alert the Court of
13 that. Otherwise, what we've shared with
14 Mr. Fremgen, I believe, he does not have an
15 objection to.

16 THE COURT: Is that correct?

17 ATTORNEY FREMGEN: I've received, uh, two
18 CDs of photographs and we have no objection to
19 what's within those two CDs.

20 THE COURT: All right. Uh, motion 7 and 8
21 go to the defendant's clothing during the course of
22 the trial and the non-use of -- of shackles. Uh,
23 uh, motion 8 requests the street clothing, and the
24 Court has already said it's going to grant that. In
25 fact, I think I granted it a long time ago. And

1 during the, uh -- during the course of the trial
2 when the defendant is in the observation of the
3 jury, he will not be shackled.

4 The last motion in that set of motions,
5 uh, request that the prosecutor re -- refrain
6 from stating his personal opinion of the
7 witnesses' credibility, the defendant's guilt or
8 innocence, the justness. And -- and it goes on
9 to quote a portion of the, uh, State Bar Code
10 of -- it's called the Lawyers Rules of
11 Professional Responsibility these days, uh,
12 20:3.4. Uh, presumably, Mr. Kratz, you're going
13 to live within that rule?

14 ATTORNEY KRATZ: Myself and, uh,
15 co-counsel, Judge, uh, although when -- we will
16 surely be commenting on the evidence. I'm sure we
17 will not state a personal belief.

18 THE COURT: All right. That's the -- those
19 are the initial set of motions that we are
20 considering.

21 The second motion is a motion submitted
22 by the State, uh, indicating the State's, uh --
23 the --

24 ATTORNEY FREMGEN: Judge, I'm sorry. If
25 you go --

1 THE COURT: I -- Did I miss one?

2 ATTORNEY FREMGEN: You skipped one.

3 Number -- On your sheet it's number seven. Oh, that
4 was addressed?

5 ATTORNEY KRATZ: He addressed them
6 together.

7 ATTORNEY FREMGEN: Oh, I'm sorry.

8 ATTORNEY KRATZ: We reached an
9 agreement.

10 ATTORNEY FREMGEN: Okay. That's fine. I
11 think that may have been the one you mentioned you
12 were following Judge Willis' previous ruling or --
13 on the display of memorials, etc.

14 THE COURT: Right.

15 ATTORNEY FREMGEN: Okay.

16 THE COURT: Right. Right. Yeah, and --
17 and I had talked about -- you're right, I didn't
18 talk about that specifically here today, but we
19 had talked about that previously.

20 Uh, the State's motion in limine
21 relating to the admissibility of DNA evidence.

22 Is there an agreement on that?

23 ATTORNEY FREMGEN: Judge, the defense is
24 not objecting to the State's use of -- we're not
25 going to, uh, contest the foundation. Um,

1 essentially, I -- I -- my understanding the State's
2 obviously going to still produce witnesses to
3 testify about the proc -- the process, the protocol,
4 the procedure, but we're not raising any objections
5 to those.

6 THE COURT: All right. I take it that's
7 satisfactory, Mr. Kratz?

8 ATTORNEY KRATZ: If I could just have one
9 moment, Judge.

10 THE COURT: Okay.

11 ATTORNEY KRATZ: We just wanted to make
12 sure, Judge, that the defense is not challenging the
13 admissibility of the evidence since this is an
14 admissibility issue. If, in fact --

15 ATTORNEY FREMGEN: Nope.

16 ATTORNEY KRATZ: -- that is, uh --

17 THE COURT: My understanding is,
18 Mr. Fremgen, that you are not challenging the
19 admissibility of it.

20 ATTORNEY FREMGEN: No, Judge.

21 THE COURT: No means we are not challenging
22 it?

23 ATTORNEY FREMGEN: We're not -- we're not
24 challenging the admissibility of the DNA evidence.

25 THE COURT: All right. Next set of motions

1 are -- are called the State's Motion in Limine,
2 Series 1.

3 Uh, the first of them is a motion to
4 preclude third party liability evidence. Um,
5 gentlemen, have you discussed this motion? And
6 this motion relates to, uh, if the defense
7 intends to introduce evidence that other -- uh,
8 that someone other than Steven A. Avery
9 participated in these offenses, uh, the -- uh,
10 which Mr. Dassey is now charged, the State
11 requests an offer of proof. Uh, is the defense
12 intending to produce any such evidence?

13 ATTORNEY FREMGEN: No, Judge.

14 THE COURT: The next is the motion to
15 exclude evidence that the Manitowoc County Sheriff's
16 Department or any other law enforcement agency
17 planted evidence to frame Steven Avery. The -- the
18 motion goes on to spell out with some specificity
19 what particular evidence the maker of the motion
20 refers to.

21 ATTORNEY FREMGEN: Judge, I'm sorry.
22 I -- I -- I believe I spoke to Attorney Fallon
23 yesterday in regards to this motion. Uh, our
24 intent is not to raise questions as to whether
25 evidence was planted. Obviously, we would

1 reserve any right to cross-examine officers and
2 that cross-examination may be -- we're not going
3 to cross-examine on planting, but we're not going
4 to simply -- we put it bluntly, I guess we can be
5 vigorous or our cross-examination, though we're
6 not going to raise the issue of planting. Is
7 that fair?

