

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

3 STATE OF WISCONSIN,

4 PLAINTIFF, JURY TRIAL - DAY 5
5 PEREMPTORY STRIKES &
6 MOTION HEARING - MANITOWOC COUNTY
7 MOTION HEARING - CALUMET COUNTY
8 vs. Case No. 05 CF 381

9 STEVEN A. AVERY,

10 DEFENDANT.

11 **DATE:** FEBRUARY 9, 2007

12 **BEFORE:** Hon. Patrick L. Willis
13 Circuit Court Judge

14 **APPEARANCES:** KENNETH R. KRATZ
15 Special Prosecutor
16 On behalf of the State of Wisconsin.

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

20 NORMAN A. GAHN-Present in Manitowoc only.
21 Special Prosecutor
22 On behalf of the State of Wisconsin.

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

JEROME F. BUTING-Present in Manitowoc only.
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

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1 THE COURT: At this time the Court calls
2 the case of State of Wisconsin vs. Steven Avery,
3 Case No. 05 CF 381. Will the parties state their
4 appearances for the record, please.

5 ATTORNEY KRATZ: Good morning, your Honor.
6 The State of Wisconsin appears by Calumet County
7 District Attorney Ken Kratz appearing as lead
8 special prosecutor in this case. Also appearing on
9 behalf of the State is Tom Fallon, Assistant
10 Attorney General with the Department of Justice and
11 Norman Gahn, Assistant District Attorney from
12 Milwaukee County, also appearing as special
13 prosecutors.

14 ATTORNEY STRANG: Good morning, Steven
15 Avery is here in person, your Honor. Jerome F.
16 Buting represents him, to my right, and Dean A.
17 Strang.

18 THE COURT: Very well, we are here this
19 morning to complete the process of jury selection.
20 The remaining members of the jury panel are now in
21 the courtroom. At this time the Clerk will call the
22 jury panel members by name and the jury bailiff will
23 show the panel members where to be seated.

24 THE CLERK: Daniel Slaby, Diane Free, Terri
25 Temme, Jacqueline Ungrodt, Cherri Haskell, Barbara

1 Schmidt, Sharon Thorne, Julie Dorn, Paul Nelesen,
2 Nathan Klein, Philip Saari, Michael Stonebraker,
3 John Lawrence, August Schuette, Marian Flint, Kevin
4 Brotski, Richard Mahler, Tami Gosz, William Mohr,
5 Patrick Keehan, Melvin Pedersen, Henry Gray, Nancy
6 Stienmetz, Mary Lou Salomon, Carl Wardman, Laura
7 Barber, Scott Defere, Donald Kickland, David
8 Guckeisen, Patricia Piaskowski.

9 THE COURT: Members of the jury panel, as I
10 explained last week, now that 30 qualified jurors
11 have been identified, the parties will be exercising
12 what are known as peremptory challenges. Each side,
13 on an alternating basis, is permitted to strike
14 seven members of the jury panel.

15 The 16 remaining jurors will hear the
16 evidence in this case. At the conclusion of the
17 trial, the names of the alternate jurors will be
18 drawn by lot and 12 jurors will deliberate and
19 render verdicts in this case. The parties will
20 now begin the process of exercising their
21 peremptory strikes. The courtroom is to remain
22 quiet until that process has been completed.

23 (Peremptory strikes made.)

24 THE COURT: At this time the Court will
25 read the names of the persons who have been selected

1 to serve on the jury in this case. When you hear
2 your name read, please stand.

3 Daniel Slaby, Diane Free, Terri Temme,
4 Barbara Schmidt, Sharon Thorne, Julie Dorn, Paul
5 Nelesen, Nathan Klein, August Schuette, Marian
6 Flint, Richard Mahler, William Mohr, Henry Gray,
7 Nancy Steinmetz, Carl Wardman, Laura Barber.

8 Those of you who are still seated will
9 not be serving on the jury in this case and your
10 jury service in this matter is complete. On
11 behalf of Manitowoc County, I want to thank you
12 for your service. I do have one final
13 instruction to read to you before excusing you
14 this morning.

15 Your service in this case is completed.
16 You do not have to answer questions about the
17 case from anyone other than the Court. There is
18 no requirement that you maintain secrecy
19 concerning your participation in this case, but
20 you do not have to discuss the case with anyone
21 or answer any questions about it.

22 At this time the Court will ask that the
23 jurors who are currently seated -- those of you
24 who are standing can sit; the rest of you can
25 stand at this time and the bailiff will escort

1 you to the jury room.

2 ATTORNEY STRANG: Your Honor, there will be
3 a motion that should be addressed before anyone is
4 excused.

5 THE COURT: Do you wish to do that in the
6 presence of the jurors?

7 ATTORNEY STRANG: I do not.

8 THE COURT: Pardon me?

9 ATTORNEY STRANG: I do not.

10 THE COURT: Oh, okay. All right. Take
11 them to the Branch 1 jury room on the other side.
12 You can follow the bailiff.

13 (Excused jurors taken to the Branch 1 jury room.)

14 THE COURT: All right. As soon as the
15 bailiff gets back we will have the other jurors
16 retire to this room.

17 At this time those jurors who have been
18 selected to serve on the jury in this case may
19 rise and the bailiff will escort you to this jury
20 room. They will be coming back out, Shirley.

21 JURY BAILIFF: Okay.

22 (Chosen jurors taken to Branch 2 jury room.)

23 THE COURT: The Court will note for the
24 record that the jurors are now in the jury room,
25 outside of the courtroom. Mr. Strang.

1 ATTORNEY STRANG: Thank you, your Honor.
2 Outside the presence of the jury now, given the
3 demographics of those approximately 90 jurors we saw
4 physically from the panel and the State's use of one
5 of its seven peremptory strikes to strike
6 Mr. Lawrence, I feel bound to make a motion to
7 reverse that State peremptory strike under -- on
8 authority of **Batsen vs. Kentucky** and cases that
9 follow.

10 I will make the following record as a
11 matter of prima facie showing. The highest
12 sequenced numbered juror whom we examined was
13 No. 90, by my count. Of course, there were a
14 number of jurors struck by joint motion before we
15 got to 90, so we didn't see 90 human beings here.

16 But of those we did see over the last
17 four days one and one only appeared to be at
18 least partly of African/American heritage, and
19 that was Mr. Lawrence. I noticed one other
20 person who appeared clearly, at least to my eyes,
21 to be not of European ancestry and that was
22 Huang (sic) Dao, first name, H-u-a-n-g, last name
23 D-a-o.

24 Of -- Of those two people, only
25 Mr. Lawrence was in the final pool of 30. As I

1 say, I can't comment, I don't know his ethnicity
2 or his parentage, but to the eye he looks to have
3 at least one parent of -- ultimately African
4 heritage, describe him as a light-skinned black
5 man with a relaxed curl for his hairdo.

6 The other jurors in the final 30 appear
7 to me to be of -- what I will call European
8 ancestry; that is, Caucasian or white-skinned, in
9 the vernacular. So I -- I think there's a prima
10 facie showing.

11 I note as well that although the Court
12 ultimately found cause for striking Huang Dao,
13 Mr. Huang was a juror we sought to keep and,
14 indeed, I think I wanted him held in abeyance if
15 nothing more. The motion to strike Mr. Dao was
16 the State's.

17 Again, that's a different matter in the
18 sense that the Court found cause. And I believe
19 I acknowledged that, you know, there were --
20 there was a basis for the State's motion for
21 cause and I recognize the potential issues there.

22 I add that only for the full context in
23 moving to set aside the State's use of its
24 peremptory strike against Mr. Lawrence as a
25 matter of due process under the Fourteenth

1 Amendment to the United States Constitution and
2 the correlative provisions of Article 1 of the
3 Wisconsin Constitution.