8 ATTORNEY FALLON: Um, I guess I need a
9 little -- Uh, no.

10 THE COURT: Yeah, it's fair, but it doesn't
11 really say much other than you're going to be
12 vigorous on your cross-examination. And I assume
13 you will be.

14 ATTORNEY FREMGEN: Well, our intent is
15 not -- that's not our defense. Our defense is not
16 that evidence was planted. I don't want this --

17 ATTORNEY FALLON: Does that -- does
18 that --

19 ATTORNEY FREMGEN: -- to be an issue.
20 What's that?

21 ATTORNEY FALLON: I was going to say,
22 when you say it's not going to be planted,
23 there's no evidence that it -- planted to frame
24 your client or dealing with a -- frame-up
25 evidence that was alleged in the Avery case?

1 Just so we are --

2 ATTORNEY FREMGEN: Well, I --

3 ATTORNEY FALLON: -- clear on it --

4 ATTORNEY FREMGEN: We are --

5 ATTORNEY FALLON: -- that there's no --

6 THE COURT: One at a time here.

7 ATTORNEY FREMGEN: I'm sorry. We're not
8 raising any frame-up theory of defense for either.
9 I just -- I -- I don't want the motion to make it
10 sound as if we're simply going to let the witnesses
11 speak to whatever they want to speak to without
12 having some sort of cross-examination, though. So,
13 as long as you're aware that we're going to still
14 ask questions.

15 ATTORNEY FALLON: About --

16 ATTORNEY FREMGEN: Not about planting.

17 ATTORNEY FALLON: And not about framing.

18 ATTORNEY FREMGEN: No.

19 THE COURT: All right. It's understood
20 that there'll be no questions about planting of
21 evidence of State's witness or framing anyone; is
22 that correct?

23 ATTORNEY FREMGEN: That's correct.

24 ATTORNEY FALLON: Okay.

25 THE COURT: The third of the State's set of

1 motions is a motion to preclude evidence of police
2 or investigative bias against Steven Avery. And
3 that motion goes on to name some persons who I
4 suspect were witnesses in the previous trial. Uh,
5 Mr. Fremgen?

6 ATTORNEY FREMGEN: We have no objection
7 with that.

8 THE COURT: All right. So any evidence or
9 any attempt to introduce evidence that there was a
10 police or investigative bias against Steven Avery
11 will not be permitted.

12 ATTORNEY FREMGEN: Against Steven Avery,
13 correct.

14 THE COURT: Correct. The last, and this
15 set of motions, is a motion to preclude evidence of
16 any lawsuit filed by Steven Avery against Manitowoc
17 County.

18 ATTORNEY FREMGEN: We don't believe that's
19 relevant in our case. We're not going to bring it
20 up.

21 THE COURT: Nor do I, as a matter of fact.
22 The next motion is a motion to allow, as testimony,
23 admission of a party opponent and, specifically,
24 what's sought to be admitted here, and this is the
25 defense motion, is remarks allegedly made, or a

1 remark allegedly made, in the rebuttal portion of
2 closing argument of Steven Avery's trial by Special
3 Prosecutor Kratz, in which he said, quote,
4 everything in this case pointed to one person,
5 towards one defendant, dot, dot, dot, follow the
6 Court's instruction and follow the evidence in this
7 case and return verdicts of guilty. End quote.

8 The motion goes on to set forth a basis
9 for its admission, although, I think,
10 Mr. Fremgen, you're citing here 9-0-8-0-1 (3). I
11 think you really mean 9-0-8-0-1 (4b1), uh, as
12 the -- the, uh, party opponent, uh, exception to
13 the hearsay rule.

14 ATTORNEY FREMGEN: I'm -- I'm, uh --

15 THE COURT: Looking at page two, number
16 five.

17 ATTORNEY FREMGEN: Correct.

18 THE COURT: And you also cite a number of
19 cases. Three federal cases. I think **United States**
20 **v. McKeon** is the first of them. **United States v.**
21 **Salerno** and, then, **United States v. DeLoach**. I'm
22 not going to give the citations at this, uh -- at
23 this point. They're all found in the -- or the
24 reporter citations. They're all found in your --
25 your argument.

1 And you also cite a Wisconsin case which
2 essentially adopts the holding in those three
3 cases, and that Wisconsin case is called **State**
4 **Cardenas-Hernandez** -- **State v.** -- excuse me -- of
5 **Cardenas-Hernandez** at 219 Wis. 2d, uh,
6 specifically at page -- well, it's at 531, but,
7 specifically, at page 532. You want to be heard
8 on this, Mr. Fremgen?

9 ATTORNEY FREMGEN: Judge, I guess I would
10 just rely upon the arguments in the -- the motion.
11 I don't have, yet, a transcript. I asked for one.
12 I understand it's taking some time for the court
13 reporter. There's -- she has requests from a number
14 of transcripts from that trial. Um, I have nothing
15 else to add.

16 THE COURT: Mr. Kratz, do you wish to be
17 heard?

18 ATTORNEY KRATZ: I do, Judge. Um, as the
19 Court, uh, knows from its reading of the
20 **Cardenas-Hernandez** case, use of prior statements of
21 attorneys, uh, which include, uh, prosecutors, uh,
22 is, um, dicey, to use a -- a non-legal term. It's
23 admitted very rarely. In fact, was not, in the, uh,
24 Car -- uh, **Cardenas-Hernandez** case.

25 The reasons for that that appear to be

1 obvious, first of all, the dangers, uh, that an
2 attorney will become a witness are very real. I
3 don't know if Mr., uh, Fremgen is inviting me to
4 testify in this case, since he is asking that
5 this be allowed as testimony. I see many dangers
6 in, uh, that particular, um, procedure.

7 But, uh, it is usually not relevant as
8 using an argument from one proceeding, uh, most
9 necessarily, will lead a jury to draw an unfair
10 inference -- inference, especially, in this case,
11 when considering that, um, Mr. Avery was a
12 different case than Mr. Dassey's case. Uh,
13 different evidence was allowed. Um,
14 specifically, no, um, confession or admission of
15 Mr. Dassey, uh, was allowed, and the jury wasn't
16 asked to consider, uh, whether Mr. Dassey was
17 guilty, uh, or not guilty.

18 And so, uh, the final, uh, subject that
19 this Court should consider is whether there is an
20 explanation for the inconsistency, or perceived
21 inconsistently, and -- and there surely, uh, is
22 when the State invited the jury in the Avery
23 case, uh, to reject the planting theory as the
24 evidence pointed to one individual, uh, that was
25 because that was the Avery case. That the

1 evidence in that case, uh, pointed to Mr. Avery.

2 We fully intend to present evidence that
3 points to Mr. Dassey, uh, in this prosecution
4 since this is a separate prosecution. Frankly,
5 if they were the same case, they would have been
6 joined for trial. Because they are not, and
7 because evidence, in fact, legally, in one case,
8 could not be admitted in the other case, uh,
9 that, uh, should provide the Court all the
10 explanation, uh, it needs.

11 For all of those reasons, Judge, uh, I
12 would ask the Court adopt the, uh, generally
13 held, um, provision that these kinds of arguments
14 are not to be considered testimony in a
15 subsequent, especially a different case, and deny
16 the request for, uh, admission of this argument.
17 That's all. Thank you.

18 THE COURT: All right. Mr. Fremgen, any
19 response?

20 ATTORNEY FREMGEN: No, Judge.

21 THE COURT: Uh, the Court has considered
22 the materials submitted by Mr. Fremgen. I've also,
23 uh, read the -- the federal cases, the three of
24 them, um, I think it's, uh, **McKeon**, **Salerno** and
25 **DeLoach**.

1 I -- I'm note -- I'll quote here just
2 from **Salerno**, which -- which picks up what was
3 originally decided in **United States v. McKeon**.
4 Uh, it says that, uh, the court must be satisfied
5 that a prior argument involves an assertion of
6 fact inconsistent with similar assertions in a
7 subsequent trial.

8 Uh, second, the court must determine
9 that the statements of counsel were such as to be
10 the equivalent of testimonial statements made by
11 the client. And I'm quoting here from **U.S. v.**
12 **Salerno** at, uh, 937 F. 2d, uh, 797.

13 Specifically, from page 811. Uh, the -- the
14 holding of that -- there's a -- there's a third
15 part -- third prong, to that test as well. Uh,
16 the holding of that has been -- been picked up
17 by, uh -- as I noted before -- by **State v.**
18 **Cardenas**, uh, **State**, uh -- **State v.**

19 **Cardenas-Hernandez**. Here we have a statement,
20 everything in this case pointed to one person
21 towards one defendant. Follow the court's
22 instruction and follow the evidence in this case
23 and return verdicts of guilty.

24 Well, it's true. The case did point
25 to -- to one person. That was the only person

1 being tried at the case. Uh, the evidence
2 pointed that person because the -- the admissions
3 that are the -- part of the subject of this case
4 were -- were not used as part of that case.

5 At best -- at very best, this is -- this
6 is an equivocal remark by the special prosecutor.
7 I haven't seen the context. Even if I did see
8 the context, I doubt that my mind would -- would
9 change. I think it was entirely permissible.

10 I don't think it becomes, under the --
11 the test spelled out in these federal cases, in
12 **State v. Cardenas-Hernandez**, uh, an admission by
13 a party opponent. Not by a long shot.

14 Uh, excuse me. Therefore, I'm going to
15 respectfully deny your motion, Mr. Fremgen.

16 The next sets of motions are the State's
17 Motions in Limine, Series 2, and they fall into
18 two general categories.

19 The first of them I will characterize,
20 simply, um, by the -- the title, Statements of
21 Brendan Dassey, and they amount to, uh, some
22 statements allegedly given to -- to investigative
23 agents, uh, in November of 2005. Uh, apparently
24 a -- a statement allegedly made to, uh, Cassie
25 Fiala. Uh, then, statements made to Detective

1 Wiegert and Special Agent Fassbender.

2 I think all of those have basically been
3 admitted. Uh, those are statements on -- made
4 February 27 and March 1. And then there are a
5 series of telephone -- recorded telephone calls
6 from the defendant to, uh, his mother, from the
7 defendant to his mother and another, then there's
8 also the May of 13, 2006 statement to Special
9 Agent Fassbender and Detective Wiegert at the
10 Sheboygan County Sheriff's Department.

11 And, lastly, uh -- well, I shouldn't say
12 lastly. Uh, second lastly, is a letter from the
13 defendant to me, the Court.