4 THE COURT: Who will be responding on
5 behalf of the State?

6 ATTORNEY FALLON: I will, your Honor.

7 THE COURT: Mr. Fallon.

8 ATTORNEY FALLON: Yes. Thank you.

9 Actually, I find the motion rather stunning from
10 counsel very accomplished as Mr. Strang.
11 Nonetheless, I have several responses, both legal,
12 practical, and the like.

13 First and foremost, the first step in
14 any **Batsen** challenge is that the defendant must
15 show that he or she is a member of a cognizable
16 group and that the prosecutor has exercised
17 peremptory strikes to remove members of the
18 defendants race from the venire. So unless
19 counsel is suggesting that Mr. Avery is of
20 African/American descent that would be a new
21 revelation to the State.

22 And even if that were the case, I would
23 indicate for the Court that we seriously thought
24 yesterday that we were going to move to strike
25 Mr. Lawrence for cause. We were not -- We

1 weren't as quite certain as we are this morning,
2 but we believe that Mr. Lawrence lied on his
3 questionnaire.

4 In fact, if the questionnaire is to mean
5 anything, it's a significant question. We were
6 uncertain because we wanted to verify as best we
7 could and we think we have, although nothing is
8 100 percent certain. But he, in answer to
9 question, I think it is Question 54, Have you,
10 any members -- any family members or anyone close
11 to you ever been a suspect and arrested for or
12 charged with a criminal offense?

13 First, we thought it was Mr. Lawrence
14 himself who had been arrested and has a pending
15 drug offense. But it turns out there is a John
16 O. Lawrence, Sr., age 44, whom we believe to be
17 this juror's father, with pending offenses; in
18 fact, he has a number of pending drug offenses.

19 And he indicated no. And I believe he
20 indicated there was no contacts with law
21 enforcement of any kind. And that caused us some
22 great concern. We were, last evening, working on
23 the CCAP program and trying to verify as much as
24 we can. But we believe this John O. Lawrence,
25 Jr. to be the son of the John O. Lawrence, Sr.

1 with a criminal history.

2 Would also indicate for the Court that
3 another matter concerned the State and that is
4 the youth of this man. And, obviously, at the
5 young age of 20, it's very hard for someone of
6 that age to distinguish themselves in the
7 community, but he did not impress us with a
8 significant work history, for any of that to
9 suggest to us that he had a claim or a sufficient
10 stake in the community relative to the
11 deliberation process.

12 But primarily, we are under the
13 impression, based upon our information, that he
14 was not truthful in his questionnaire and, quite
15 frankly, he should have been struck for cause.
16 We wanted to do our best to try to verify as best
17 we can. Lots of phone calls late into last
18 night. And we believe that he is, in fact,
19 related, as best we can, given the name and same
20 middle initial and the junior and what have you.

21 As a result of which, so we have a legal
22 basis, this is not a **Batsen** issue. Two, we have
23 a juror who we believe lied. And three, we have
24 the demographics of he did not distinguish
25 himself; he did not look to us like he would be a

1 responsible dedicated juror, notwithstanding the
2 responses he gave. And those are our reasons.
3 Hold on. Is there a concession that Mr. Avery is
4 not a member of the cognizable class?

5 ATTORNEY STRANG: Mr. Avery, is not
6 African/American. And it has been established since
7 1990 or 1991, by the United States Supreme Court, in
8 ***Powers v. Ohio***, that one need not be a member of the
9 same ethnic group or other cognizable class as the
10 struck juror to raise a ***Batsen*** challenge; ***Powers vs.***
11 ***Ohio***, United States Supreme Court, if my memory
12 serves even closely.

13 So I think that lays to rest entirely
14 the first defense the State offers, which is the
15 legal one. As to the factual defense, the jury
16 questionnaires will be part of the record, but I
17 recall nothing in which Mr. Lawrence offered his
18 middle initial or his middle name.

19 Now, whether there's a John O. Lawrence,
20 Sr., who is in fact his father, I don't know. My
21 recollection is the juror made a comment about
22 not knowing much about his father or not having
23 much contact. And I don't really -- don't
24 remember exactly what he said and I could be a
25 mile wide there. But the transcript would --

1 would bear that out. I do recall him listing Jr.
2 on his questionnaire. I do not recall a middle
3 initial.

4 THE COURT: All right. The Court does not
5 have the **Batsen** test committed to memory; it's not
6 something that gets raised very often. Mr. Fallon.

7 ATTORNEY FALLON: Well, there is a recent
8 Wisconsin Supreme Court case. I'm aware of **Powers**.
9 There is a 2003 Wisconsin Supreme Court case **State**
10 **vs. Lamon**, L-a-m-o-n, setting forth the three step
11 process, as well, that could be examined.

12 THE COURT: All right. I'm going to take a
13 short recess. And then we'll go back on the record.

14 Before I do that, let me ask, as long as
15 we're on the record, something I meant to ask
16 earlier: Subject to the objection raised by the
17 defense, are the 16 jurors that the Court has
18 identified, the jury that each party selected
19 based on their peremptory strikes.

20 ATTORNEY FALLON: I believe the panel left
21 reflects the -- accurately those which were struck
22 by the State.

23 ATTORNEY STRANG: So do I.

24 THE COURT: Thank you.

25 (Brief recess taken.)

1 THE COURT: At this time we are back on the
2 record outside the presence of both the at least
3 tentatively excused jurors and the jurors who have
4 been tentatively selected to serve on the jury
5 panel. The defense has made a motion challenging
6 the State's decision to exercise one peremptory
7 challenge for the purpose of removing a juror who
8 appears to be of a minority race in this case.

9 I'm not sure that that fact is disputed;
10 that is, I believe that both parties recognize
11 Mr. Lawrence would fall into the category of
12 somewhat of a minority race.

13 ATTORNEY STRANG: And I -- I think so, but
14 I also -- I was going to add one further factual
15 agreement that we were able to come to, I think,
16 during the break. I think when we went back and
17 checked, Mr. Lawrence did not list his middle
18 initial on his handwritten questionnaire, but the
19 middle initial O. is listed on the computer printed
20 voir dire list in its various sorts from the Court.
21 That's -- the one the parties have is dated
22 January 26, 2007.

23 So the name as given on the
24 questionnaire is John Lawrence, Jr. The name on
25 the computer voir dire list is John O. Lawrence,

1 without a Jr. or Sr. designation and that's at
2 least agreed on the defense part.

3 THE COURT: All right. The first issue is
4 whether or not a defendant wishing to raise a **Batsen**
5 challenge has to be a member of a minority class
6 himself in order to do so. Based on the Court's
7 reading of the case law, specifically, the **Powers**
8 case, to which the Court was referred and which is
9 actually cited in a footnote in the **Lamon** case at
10 page 762, where the Wisconsin Supreme Court
11 recognizes that a defendant of whatever race is
12 entitled to a jury selected without discrimination
13 by the authority of **Powers**.

14 So I don't believe the fact that
15 Mr. Avery himself may not be a minority -- may
16 not be a member of a minority race is sufficient
17 to preclude the defendant raising a **Batsen**
18 challenge to the dismissal of Mr. -- or the
19 striking of Mr. Lawrence in this case. The Court
20 believes, then, that it is required to apply the
21 **Batsen** analysis to this case.

22 The first step of a defendant raising a
23 **Batsen** challenge is to make a prima facie showing
24 that the prosecution has exercised a peremptory
25 challenge on the basis of race. As I indicated a

1 minute ago, I don't believe that there's a
2 dispute in this case that that part of the test
3 has been met. Mr. Lawrence appears to be the
4 only remaining minority member on the panel. And
5 the State did exercise a peremptory challenge to
6 remove him from the panel.

7 The next part of the test goes on to
8 provide that if the defendant satisfies this
9 threshold, the burden then shifts to the
10 prosecution to articulate a race neutral
11 justification for the disputed challenges, or in
12 this case, the challenge. In this case, the
13 State has offered two explanations, as I
14 understand it, for the removal.

15 The first one and the primary one is
16 that the State believes that the juror was not
17 truthful on the juror questionnaire, specifically
18 Question 54 relating to whether or not --
19 Actually, I don't have a questionnaire in front
20 of me; can somebody read me, for the record, the
21 exact question?

22 ATTORNEY FALLON: Sure. Have you, any
23 family members, or anyone close to you ever been a
24 suspect in, arrested for, or charged with a criminal
25 offense? He checked no.

1 THE COURT: Okay. So the question required
2 the juror to indicate not only whether the juror
3 himself fell into that category, but whether or not
4 any family member fell into that category. The
5 prosecutor, Mr. Fallon, indicates that the defendant
6 -- or the juror answered that question no. That is
7 not disputed.

8 It does also not appear to be disputed
9 that a gentleman with the same name, except Sr.,
10 as the juror in this case who is identified as
11 Jr. on his questionnaire, has a record of a
12 number of convictions, in addition to a pending
13 charge at this time. The State indicated that
14 they attempted to conclusively determine whether
15 or not the John Lawrence with the criminal record
16 was John Lawrence, Jr.'s father.

17 The age appears to match. And we now
18 know that the middle initial also appears to
19 match. The fact that one is a Sr. and one is a
20 Jr. adds additional support to the argument that
21 it appears he may well be the father.

22 And because of that fact, the State
23 argues it had a valid reason to -- non-race
24 related to exercise a strike against
25 Mr. Lawrence. The State also argues that, based

1 on his young age and lack of employment that his
2 commitment to the community may also be an issue
3 in this case. So the Court is satisfied that the
4 State has articulated a legitimate race neutral
5 reason for challenging Mr. Lawrence.

6 The application of the third part of the
7 test was a point of dispute in *Lamon*. There were
8 some dissents in that case, or least one that I
9 know for sure, by the Chief Justice. And I
10 attempted, during the break, to review not only
11 the majority decision, but the dissent as well.
12 And the Court is satisfied that under the
13 approach of either the majority or the dissent in
14 *Lamon*, that the State in this case has met its
15 burden.

16 Specifically, I believe that while there
17 is not conclusive evidence, or the State did not
18 come up with conclusive evidence, it came up with
19 some fairly compelling evidence to strongly
20 suggest that the juror in this case was the -- or
21 is the son of the John Lawrence, Sr. who has the
22 criminal record and that the answer given by the
23 juror may well not have been truthful. The Court
24 cannot say conclusively it was not truthful, but
25 there was certainly a good faith reason for

1 coming to that conclusion that is not related to
2 the race of the juror.

3 Part of the test outlined by the
4 dissent, which would apply -- require courts to
5 engage in more thorough analysis or a stricter
6 test, however you like to phrase it, indicates
7 that the part of the Court's duty is to assess
8 the credibility of the prosecutor and the reasons
9 given for the striking of the juror.

10 In this case, I can find nothing, based
11 on what the Court recalls to be the demeanor of
12 the State in questioning the juror, or the reason
13 given for the strike, that would suggest that
14 anything was motivated by race. I believe that
15 the reasons given by the State, under the
16 totality of the circumstances, and I'm not really
17 aware of any other circumstances that would call
18 their decision into question here.

19 While it's true that under the **Powers**
20 decision the -- a defendant who's not even a
21 minority can raise the challenge, it's a little
22 difficult to see, applying the totality of the
23 circumstances, why the race of the juror in this
24 case would have any special significance. There
25 is no reason why, to the extent a minority juror

1 would be more sympathetic to a minority
2 defendant, that that would be a reason -- an
3 improper reason for the State to attempt to
4 remove him from the jury. We don't have a
5 minority defendant here.

6 But I'm certainly not basing my decision
7 entirely on that. As I recognize -- or as the
8 case law dictates, the defense can raise the
9 issue here. But to the Court, it adds additional
10 credibility to the State's argument that it made
11 the request it did, or made the decision it did,
12 on a race neutral basis.

13 I believe in the State's argument it
14 emphasized the criminal record element of the
15 father more than the second reason, but that's an
16 additional reason which the State could have
17 used. I'm focusing more in my decision on the
18 reasonable grounds to suspect untruthfulness on
19 the questionnaire.

20 So, the Court will deny the defense
21 motion in this case. With that, is there
22 anything else either party wishes to raise before
23 bringing the jurors back?

24 ATTORNEY BUTING: Judge, just -- just one
25 thing, real quickly, I want to put on record. In

1 speaking with Mr. Gahn today, it appears there may
2 be some confusion over what the Court's order on the
3 test -- the test of the samples for this EDTA, or
4 whatever. My understanding was that the State would
5 preserve sufficient sample of the vial of blood for
6 any defense testing and that we would get sufficient
7 sample of the actual RAV 4 stains that were being
8 tested by the FBI.

9 Mr. Gahn was under the impression that
10 any other stains in the RAV 4 that had not been
11 tested or that would be -- would satisfy that
12 part of it. I just want to put on the record
13 that I disagree with that. I think the defense
14 needs to have half of the actual stains that are
15 being tested -- actual stains from the RAV 4 that
16 are being tested and about which any opinion
17 might be given by the FBI.

18 And I believe that was what we discussed
19 in court. It's not clear in the hand -- or the
20 written order, which was handed to me in the
21 middle of jury selection, but I think that's what
22 we anticipated.

23 THE COURT: Mr. Gahn.

24 ATTORNEY GAHN: I will just state that I
25 don't know if I'm disagreeing with Mr. Buting at

1 this point or not. All I know is that I do recall
2 that we talked about splitting the blood vial
3 evidence. But there are five blood stains from the
4 RAV 4.

5 Three of them were -- And of those 5,
6 DNA testing was done and each of the five showed
7 to be the blood of Steven Avery. Three of those
8 five have been sent to the FBI. The FBI may be
9 taking one of those and I will find that out
10 hopefully before noon. They may be consuming one
11 of them. They don't know.

12 But I do know that my understanding of
13 the order was we would preserve sufficient sample
14 of blood stains from the RAV 4. I know for sure
15 we have got four that are preserved. Whether one
16 of them maybe consumed, that's kind of up to the
17 tester. So I, whatever, if it is, then I will
18 ask them to find a larger stain, see if we can
19 cut it in half and then I will ask them to test
20 that one too. I mean, I don't know if there is
21 disagreement here yet or not.

22 THE COURT: The focus at the argument was
23 on splitting the blood vial sample; I recall that.

24 ATTORNEY GAHN: Right.

25 THE COURT: I -- All I will say is, I think

1 it's important if this line of examination is
2 pursued, for the defense to also have an opportunity
3 to perform testing on blood that was found in the
4 vehicle. Sitting here as the judge and not an
5 expert in the analysis of blood, I'm not going to be
6 issuing orders about whether or not a blood stain
7 can be split -- a particular blood stain can be
8 split because, frankly, I don't know if that's
9 scientifically possible.

10 The Court's ultimate concern would be
11 the element of fairness. And I think its
12 important that in some scientific fashion that
13 both parties get a chance to analyze the blood
14 sample in the car to the extent that's feasible.

15 ATTORNEY BUTING: Well, Judge, I just want
16 to be very clear on the record, because it is my
17 understanding and I think it was clear before, that
18 in order for fairness to be preserved here, we -- it
19 is not enough to say we get some other sample. We
20 need half of these stains that the FBI is going to
21 be testing, because the EDTA levels will vary
22 depending upon where in the car, what the substrate
23 is, fabric, medal, whatever. And that was a big
24 issue in the **Cooper** case and so that's why I want to
25 make sure that that's clear that that's a concern

1 for us here.