14 And, lastly, is other recorded
15 statements made by Brendan Dassey to, uh, his
16 mother, Barb Janda.

17 Generally speaking, with respect to the
18 phone conferences made by the defendant, um,
19 while he was incarcerated, uh, it's my
20 understanding that under -- under -- under, 968,
21 uh, 31, (2b) and 968.28 (2b), uh, that as long as
22 there's one party consent, and as long as the
23 party who consented is available to authenticate,
24 or someone else is available to authenticate,
25 the -- the phone calls, that they are -- uh, they

1 are going to be admitted.

2 Uh, the defendant will -- and this is
3 assuming that the -- the appropriate, uh, uh,
4 language is found at the beginning of the phone
5 call advising the defendant that these are going
6 to be recorded and that, uh -- that -- that
7 recordation, uh, is going to occur. That has
8 been deemed in -- in case law to be an implied
9 consent.

10 Now, any admission is -- is, of course,
11 subject to relevancy considerations but, to -- to
12 sort of speed this up, uh, Mr. Fremgen, is that
13 your understanding of the law?

14 ATTORNEY FREMGEN: Attorney Edelstein's
15 going to argue that motion.

16 THE COURT: Attorney Edelstein.

17 ATTORNEY EDELSTEIN: Your Honor, despite,
18 uh, not necessarily agreeing with the ruling that,
19 uh, indicates that it's an implied consent, because,
20 obviously, our client was not in a position to make
21 a choice, there were no other options available, um,
22 I think that is a correct statement of the law under
23 **Riley**.

24 So, to the extent the Court is
25 addressing the telephone calls, um, from the

1 defendant, um, based upon that ruling, uh,
2 understanding the admissibility, we would only
3 ask the Court require the State to provide to us,
4 with some specificity, those particular calls
5 they intend to use and making specific reference
6 to the tracks on the CDs that we've been
7 supplied.

8 We have a multitude of CDs. A lot of
9 phone calls. And while the CDs indicate a date
10 range, there was no way to reference them
11 individually, um, simply by looking at that. And
12 it's purely speculation on our part. I think
13 we're certainly entitled to more specific notice.
14 I think the State has that capability, obviously,
15 um, and we would ask the Court require that as a
16 condition of that portion of their motion that
17 the Court has ruled on relative to the phone
18 calls.

19 THE COURT: Mr. Kratz?

20 ATTORNEY FALLON: Your Honor, I'll be
21 handling this, uh, motion --

22 THE COURT: Oh.

23 ATTORNEY FALLON: -- for the State.

24 THE COURT: Mr. Fallon.

25 ATTORNEY FALLON: Thank you. Um, first

1 and foremost, I think the -- the **Riley** case is
2 dispositive, and absent other relevant
3 evidentiary objections, I think the calls are
4 admissible.

5 Um, secondly, with respect to, uh,
6 adequate notice, with all deference to Counsel, I
7 must disagree. It seems to me that is exactly
8 why we're here today. That is the point of the
9 notice of intent and motion to possibly admit
10 these statements.

11 I can't tell you right now whether, uh,
12 all of these statements will be utilized by the
13 State's -- in its case in chief. Um, however,
14 the point of the motion hearing today was to
15 determine whether or not any -- there was any
16 contest or other legal bases to deny
17 consideration of those.

18 Most notably, the voluntariness that --
19 of any of these statements, or the **Miranda**, or,
20 uh, as we've just discussed, viz-a-viz the
21 telephone calls, whether there's adequate, uh,
22 notice, uh, to, uh, come with under -- come
23 within the umbrella of implied consent. And I
24 think we've met that. Um, we've specifically
25 indicated the day the call and to whom the call,

1 uh, or who the participants in the call was. I
2 don't think we need more, uh, for adequate
3 notice.

4 And, third, um, a lot of what could be
5 used in this case depends in large part what
6 evidence the defense will introduce in their case
7 in chief. Many of -- of our calls here, um, are
8 being, um, we're seeking an advance ruling, may
9 very well be rebuttal or reply evidence, to which
10 we really technically don't have to give notice
11 yet as of this time, but we sought to put it all
12 in there just to deal with it now rather than
13 having to deal with it in mid-trial or before the
14 case start -- before the State starts its
15 rebuttal case.

16 But I think the fact that we've given
17 him notice of the date, uh, and the participants
18 of the call and a -- and a copy of the call is --
19 is more than, uh, sufficient notice.

20 ATTORNEY EDELSTEIN: Your Honor, if I
21 might respond very briefly.

22 THE COURT: GO ahead.

23 ATTORNEY EDELSTEIN: In the motion,
24 letter N makes reference to any other recorded
25 statements. Now, I will concede that to the best

1 of our knowledge the State has provided us any
2 telephone calls made by our client to his mother,
3 Barb Janda. But, again, that is so wide open and
4 there are so many that it's virtually impossible
5 to know with any specificity what that relates
6 to.

7 Additionally, as to J, the May 13
8 telephone call, the Court has, to my
9 understanding, not specifically ruled as to what
10 we'll call the May 13 statement to the police.

11 The telephone call, which is the subject
12 of J is intricately tied to that and there's a
13 significant issue as to the, um, I think
14 admissibility based upon a voluntary issue given
15 the nature of the exchange between the defendant
16 and the police officers, uh, toward the end of
17 that particular interview.

18 It was -- and -- precisely, what I'm
19 referencing, Your Honor, is the police officers
20 made it quite clear that he had to call his
21 mother, and he had to call his mother that day
22 once they were done with that interview. They
23 made it quite clear that they were going to talk
24 to her if he did not. He needed to do it before
25 they did. They're clearly in a position where

1 they understand that any phone calls he makes are
2 going to be recorded.