2 THE COURT: All right. Let's do this.
3 Mr. Gahn, you check with your folks at the FBI and
4 see if it's feasible to split a sample of a stain or
5 stains in the vehicle. If the parties still have an
6 agreement, you can come back to court, but I just
7 don't feel I have enough information in front of me
8 to address a difference of opinion if there is one.

9 Is there anything else before we bring
10 back the jurors who have been selected? And I
11 take it, that based on the Court's decision
12 denying the defendant's **Batsen** motion, the jurors
13 who are not selected can now be released?

14 ATTORNEY STRANG: Yes.

15 THE COURT: Okay. Very well. Janet, can
16 you have them bring in the jurors? You can let
17 Linda know the other jurors can be released.

18 THE CLERK: They are not going to be in any
19 order.

20 THE COURT: They don't have to, we can put
21 14 in the box and then the extra two in front.

22 (Wherein the jury panel was brought in.)

23 THE COURT: You may be seated. Members of
24 the jury panel, and I'm going to address you that
25 way because you have not been sworn as jurors yet,

1 that will happen on Monday. I will be giving you
2 some preliminary instructions on Monday and one of
3 them will include what you just experienced, which
4 is, from time to time the jurors may be excused from
5 the courtroom for the Court to hear arguments from
6 the parties.

7 For purposes of this morning's
8 proceedings, in just a minute the Court is going
9 to excuse you for the day. But while you are
10 back in the jury room you will be receiving
11 instructions concerning transportation
12 arrangements for Monday, when the trial is
13 scheduled to begin. If you have any questions
14 concerning any of those arrangements, please pass
15 them on to the bailiff. And if necessary, they
16 will be addressed by the Court.

17 Before I excuse you today, I want to
18 again stress that you are to make certain that
19 you have no exposure to any media coverage of the
20 trial until you reach your verdicts in this case.
21 As I have previously informed you, the jury will
22 not be sequestered during this trial, but that
23 decision is dependent on your commitment that you
24 will not listen to, watch, or read any news
25 accounts of the case during trial, nor discuss

1 the case with anyone, including members of your
2 family or other jurors.

3 For these reasons, I'm going to order
4 that for the duration of the trial, you simply
5 not watch the local news on television. Do not
6 listen to the local news on the radio. And do
7 not read the newspaper unless you first have
8 someone remove any articles about this case from
9 the paper. That is of vital importance.

10 In addition, and I think one of the
11 jurors brought this up in voir dire, using the
12 mute button should a promo or something come on
13 TV while you are watching another show or
14 anything regarding this case. Please take those
15 type of steps to consciously avoid any exposure
16 to the case that may inadvertently be presented
17 to you during the course of the trial.

18 If you are inadvertently exposed to any
19 information about this case during the trial,
20 please notify the jury bailiff. At this time,
21 I'm going to excuse you for today, subject to the
22 transportation instructions you will be receiving
23 shortly.

24 ATTORNEY FALLON: Your Honor, one other
25 reminder about the internet access as well.

1 THE COURT: Oh, I did not include internet
2 access, but that would also be exposure to the case
3 which is prohibited. Do not look on the internet
4 for any information about this case. Thank you, Mr.
5 Fallon.

6 (Jury panel not present.)

7 THE COURT: Counsel, is there anything else
8 before we adjourn to Chilton this afternoon.

9 ATTORNEY STRANG: One brief thing, which
10 is, given how long this ran this morning, I'm
11 wondering if we could push back to 1:30 this
12 afternoon; I have to get the materials for that
13 hearing back in Appleton.

14 THE COURT: Okay. I do have one request;
15 do the parties have any idea how long they think the
16 proceedings may take this afternoon? I know -- I
17 assume there's going to be -- or I was led to
18 believe there would be some evidence regarding the
19 motion about the materials the State wishes to
20 present during the opening.

21 ATTORNEY KRATZ: That's the smallest part,
22 Judge, the admissibility hearing on the
23 demonstrative evidence. And Mr. Austin from the
24 State Patrol will be available for live testimony in
25 that regard.

1 We do have some other matters that --
2 both as to opening statements and some other
3 evidentiary matters. With -- with my best guess,
4 Judge, we should be out of there by, if we start
5 at 1:30, by 3:30 or 4:00, if that would please
6 the Court.

7 ATTORNEY STRANG: I'm guessing a little bit
8 longer. I would have guessed the computer generated
9 animation hearing, between testimony and argument
10 might go an hour and a half or even two,
11 conceivably. And there will be some substantial
12 discussion on the preliminary jury instructions.

13 And I will try to catch up with counsel
14 for the State before -- if I can, before we get
15 to that, just to see whether there's areas of
16 agreement on the substantive part of the
17 preliminary jury instructions.

18 THE COURT: Okay. All right. We'll see
19 you at 1:30 in Chilton.

20 (Noon recess.)

21 (Proceedings reconvened at Calumet County Courthouse.)

22 THE COURT: At this time the Court calls
23 State of Wisconsin vs. Steven Avery, it's Case No.
24 05 CF 381. This matter is scheduled for a motion
25 hearing this afternoon. Will the parties state

1 their appearances for the record, please.

2 ATTORNEY KRATZ: State appears by Calumet
3 County District Attorney Ken Kratz, also by Tom
4 Fallon with the Department of Justice.

5 ATTORNEY STRANG: Good afternoon. Steven
6 Avery in person and Dean Strang on his behalf.

7 THE COURT: All right. And we're here this
8 afternoon I believe, first, to hear a motion filed
9 by the defendant to exclude the use of computer
10 generated animations in the State's opening
11 statement, for purposes of today; is that correct?

12 ATTORNEY KRATZ: Judge, the issue is the
13 admissibility of the animations, generally. There
14 is a second issue that needs to be decided regarding
15 images that would be used in opening statements both
16 by the State and the defense. They are related in a
17 sense, but the admissibility hearing regarding the
18 demonstrative evidence generally, and the computer
19 generated scene images, as well as animation,
20 specifically, will need to be ruled on by the Court
21 this afternoon.

22 THE COURT: All right. Mr. Strang, it's
23 your motion I will let you add to that if you wish.

24 ATTORNEY STRANG: Well, I agree with
25 Mr. Kratz and, indeed, it is simpler than that.

1 What we ought to deal with is just the admissibility
2 of the computer generated animations. Because if,
3 or to the extent they are admissible, then, of
4 course, there is no objection to Mr. Kratz using
5 images from them in his opening statement.

6 I say of course, I mean, I guess that
7 doesn't necessarily follow, but it is a fact here
8 that if the underlying animations are admissible,
9 I don't have a quarrel with him using a few
10 slides from them in his opening statement. And
11 he already has shown me those that he wishes to
12 use.

13 ATTORNEY KRATZ: I'm sorry, Judge, just to
14 complete that point, there is the more global
15 question, though, if there are any other objections
16 to images that I have proposed in openings, I just
17 simply wanted to make a record of that before
18 Monday, otherwise we're ready to proceed.

19 THE COURT: All right. You may proceed.

20 ATTORNEY KRATZ: Judge, I have heard at
21 least from one member of my staff that at least the
22 Court's microphone isn't picking up very well in the
23 house. This is probably a good opportunity to set
24 volume levels and the like. We can do that during
25 the hearing, of course, but I at least wanted to

1 alert the Court that it's a little quiet, at least
2 for the house, the people behind us, not being able
3 to hear very much.