3 So, in effect, they're posturing
4 themselves to create, uh, what they hope and
5 arguably might be based upon the State's desire
6 to use that particular phone call, an
7 incriminatory statement. So that one, I think,
8 has to be dealt with quite separately, perhaps,
9 from some of the others.

10 THE COURT: Mr. Fallon?

11 ATTORNEY FALLON: Well, I have several
12 thoughts on that. Uh, the letters I and J in the
13 motion on page two, whether you deal with them
14 individually or jointly, the question still comes
15 down to this:

16 Is there an objection, and that's the
17 point of the motion, as to the voluntariness of
18 tho -- of that statement. And if Counsel wants
19 to tie J to I, then fine, we'll do that. Let's
20 take up I. The question is this:

21 Was Mr. Dassey adequately Mirandized.
22 Question number one.

23 Question number two, was, uh, the
24 balance of the statement, and in the totality of
25 the circumstances, was the statement voluntarily

1 obtained?

2 Those are the questions.

3 Third, if you want to tie the subsequent
4 telephone call, let us not lose sight of the fact
5 that whether the officers suggested, told,
6 demanded or asked Mr. Dassey to talk this matter
7 over with his mother, does it really matter?

8 The fact is, Mr. Dassey chose to make
9 the call and, like anyone else, chose to seek
10 counsel from his mother.

11 What makes that statement presumably
12 involuntary is beyond me. It's a choice to make.
13 A discussion was held. The parties are aware the
14 matter is being recorded. Those are the
15 preliminary issues that we must deal with to
16 determine the admissibility.

17 If the defense wants to make use of
18 those statements in some other capacity,
19 viz-a-viz this whole false confession scenario,
20 then that is, of course, their choice to do in
21 their case in chief either with or without
22 assistance of Dr. Gordon.

23 So, again, the question for today is is
24 there a challenge to the voluntariness to the
25 **Miranda** of the statement, uh, referred to in

1 letter I? And, if not, then I don't see how what
2 occurred in the subsequent telephone call, uh,
3 several hours later, or an hour later, I -- my --
4 escapes me as to how much time passed -- I don't
5 see how that makes that statement inadmissible.

6 THE COURT: Well, here, Mr. Edelstein,
7 are -- are you objecting on voluntariness grounds to
8 I and J? And, if so, are you requesting that the
9 Court, uh, view whatever I -- I assume I is a -- is
10 a DVD or is on DVD -- and listen to J?

11 ATTORNEY EDELSTEIN: We are not objecting
12 to I on the basis of voluntariness. That particular
13 statement, however, I believe is still subject to
14 the defense motion, which this Court has yet to rule
15 upon based upon ineffective assistance.

16 That's a little different than the
17 February 27 and the March 1 statements where
18 prior counsel had conducted a hearing and we
19 attempted to re-litigate that issue and the Court
20 found that that was a, um, post-judgment issue.
21 So that's the only basis of an objection as to
22 the May 13 statement by the defendant.

23 I think the issue on J, while it is not
24 a statement to a police officer, it was promoted,
25 encouraged and almost insisted that he make that

1 phone call. These are police officers. This is
2 a very vulnerable individual. That is tantamount
3 to the creation, the coercive creation, of
4 evidence. It's different than when you start.
5 He may have made a voluntary statement, but
6 that's a totally different issue. That is the
7 creation by experienced police officers of what
8 they know and reasonably believe to be admissible
9 against him.

10 When a -- an individual like that, in
11 that circumstance, is encouraged to make that
12 type of call, the officers knowing full well that
13 this is a -- something that may be used against
14 him, I think that that has to be looked at
15 separately from that portion -- from the rest of
16 the statement itself. Uh, taking the position
17 that that, in and of itself, because of the
18 conduct, uh, was, in fact, the creation of
19 involuntarily produced evidence.

20 And I think the Court, from a review of
21 that particular portion of the, uh, DVD, would be
22 in a best position to determine whether or not
23 that's the case. If necessary, uh, one of the
24 officers could be called and examined to
25 determine, uh, what their purpose in doing that

1 was. There can be no other logical conclusion
2 other than it was their intent, knowing full well
3 that these are being recorded, to create that
4 type of evidence against the defendant.

5 THE COURT: Mr. Fallon.

6 ATTORNEY FALLON: Yes, two points. One,
7 with respect to, um, the law enforcement, uh,
8 interrogation on May 13, item I, the -- I take it,
9 then, that there's no objection to **Miranda** or
10 voluntariness. And if that's the case, then the
11 only matter of issue or consequence to the defense
12 appears to be the ineffective assistance of counsel
13 claim.

14 Well, then, I have two comments to make
15 viz-a-viz that. First, it's not ripe at this
16 time and, quite frankly, it may never be ripe,
17 um, for a determination of, one, deficient
18 performance, and, two, prejudice. Because any
19 constitutional claim, there's no violation until
20 the statement is actually admitted. And, then,
21 you have to evaluate it in the general context of
22 all the other factors.

23 Um, so if the statement is never
24 admitted by a party, particularly the State, it's
25 not an issue. If the statement is utilized by

1 the defense, then they can't claim that issue.

2 Now, with respect to the, um, telephone
3 call, it matters not. It is the matter -- The
4 only issue is, who initiated the call? And so
5 un -- under these circumstances, there's no
6 question as to the voluntariness of the call. It
7 was a choice of Mr. Dassey, the defendant, to
8 call and seek counsel of his mother. Whether he
9 was -- again, whether he was suggested, told to,
10 or whatever, time passed, he was alone, he had
11 time to think, he made a call. I don't see how
12 that's involuntary. I'll await the Court's
13 ruling.

14 THE COURT: Yeah. All right. Uh,
15 Mr. Edelstein, your -- your last shot here.

16 ATTORNEY EDELSTEIN: Interrogations have
17 the ebb and flow. We've all seen that. There are
18 times when people assert their rights and police
19 officers say things to persuade them to come off of
20 that. That very last portion of this interrogation,
21 if you will, that really had nothing to do with any
22 questions to Brendan, other than, for example, when
23 will you call her, which is not intended to gather
24 any statement of him eliciting an inculpatory
25 response, but is, in fact, intended to create a

1 separate evidentiary item which these officers knew,
2 had to know, was going to be preserved, that they
3 could use against him later, seeking to have him
4 make inculpatory statements to a third person.

5 At that point, I think, the issue of
6 voluntariness does, again, become an issue.

7 Now, am I saying it required a separate
8 warning? No, I'm not. But if we evaluate this
9 on the totality of the circumstances, I believe
10 the Court is in the best position upon a review
11 of that portion. This wasn't just a simple
12 request. Brendan, you should talk to your mom
13 about what we talked about here today. It was
14 very specific, um, and tantamount to coercion.
15 Therefore, it's not voluntary. I don't think
16 that that statement -- that phone call, uh,
17 should be admitted.

18 ATTORNEY FALLON: Well, then, maybe we need
19 to have a hearing and Mr. --

20 THE COURT: I ask --

21 ATTORNEY FALLON: -- Dassey will need to
22 take the stand.

23 THE COURT: Well, here's what we're going
24 to do. I -- I hear -- I'm hearing about what was
25 said and -- and how it was said, but I've never seen

1 it nor have I heard it. Uh, so I've got to take a
2 look at it. Uh, I'll reserve ruling on I and J.

3 What I would like to do, because we
4 don't have a whole lot of time here, is, uh, take
5 a look -- if I can get a copy of the DVD, as well
6 as this particular phone message, I'll listen to
7 them over the weekend and, uh, if time permits,
8 and I think it does for me on Monday, we can come
9 back and we can -- we can talk about this again.
10 I'll rule on it.

11 Uh, as to your argument about
12 ineffective assistance of counsel, uh, I -- I
13 understand certainly the substance of the
14 argument, but, uh, the Court, uh, in ruling the
15 last time, it was raised in a slightly different
16 context, said that until the case is over, that
17 is not ripe for a decision or even discussion.
18 All right.

19 Uh, with respect to the rest of them,
20 the rest of the requests here, and maybe I'll
21 just -- I'll just go from -- from A to N, uh, any
22 objection, defense, to A?

23 ATTORNEY EDELSTEIN: No.

24 THE COURT: And those are statements, or
25 that is a statement that -- that -- uh, how about B?

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ATTORNEY EDELSTEIN: No.

THE COURT: C?

ATTORNEY EDELSTEIN: Your Honor, we do object to that. We do not believe that it's relevant and it's highly prejudicial.

THE COURT: Well, subject to -- subject to and -- and relevancy is always a consideration, but subject to a relevancy objection, and, again, I don't know what's on that tape, but subject to a relevancy objection? This is -- if -- if it's a statement by Brendan Dassey, it's probably a 9-0-8-0-1-4-b-1 statement, depending upon what it says. You agree?

ATTORNEY EDELSTEIN: I agree, Your Honor. But, again, I think once that, um -- Perhaps that's something we could have the Court rule on in advance if the parties agree to allow the Court to review that particular statement. It's our position that, um, the prejudicial value heavily outweighs any relevancy.

THE COURT: All right. I'll do that. Uh, D? Do you have any objection to D? I think it's already been admitted.

ATTORNEY EDELSTEIN: No.

THE COURT: E? F? G?

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ATTORNEY EDELSTEIN: No, Your Honor.

THE COURT: H? It's a recorded phone conversation of March 7 from the defendant to his mother.

ATTORNEY EDELSTEIN: No, Your Honor.

THE COURT: K? Statements in a recorded phone call from the Sheboygan County Jail from the defendant to his mother?

ATTORNEY EDELSTEIN: No, Your Honor.

THE COURT: L? The May 18, 2006 statements in a recorded telephone call of Brendan Dassey to Barb Janda and Candy Avery, including, but not limited, going over to the Steve Avery bonfire about 7:00 p.m. on October 31 and being in the garage and cleaning up some reddish brown stuff on the garage floor?

ATTORNEY EDELSTEIN: No, Your Honor.

THE COURT: M? The June 30, 2006 letter from the defendant to the Honorable Jerome Fox, Circuit Court Judge, Manitowoc County Circuit Court?

ATTORNEY EDELSTEIN: No objection.

THE COURT: And, N, any other recorded statements made by Brendan Dassey to his mother, Barb Janda?