4 THE COURT: My recollection is that
5 somewhere there is a remote control device around
6 here that allows me to control the volume, but I'm
7 not sure where it is.

8 SHERIFF PAGEL: One should be yours, two,
9 the clerks, three is the -- four and five should
10 be --

11 ATTORNEY KRATZ: One is the bench.

12 THE COURT: Number one is the bench.

13 ATTORNEY KRATZ: That's much better
14 already.

15 THE COURT: Is that satisfactory?

16 ATTORNEY KRATZ: Perfect.

17 THE COURT: Wonderful.

18 ATTORNEY KRATZ: Thank you, Judge. The
19 State will call Tim Austin to the stand.

20 ATTORNEY STRANG: While Mr. Kratz is
21 setting up, there was an issue Mr. Fallon suggested,
22 which is keeping media cameras off of the laptop
23 screens of counsel for both sides. I don't know if
24 that's already covered by the media order or if we
25 need to address it.

1 THE COURT: I don't have a copy of the
2 media order in front of me, but I know it referred
3 to materials that counsel use on their table. And I
4 will indicate today that if the order as written
5 does not specify images on laptop computers it's
6 meant to apply to all materials on the table, and
7 that specifically includes laptop computers.

8 ATTORNEY KRATZ: Tim.

9 THE CLERK: Raise your right hand.

10 **TROOPER TIMOTHY AUSTIN**, called as a
11 witness herein, having been first duly sworn, was
12 examined and testified as follows:

13 THE CLERK: Please be seated. Please state
14 your name and spell your last name for the record.

15 THE WITNESS: My name is Timothy Austin,
16 A-u-s-t-i-n.

17 ATTORNEY KRATZ: Mr. Austin, if you could
18 pull the microphone down towards you. Would you
19 once again state your name for the record.

20 THE WITNESS: Yes, sir. My name is Timothy
21 Austin.

22 **DIRECT EXAMINATION**

23 BY ATTORNEY KRATZ:

24 Q. Mr. Austin, how are you employed?

25 A. I'm employed as a trooper with the Wisconsin

1 State Patrol.

2 Q. How long have you been a state trooper?

3 A. I have been with the patrol since July of 1996,
4 about 10 1/2 years.

5 Q. And do you have any specific responsibilities
6 with the State patrol?

7 A. Yes, I'm assigned to the Wisconsin State Patrol
8 Academy, to the Technical Reconstruction Unit.

9 Q. Mr. Austin, have you brought with you here a
10 document which is known as a curriculum vitae?

11 A. Yes, sir, I have.

12 Q. And for lack of a better term, is the common
13 knowledge of this kind of a document called a
14 resume, or something like that?

15 A. Yes, they are. Essentially outlines my training
16 and experience in the field of reconstruction
17 activities.

18 Q. I have handed you what's been marked for
19 identification as Exhibit No. 1; could you tell
20 us what that is, please?

21 A. Yes, sir, this is the document you referred to.
22 It's my curriculum vitae that goes over my
23 education, training, certification.

24 Q. And at least for purposes of this hearing, if you
25 could just briefly indicate whether or not you

1 have a specific education, training, and
2 experience that permits you, on behalf of the
3 State Patrol, to create images for use not only
4 for investigative purposes, but for use in court
5 proceedings?

6 A. Yes, sir. I hold certification as an instructor
7 in the field of forensic mapping and the use of
8 Total Station technology for collecting
9 measurements at scenes.

10 Q. Mr. Austin, in this case, were you asked on
11 behalf of the State of Wisconsin to assist in
12 creation of images at or near a property known as
13 the Avery Salvage Yard?

14 A. Yes, sir. I was contacted to provide forensic
15 mapping services ultimately leading to the
16 creation of scale diagrams and three dimensional
17 models.

18 Q. When did you first become involved in this case?

19 A. Without referencing my notes, I believe it was
20 November 5th, 2005.

21 Q. The same day that the law enforcement personnel
22 took control of the Avery property, executed
23 search warrants, and otherwise began their search
24 efforts; is that right?

25 A. Yes, sir. That's correct. It was late in the

1 afternoon on that day when I was contacted.

2 Q. Mr. Austin, did you then spend time on the Avery
3 salvage property itself and did you in fact take
4 some measurements and perform other duties which
5 allowed you to create these images?

6 A. Yes, sir. For the next approximately seven days,
7 myself and a team of law officers forensically
8 mapped and measured the entire Avery Salvage Yard
9 property.

10 Q. To assist the Court and counsel in providing your
11 testimony today, I'm going to have you refer to
12 the image that has been portrayed on the screen.
13 Can you tell us what we're looking at, please?

14 A. What you are looking at is an aerial photograph
15 that I believe was taken by State Patrol Pilot,
16 Trooper Dennis McConnell. It shows the Avery
17 salvage yard property referred to before and some
18 of the surrounding properties and landscape.

19 Q. Now, so the Court understands where some of these
20 images are going to be coming from, you provided
21 counsel, that is the prosecution and the defense,
22 as well as a copy for the Court, of some figures
23 or images that ultimately have made it's way into
24 a binder of yours; is that correct?

25 A. Yes, sir, that's correct. This is one of many

1 images that I put in a document entitled a
2 Forensic Mapping and Scenery Construction Report.

3 Q. To complete the record, Mr. Austin, I have handed
4 you what's been marked as Exhibit No. 2. Can you
5 tell us what that is, please.

6 A. Exhibit 2 is a DVD containing my narrative
7 report, digital photographs taken by myself and
8 other State Patrol Officers, and other logs
9 documented by the State Patrol. Essentially, the
10 binder I described before is what's on this DVD.

11 Q. All right. Did you bring that binder with you?

12 A. Yes, sir, I have a black and white copy.

13 Q. Can you just hold it up for us and show us what
14 you are talking about.

15 A. This binder here is the one I'm referring to.

16 Q. So Exhibit No. 2 is a electronic version of all
17 the information that's included in that binder.
18 And again, the relevant portions, other than some
19 of the measurements and the like, but at least
20 the figures that you will be referring to have
21 all been provided to counsel and the Court; is
22 that your understanding?

23 A. Yes, sir, that's correct.

24 ATTORNEY KRATZ: Okay. Just to - so that I
25 don't forget, more than anything else, Judge, I am

1 going to move for the admission of Exhibits 1 and 2
2 at this time?

3 ATTORNEY STRANG: No objection.

4 THE COURT: All right. Those exhibits are
5 admitted. I have one question, has -- or maybe it's
6 still coming -- has the image that we're looking at
7 on the screen been identified in some fashion yet?

8 ATTORNEY KRATZ: It has not, Judge. It is
9 about to be.

10 THE COURT: Very well. Go ahead.

11 ATTORNEY KRATZ: Mr. Strang indicates,
12 Judge, that my mike should be up a little bit as
13 well as Mr. Austin's. This is probably the time --

14 SHERIFF PAGEL: I think three would be for
15 Mr. Austin.

16 THE COURT: And State should be 4 or 5.

17 ATTORNEY KRATZ: Mine says mike 4
18 underneath, Judge.

19 ATTORNEY STRANG: Mine is mike 5.

20 THE COURT: I'm hearing some type of
21 buzzing periodically. I don't know if it's coming
22 over the sound system or where, but if it's not
23 bothering the parties, we'll proceed.

24 ATTORNEY KRATZ: I think what happens,
25 Judge, with this sound system, when you talk, as you

1 might know, our microphones cut out. When the Court
2 talks, they don't want anybody else talking at that
3 time, which is probably a good idea. But I think
4 the system then picks up yours, if we overlap a
5 little bit. And I think that's what's causing that,
6 but we'll move forward.

7 Q. (By Attorney Kratz)~ Mr. Austin, are you able
8 then to -- With the image that we're referring to
9 here, are you able to find that figure and could
10 you please identify that in your materials?

11 A. Yes, sir. May I reference my binder?

12 Q. Please do.

13 A. If I may, sir.

14 Q. Go ahead.

15 A. That photograph is Figure 3, which appears on
16 Page 10 of my narrative report.

17 Q. So at that scene that you have identified as the
18 Avery salvage property, then, I think you began
19 telling us that you took some measurements. Can
20 you tell us about that.

21 A. Yes, sir. The bulk of the measurements were
22 taken using an electronic device called a Total
23 Station, that's made by a company called
24 Geodimeter?

25 Q. Can you spell that for us.

1 A. Yes, sir, G-e-o-d-i-m-e-t-e-r.

2 Q. What is Total Station?

3 A. Total Station essentially is an electronic
4 device. It measures distance and angles to
5 document an objects position in 3D space,
6 basically measures along an X, Y, Z axis on a
7 standard coordinate system.

8 Q. What is Total Station typically used for in your
9 line of work, if you understand what I'm asking
10 you?

11 A. The Total Station, we utilize that in the
12 reconstruction unit for taking measurements at
13 both crash and crime scenes.

14 Q. You mentioned that Total Station assists in
15 taking measurements, can you very briefly tell us
16 how that occurs.

17 A. Are you asking me how the instrument works, or
18 how it records measurements?

19 Q. Sure.

20 A. Essentially, the instrument locates itself, if
21 you will, in 3D space. And then, if I'm taking a
22 measurement to you, Mr. Kratz, the instrument
23 recognizes that it's going say -- turning 90
24 degrees towards you, an elevation of maybe down
25 two degrees. The instrument recognizes that

1 change in elevation or change in angle and then
2 assigns or calculates what your coordinates would
3 be in relationship to me.

4 Q. I see. So, it isn't just simply a tape measure,
5 me to you, that would be one access, if you will,
6 but it's actually a three dimensional measurement
7 that is being taken; is that correct?

8 A. Yes, sir, that's correct.

9 Q. So, in lay terms, is that even more accurate than
10 a tape measurer or a one dimensional measuring
11 device?

12 A. When you look at adding in the operator factor,
13 if you will, yes, the Total Station is going to
14 be more accurate than if we had strung out, you
15 know, a thousand foot of tape at the Avery
16 salvage lot.

17 Q. All right. How many days were you involved in
18 taking measurements at the Avery property?

19 A. May I, again, reference my notes.

20 Q. Sure.

21 ATTORNEY STRANG: The witness ought to feel
22 free to look at whatever he needs, whenever he
23 needs.

24 THE COURT: Very well.

25 THE WITNESS: Thank you, sir.

1 A. We began the mapping on November 5th and finished
2 the mapping at the Avery property on
3 November 12th.

4 Q. So that was really the entire time that law
5 enforcement had control of the property; is that
6 right?

7 A. Yes, sir.

8 Q. You mentioned that during that time frame you
9 were involved in taking these measurements
10 individually. How many of those days were you
11 personally out there, if you remember?

12 A. I believe that I was there for six of those seven
13 days.

14 Q. And during that time, Trooper Austin, do you know
15 how many individual measurements were taken
16 through and by use of this Total Station process?

17 A. Yes, sir, there were over 4100 measurements taken
18 at the Avery Salvage Yard.

19 Q. I assume, based upon what you know of Total
20 Station and your use and the certifications for
21 that piece of equipment, you have an opinion as
22 to its accuracy?

23 A. Yes, sir. My opinion is that Total Station is
24 obviously very accurate. In fact, the maximum
25 induced error that an instrument gives us is only

1 about three seconds.

2 To explain, a circle is divided into 360
3 degrees. Each degree is divided into 60 minutes.
4 Each minute is divided into 60 seconds. The
5 Total Station is accurate to within three
6 seconds.

7 Essentially, in this particular case,
8 our longest shot is about 1200 feet. That comes
9 out to be an accuracy of about less than half an
10 inch.

11 Q. After the measurements are obtained by you, and
12 after the data is compiled, could you tell me the
13 first step in the creation of images. And let's
14 first talk about two dimensional images.

15 A. Certainly. The Total Station stores it's data
16 internally in its on board data collector. We
17 download the data from the Total Station and we
18 bring it into a computer aided drawing program.
19 In this case, we used a software program called
20 CAD Zone to begin processing that information.

21 Q. I'm going to, once again, direct your attention
22 to the in-house screen. We have to come up with
23 a better name for that as we go through the
24 trial. If you could tell me what figure we're
25 looking at here and if this is an image that may

1 better describe a two dimensional drawing or
2 representation that's created.

3 A. Yes, the particular picture, if you will, you
4 have on the board is Figure 4 from my narrative
5 report. What this shows is the two dimensional
6 view, meaning it is straight or completely
7 orthogonal, looking straight down on this portion
8 of the Avery Salvage Yard?

9 Q. I'm sorry, do you have a laser pointer with you?

10 A. No, sir, I do not.

11 Q. I'm going to give you mine.

12 A. Thank you.

13 Q. Trooper Austin, please feel free to use that as
14 you are describing things so we can better
15 understand what you are talking about. Go ahead.

16 A. Sir, if I -- if I may, do you have Figure 5? It
17 might be easier to help explain this.

18 Q. I'm sure I have everything.

19 A. What I have asked you to do is essentially zoom
20 out and look at the entire Avery property that
21 was diagrammed and mapped. The portion you
22 showed us before, which was Figure 4, is a
23 closeup of this upper northeast corner, which is
24 the primary business buildings, if you will, for
25 the Avery Salvage Yard.

1 So if you want to go back to Figure 4,
2 at least we know now what portion of the main
3 diagram it is from. So, now, we essentially zoom
4 in on that northeast corner and we can see this
5 would be the main road coming in. This is a
6 gravel driveway, if you will, that runs east and
7 west.

8 Here is a storage building, the main
9 shop, and here's a private residence. So we have
10 taken a small portion of that area that was
11 mapped and, now, looking at our diagram, straight
12 from above, looking down at a specific corner of
13 it.

14 Q. Now, diagrams like this, two dimensional
15 diagrams, is that what are commonly used in
16 trials or when there are triers of fact, to help
17 juries or judges understand evidence?

18 A. Yes, sir. We very commonly use two dimensional
19 diagrams such as this to help show the scene or
20 show where objects are or distances of particular
21 items.

22 Q. Although this is much nicer, the concept really
23 isn't any different than a blackboard or a
24 chalkboard that might be used to help describe,
25 or help understand some evidence; is that fair?

1 A. As technology has evolved, we have moved from the
2 chalkboard, to the easel, to two dimensional
3 diagrams. And as technology continues to
4 improve, we're going to move ahead also.

5 Q. Let's move ahead today, then. After your two
6 dimensional images are created, are you able to,
7 then, with the Total Station and the measurements
8 that are gained therefrom, create three
9 dimensional modeling?

10 A. What I discussed, the Total Station, a few
11 questions ago, I mentioned that the Total Station
12 measures in 3D space. That's the X coordinate, Y
13 coordinate, and now the Z coordinate, which gives
14 us height or elevation to objects.

15 So we have the information there, just
16 that we now bring that data into a second
17 computer program. This one is called forensic
18 3D, which allows us to draw or create diagrams in
19 3D space, so we can add that height, elevation
20 element to objects.

21 Q. I'm going to, once again, direct your attention
22 to the screen, ask if you can tell us what this
23 figure is, what it shows, and how it helps
24 explain your process?