ATTORNEY EDELSTEIN: Your Honor, again

1 that's --

2 ATTORNEY FALLON: Let me -- let me help you
3 out on that one. If -- if -- if -- we put that in
4 just in case we missed something, and, uh -- but it
5 would be within that category or context. And let
6 me just say this, if we do identify another
7 statement that was somehow overlooked, we'll provide
8 notice immediately and then we can briefly discuss
9 whether it's of issue or not.

10 THE COURT: All right.

11 ATTORNEY EDELSTEIN: That's fine, Your
12 Honor.

13 THE COURT: With that consideration? All
14 right. Now, the second part of the motion deals
15 with statements by Steven Avery and Barb Janda. Uh,
16 and the justification or the basis for the motion is
17 that the statements are in furtherance of the
18 conspiracy to cover up the crimes of first degree
19 murder and constitute attempts to intimidate a
20 witness under Section 940.43 (4), and which may
21 include an attempt to suborn perjury.

22 Uh, second, all of this behavior on
23 behalf of Steven Avery and Barb Janda constitute
24 other acts of both Janda and Avery which fully
25 explain the defendant's recantation and which

1 refute the defense of false confession.

2 Third, such statements are offered for
3 the subsequent effect of them on the listener,
4 Brendan Dassey.

5 Lastly, these statements constitute
6 information utilized and relied upon by the
7 expert witnesses in this case.

8 And we start off with, A, an October 31,
9 2005, 5:36 p.m. statement in a recorded cone --
10 phone call from Jodi Stachowski to Steven Avery.

11 I don't know how I can be ruling on
12 these at this time. Certainly -- oops.
13 Certainly not on that one. I have no idea what
14 it is. What relevancy it may or may not have.
15 Uh, the conspiracy theory? What? Is this,
16 again, we're at 9-0-8-0-4-1?

17 ATTORNEY FALLON: There are several
18 possible theories regarding the admissibility of
19 these statements and there's also determinate --
20 there also is a conceivable ruling or understanding
21 of the evidence that it may not be admissible.

22 We're in a bit of a difficult spot
23 because we don't know -- we -- the Court has just
24 ruled now, for instance, as to the admissibility
25 of Dr. Gordon's opinion. And, as such, uh, what

1 effect any of this additional information may
2 have in any cross-examination of Dr. Gordon.
3 That's clearly one issue here. Because he's
4 going to be taking into consideration, if he's
5 making opinions regarding, uh, suggestibility,
6 although, I realize the Court has somewhat
7 circumscribed the scope of his opinion-giving
8 testimony.

9 Um, secondly, again, a lot may very well
10 depend on how the defense presents their case,
11 uh, as to whether this statement or several of
12 the succeeding statements are, in fact,
13 admissible.

14 I just wanted to bring it to everybody's
15 attention that these statements are out there.
16 It may require further hearing down the road, or
17 we may forgo any attempt to introduce it at all.
18 We're kind of in a situation of trying to respond
19 and guess what -- what the defense -- the --
20 the -- the actual focus of the defense will be on
21 this.

22 So it's there. Out there. I mean,
23 Counsel rightly anticipated this as an issue in
24 his motion. He filed his motion, I guess, an
25 hour or two before we, uh, filed ours. So, um,

1 it's clearly an issue that's subject for
2 discussion. But, you're right, I'm not sure we
3 can rule on all of this today.

4 THE COURT: Mr. Fremgen or Mr. Edelstein?

5 ATTORNEY EDELSTEIN: Your Honor, I guess
6 the -- I -- I would concur with, uh, Counsel's last
7 statement. That is, it is going to be difficult to
8 determine this with any precision today.

9 We have a general objection because,
10 first of all, uh, the assertion in their motion
11 that the statements, uh, were utilized and relied
12 upon our expert, um, I do not believe is correct.
13 But even further than that, we don't have any
14 type of, uh, conspiracy charged here. We have
15 statements from, um, an individual and
16 individuals who are not those of our client.

17 We have no idea what portion or all of
18 these statements the State deems to be relevant.
19 Uh, I think it is an issue that is probably left
20 open at this point. Uh, we do object to that.
21 Again, though, on the basis that we do not have
22 even a threshold, um, under the case law.

23 And in that regard, I direct the Court's
24 attention to, uh, **State v.** -- and I'll spell
25 it -- **S-a-v-a-n-h**, that's at, um,

1 287 Wis. 2d 876. The analysis under there is
2 such that I don't believe that the statements
3 from Steven Avery or phone calls from Steven
4 Avery, um, to Barb Janda or, for that matter,
5 anyone else would be admissible.

6 ATTORNEY FALLON: Well, let me offer this
7 observation, uh, and reply to the last comment.
8 Counsel is correct that as we referenced a number of
9 these phone conversations, I think it's fair to say
10 that of a 15-minute conversation that we've
11 identified, there may be a minute or two that is,
12 arguably, relevant, depending on the context in
13 which the State may choose to use it.

14 So, I -- I would concede with Counsel,
15 that's true and that's what makes this difficult
16 because we're not really sure where they're going
17 and how they're going to present their defense.
18 So it would require a -- a little more pinpoint
19 accuracy with respect to the particular
20 statements. So I'm prepared to accept that as a
21 proposition and that's one of the reasons why I
22 say I don't -- we're not seeking a ruling of
23 admissibility today. This is more in the context
24 of a notice that there may be an issue down the
25 road.

1 With respect to the conspir --
2 conspirator issue, let me offer, um, some insight
3 from Professor Blinka in his book. And this is
4 in Section 801.505, um, page 567, I think, in his
5 most recent, um, treatise.