25 A. This is Figure 8 from my narrative report. It's

1 on Page 14. This shows an unrendered three
2 dimensional image. When I say unrendered, what I
3 mean is, it does not have any textures applied to
4 three dimensional surfaces. As you can see, our
5 garage building, our vehicles are white. They
6 essentially haven't been painted, if you will. I
7 haven't applied any type of textures to those
8 objects.

9 Q. The application of the texture, then, how is that
10 process created?

11 A. In many cases, the software will allow us to take
12 a photograph of a particular texture. What I
13 mean by that, if I was diagramming this desk, I
14 could take a photograph of the wood and paste
15 that wood, that photo of the wood, on the model.

16 In this case, in this particular garage,
17 we photographed the siding on that garage so that
18 we could apply it to our three dimensional model.

19 Q. And so you aren't only guessing at what the
20 different colors and the different textures of
21 objects are, but you take them from images that
22 you retrieve from the property; is that right?

23 A. In most cases. I don't like the word guessing,
24 because there are some that I did apply textures
25 from a personal library. For example, the paint

1 on the truck, I did not photograph the paint on
2 that particular truck. I applied a general black
3 car paint texture to it. What we do see on the
4 garage --

5 Q. By the way, what figure are you referring to now?

6 A. I'm sorry, this is Figure 9. It's the same
7 image; however, it has now been rendered in the
8 software. Again, what we do see here, however,
9 is that texture mapping process on the garage
10 building.

11 Q. Your three dimensional modeling, could you
12 describe, not just in this case, but in other
13 cases that you have been asked to testify and
14 other cases that your colleagues have been asked
15 to testify, what is the advantage of 3D modeling
16 versus the two dimensional images that we saw, as
17 a jury or a trier of fact may consider?

18 A. When we look at two dimensional image, again,
19 we're just looking straight down on that
20 particular area. What's difficult for us to
21 appreciate, any type of spacial relationship or
22 geometric perspective, if you will.

23 In other words, we don't know, or it's
24 more difficult to actually visualize how that
25 scene looked, or how objects are related to each

1 other. When we now take that into a three
2 dimensional model, we can get a better
3 understanding of how that scene looked or how
4 objects are, again, in relationship to each
5 other.

6 Q. All right. You were asked, then, by the State,
7 by the prosecution, to take these 4100 plus
8 measurements, all of the data, including all the
9 photographs that you both obtained, and viewed,
10 and created some modeling for us; is that right?

11 A. Yes, sir. I have to add, though, we did not
12 model the entire Avery property in 3D.

13 Q. Why not?

14 A. I think I would still be working on it today if I
15 modeled that in 3D.

16 Q. All right.

17 A. Also, the work that I did was under the direct
18 supervision of the lead investigators or
19 yourself. And it was determined that we probably
20 really don't need the entire property done in
21 three dimensions.

22 Q. Now, because this is an adversary system, in other
23 words, because there's the defense, and the
24 prosecution, is it typical for one side or
25 another to ask you or direct you to create images

1 for use at trial?

2 A. Yes, when you look at the work that I did, and I
3 know we're going to get deeper into this, but
4 there are evidentiary areas that I don't
5 necessarily know about. And I need that
6 guidance, for persons to tell me what is
7 important, and what is not important, in a
8 diagram.

9 It's very typical for one side to tell
10 me what they would like to see. Many of these
11 exhibits I designed to assist others, in
12 explaining to you, or to a jury, what it is that
13 they did out there at the scene.

14 Q. Let me just talk about that just briefly. So,
15 other than you showing, if you will, or being
16 able to show the jury the scene itself, did we
17 ask you to provide or create these images to
18 allow investigators or law enforcement officers
19 that found evidence, or even other experts, to
20 use those images to better explain or describe
21 the evidence that they may have found, or their
22 testimony.

23 A. Yes, sir. It's one thing to be able to, if you
24 will, sit in this box and verbally explain where
25 something was positioned. But to be able to

1 physically show that geometric relationship; in
2 other words, where it is compared to other
3 objects, helps persons to better understand where
4 these items are located, where they are in
5 relationship to other items.

6 Q. Let's talk about some interiors first, all right.
7 And you were asked to do some modeling, not just
8 in the yard itself, or in the exterior -- or is
9 it easier to talk about exteriors first?

10 A. It's your option, sir.

11 Q. Doesn't matter to you, I'm sure. All right.
12 Let's talk about some interiors. I'm going to
13 show you Figure No. 31. Let's talk about what
14 we're looking at here, first.

15 A. Sir, this is Figure 31, found on Page 32 of my
16 narrative report. What we're looking at here is
17 an overview of a residence that was on the
18 salvage yard property. And what I have done with
19 this particular model is, I have hidden the roof.
20 In other words, if the roof is a layer, I turned
21 the roof off, so that we can see all of the rooms
22 together.

23 Q. Let me just stop you there. I'm sure Mr. Strang
24 and I at some point will establish the
25 foundation, but Exhibit 31, we're looking at

1 Steven Avery's residence?

2 A. Yes, sir.

3 Q. All right. Go ahead.

4 A. Again, what I have done is taken the roof off, or
5 rather, hidden the roof from the model so that we
6 can look at all the various rooms that are inside
7 of his residence. If you think of -- remember
8 the old overhead projectors, you could lay one
9 piece of plastic over it, and another, and
10 another, essentially we have taken one off so
11 that we can see what's underneath the roof in
12 this case.

13 Q. Now, Figure No. 31 is an unlabeled, or a clean,
14 if you will, image. Were you also asked, and did
15 you provide labels, if the Court allows, and if
16 the State, or whatever party actually wishes to
17 present them, believes it would be helpful for
18 the jury?

19 A. I provided you with two separate images, one
20 being unlabeled, which we just saw on the screen,
21 and I also provided you with one having labels,
22 in other words, there's text and leader arrows
23 identifying various rooms.

24 Q. What are we looking at now?

25 A. This is the image I just described. It is the

1 same one you had previously; however, this one
2 has text and leader arrows identifying various
3 rooms in the residence.

4 Q. And through all the images -- in fact, I'm going
5 to have you look at, I think it's Exhibit No. 4.
6 You have a packet of images up there, could you
7 tell us what Exhibit 4 is.

8 A. Yes, sir, I believe these are those images that I
9 provided you with. They are 4 by 6 prints of
10 these rendered models. And there should be label
11 versions and unlabeled versions in these
12 envelopes.

13 Q. And for assistance of the Court and really trying
14 to anticipate what the Court's direction may be,
15 to me, to the State, in use of some of these
16 images, you have created a hard copy, or a set of
17 all of your figures, both labeled and unlabeled,
18 so that a record can be made, that is, if some of
19 the documents -- some of the images might be
20 introduced and some may not, we're able to just
21 put in the ones that are acceptable to the Court,
22 and perhaps to counsel, as well; is that right?

23 A. Yes, sir, that's correct.

24 ATTORNEY KRATZ: Just to complete the
25 record, Judge, although we will have originals, the

1 entire packet which has been provided to the Court
2 in a 8 1/2 by 11 form, all those images are in
3 Exhibit No. 4. I would ask the Court receive those
4 for purposes of the record at this time.

5 THE COURT: Any objection?

6 ATTORNEY STRANG: None.

7 THE COURT: Those are received.

8 Q. (By Attorney Kratz)~ Now, other than the
9 buildings including Mr. Avery's trailer, were you
10 asked to do some interior renderings of
11 Mr. Avery's garage?

12 A. Yes, sir.

13 Q. And could you tell me, if we look at one of those
14 figures, direct me to one that might be helpful.
15 Exhibit 41?

16 A. Yes, sir, Exhibit 41.

17 Q. I'm showing you what's been labeled, then, as
18 Exhibit 41; what are we looking at?

19 A. Sir, Figure 41 is an overview of the garage that
20 you asked about. Again, I hid or turned off the
21 roof layer so we could see what's inside of that
22 garage.