6 It said, statements by coconspirators
7 relating to escape, coverups or intimidating
8 witnesses are not admissible under this rule
9 unless it can be shown that a coverup was part of
10 the original plan, or unless the evidence
11 demonstrates that a second conspiracy was formed
12 to conceal the misdeeds of the first.

13 So as -- as -- that may be a viable
14 theory for some of these statements, we're
15 certainly not offering that for all of the
16 statements. A -- again, um, there -- depending
17 upon the statement and the manner in which we
18 choose to use it to respond to what we think has
19 been offered by the defense, will -- the -- the
20 theory of admissibility will change depending on
21 the statement and the context.

22 And -- and that's why I say it's not --
23 I don't think it's ripe for a decision today
24 because we may choose to use none of them. We
25 may use just two of them. And I would

1 acknowledge to Counsel that we'd have to sharpen
2 the focus and -- and present, briefly, uh, to you
3 exactly what the statement is and what our theory
4 of admissibility is based on the context of the
5 evidence at the trial at the time.

6 And, again, this comes in in our
7 rebuttal case, not in our case in chief. So
8 there will be time to deal with it and address
9 it. We wanted to give the parties and the Court
10 fair notice that this is an issue that is looming
11 out there but may never need to be addressed.

12 THE COURT: All right. Uh, I had a chance
13 to -- to go through these, and these are -- are
14 alphabetized here has A through K, uh, various
15 statements made and phone conversations in which
16 Steven Avery was involved, and I -- I could, I
17 suppose, conceivably see that some of these might be
18 admissible under some theory, some, uh, you're going
19 to have to do a lot of talking and theorizing to
20 convince me that they -- they have any validity as
21 part of this trial.

22 But, whatever the case may be, I'm --
23 I'm going to withhold, uh, ruling. I'm in no --
24 I haven't heard any of them. Uh, there's no
25 context here at this point in which to -- in

1 which to intelligently determine what it is these
2 statements -- first, what parts are going to be
3 used. Secondly, what it is they're going to be
4 used for. So I think at this point it would be
5 premature to -- to make a ruling on any of these
6 statements. And, uh, as I said, I'm withholding
7 it.

8 Just -- just for the reporter's record,
9 the -- the **Riley** case, that Mr. Edelstein
10 referred to, was **State v. Riley** at
11 287 Wis. 2d 244.

12 Now, is there anything else, uh, to come
13 before on motions?

14 ATTORNEY KRATZ: Judge, there were two, uh,
15 issues that, uh, previous counsel had addressed.
16 One was a filing a notice of alibi, the other was
17 filing a notice of presentation of learned treatise.
18 I understand from, uh, preliminary discussions with
19 Mr. Fremgen, that the defense intends to withdraw
20 those. And that should be done on the record.

21 THE COURT: All right. Mr. Fremgen, you
22 heard what Mr. Kratz said, did you not?

23 ATTORNEY FREMGEN: Yes, Judge. We, uh --
24 those were filed by previous counsel. We don't, uh,
25 intend to use learned treatise, and I believe prior

1 counsel intended to use that in lieu of an expert.

2 Um, I think we're beyond that point.

3 And, second, as to alibi, I wasn't
4 entirely sure as to the context of that motion,
5 but we would withdraw it in any regard.

6 Uh, and last, I would just note for the
7 record that I -- the defense will provide to the
8 State, some time after the hearing today, our
9 witness list as well.

10 THE COURT: All right. Now, I -- I said
11 that I wanted to, with respect to items, uh -- I
12 think they were J and K?

13 ATTORNEY FREMGEN: Right.

14 THE COURT: That I wanted to set --

15 ATTORNEY FALLON: I and J.

16 THE COURT: I and J.

17 ATTORNEY FALLON: And we'll also get you a
18 copy of the uh, uh, report dealing with item C.

19 THE COURT: Okay. I'm -- I'm just going to
20 have to get the -- the Court's schedule here and
21 we'll set something. Okay.

22 ATTORNEY FALLON: Judge, may I make a
23 suggestion with counsels', um, input? I don't think
24 it would be -- it would take that much time. Is
25 there any chance that we could maybe take a half an

1 hour Thursday morning at, say, 8:30, before we start
2 the jury process at 9, and just finish up on that,
3 just to give your opinion and ruling, as opposed to
4 coming back on Monday? What to you think?

5 ATTORNEY FREMGEN: That -- that --
6 that --

7 THE COURT: That's fine. We would be -- we
8 would be doing this in Madison then?

9 ATTORNEY FALLON: Yeah.

10 THE COURT: Sure.

11 ATTORNEY FALLON: If that's all right.

12 THE COURT: It's fine with me.

13 ATTORNEY FALLON: Uh, that would save time
14 and -- your time and ours.

15 ATTORNEY FREMGEN: I think they probably
16 have to use the video -- the -- the movie they watch
17 before the jury selection. So while they're
18 watching that, we could do --

19 ATTORNEY FALLON: We could finish up on
20 this.

21 THE COURT: Sure. Sure. Let's do it --
22 we'll do it then that way.

23 ATTORNEY FALLON: That would be great.

24 THE COURT: Okay. Anything else?

25 ATTORNEY FALLON: No.

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THE COURT: If not, we're adjourned.
Counsel, I'll see you in chambers.

(PROCEEDINGS CONCLUDED.)