23 Q. I'm sorry, this is Figure 41, it might be from
24 Exhibit No. 2, if I'm remembering correctly. Why
25 don't you take the laser pointer and just very

1 briefly tell us the items that you have been
2 asked to place inside of that garage?

3 A. Inside of the garage, there's a Suzuki Samurai
4 vehicle that was in the garage when I completed
5 the forensic mapping of that location. Next to
6 that is a snowmobile. There's also a snowmobile
7 on the opposite side of the Suzuki Samurai.

8 And then around the border, around the
9 walls here, we see various tools, if you will.
10 There's a tool chest in the back. There's an air
11 compressor. Next to that is a welder. There's a
12 freezer and a filing cabinet in here. Various
13 larger items that we can use to locate anything
14 else we need to find in the garage.

15 Q. Let me ask you, Trooper Austin, without the
16 assistance of this computer generated image,
17 would a jury or a trier of fact ever be able to
18 see something like this?

19 ATTORNEY STRANG: That really is not a
20 proper question.

21 ATTORNEY KRATZ: I can ask it a different
22 way perhaps, Judge.

23 THE COURT: Go ahead.

24 Q. (By Attorney Kratz)~ The computer generated
25 images, does it allow anybody, not just a trier

1 of fact, but anybody in the courtroom, to
2 visualize a scene from an angle or from a
3 perspective that the human eye could not?

4 A. That's why I believe that the three dimensional
5 models are important. In this case, you know, we
6 would never be able to have an overview of the
7 garage interior without removing -- excuse me --
8 removing the roof as we did in the three
9 dimensional model.

10 The same with the house. And we can
11 then move about in this model to gain other
12 perspectives so that we can, you know, perhaps
13 from a different viewpoint, look at those spatial
14 relationships we discussed earlier.

15 Q. When talking about three dimensional, it is that
16 relationship, that is, the relationship between a
17 piece of evidence to a fixed object, or to a
18 known location that's important; is that what
19 your testimony was?

20 A. Yes, sir.

21 Q. All right. Let's talk about exteriors for just a
22 moment. I'm going to have you -- have you look
23 at Figure No. 10 and tell us what we're looking
24 at?

25 A. Figure No. 10, Mr. Kratz, is an overview of the

1 entire area that I did model, in three
2 dimensions.

3 Q. Does that include what would be known as the
4 Steven area -- excuse me -- Steven Avery
5 residence and curtilage, as well as the Barb
6 Janda and Dassey residence and area surrounding?

7 A. In previous slides, we looked at a residence, in
8 the interior, and that Steven Avery residence is
9 over here. The garage we looked at is next to
10 that residence.

11 In terms of a directional relationship,
12 in this particular view, north would be to the
13 bottom of the screen. And, yes, I'm sorry, to
14 finish your question, sir, the Barb Janda
15 residence is over here on the left side of your
16 screen, and her garage.

17 Q. I'm going to have you look at just a couple of
18 other images, Image No. 16.

19 A. Yes, sir. Figure No. 16 is also from my report.
20 Essentially, we have moved our camera to get a
21 different perspective of the Steven Avery
22 property. This allows us to see both the
23 residence, the garage, as well as some other
24 items I was asked to include in the model.

25 Q. Were one of those items, or two of those items

1 that we're going to talk about, first of all, the
2 van, the Dodge Caravan, I believe; is that shown
3 in this image?

4 A. Yes, sir. The Dodge Caravan is this red colored
5 vehicle down here in the lower left portion of
6 your screen.

7 Q. For the Court's information and just as by way of
8 offer of proof, the evidence in this case will be
9 that was the vehicle that Teresa Halbach was
10 asked to come and take a picture of. Were you
11 also asked to include a burn barrel that was
12 found, or that you took dimensions of, and
13 measurements of, on this property?

14 A. Yes, sir. Both the mini-van and the burn barrel
15 were in place when I did the forensic mapping, so
16 they were located with the Total Station. The
17 burn barrel you are referring to is over here on
18 the right side of your screen.

19 Q. And not going into any detail, because that's
20 what the trial is for, but was it your
21 understanding that there is some evidence that
22 was recovered from the interior of that burn
23 barrel?

24 A. That is my understanding, sir.

25 Q. Now, as I understand, you're able to move the

1 camera around, if you will. Figure No. 20 is an
2 example of that. Can you tell us what we're
3 looking at.

4 A. Sir, that is indeed Figure No. 20 from my
5 narrative report. What we have done from that
6 previous slide you had up is we have moved our
7 position further to the south. And we're now
8 looking to the northwest, to the back of the
9 trailer -- I'm sorry -- residence we discussed
10 before, and the back side of the garage, and
11 items that were identified to me as being of
12 evidentiary value, behind that garage.

13 Q. Although Figure 20 shows some of the same items
14 that Figure No. 16 would be, this is a different
15 angle and, again, something that the human eye
16 would not be able to accomplish; is that correct?

17 A. And we're moving in closer from that last point,
18 which allows us to see items in better or greater
19 detail as they have been modeled here. So, yes,
20 I do agree with you.

21 Q. Last example that I'm going to give you, and
22 again, these are just by way of example, Figure
23 No. 23, tell me what we're looking at.

24 A. Sir, this is Figure No. 23 from my narrative
25 report. We have moved further to the southeast,

1 where we were before, and looking at the back
2 side of Steven Avery's residence. We're now
3 looking at the backside of the Barbara Janda
4 residence, and some other items back here that I
5 was asked to include in the model.

6 Q. All right. Trooper Austin, a little bit out of
7 your area of expertise by crash reconstruction
8 and crime scene reconstruction, were you asked to
9 assist another expert, an anthropologist in this
10 case, in the creation some other images?

11 A. Yes, sir. I was asked to work closely and under
12 Dr. Leslie Eisenberg, to create additional model
13 images.

14 Q. Were you able to perform that task?

15 A. Yes, I physically met with Dr. Eisenberg in
16 Madison and had lengthy communications with her,
17 after meeting with her person, to create model
18 images that would help her to explain her
19 findings in this case.

20 Q. Now, I don't expect -- in fact, let me just ask
21 you, much of what you were asked to create, did
22 you know what it was that you were creating? I'm
23 not sure how to ask that. Why don't you tell us
24 how that process culminated.

25 A. Yes, I was asked to create the model, which is my

1 area of expertise. However, what she wanted me
2 to assist her with was creating skeletal models
3 so that we could point out locations of various
4 bones. That is certainly outside of my area of
5 expertise, that's why I worked closely with her,
6 and directly under her, so she could explain, I
7 would like a leader arrow pointing to this bone,
8 and this bone is called a, and the name of that
9 bone.

10 Q. All right. I have a figure on the screen, it's
11 just the -- a picture of a female skeleton.
12 We're not going to show these because that will
13 be Dr. Eisenberg's area of expertise, but could
14 you just briefly describe how these skeletal
15 models were created?

16 A. The base skeletal model, that would be the one
17 without any type of textures to it, I obtained
18 from the FBI in Quantico, Virginia. They sent me
19 a CD containing various skeletal models.

20 I chose the female skeleton as was most
21 appropriate in this case. I then applied a bone
22 texture to it, received approval from
23 Dr. Eisenberg, and then met her in person to
24 again show close ups or different bone locations
25 on that model.

1 Q. All right. And, again, those have been created,
2 provided to the Court and to counsel -- excuse
3 me -- and are included in your images, both
4 Exhibit No. 4, as well as Exhibit No. 2; is that
5 correct?

6 A. Yes, sir. They are on the DVD I provided to you
7 and they should be in the photographs also -- or
8 the 4 by 6 images rather.

9 Q. All right. Let's leave the scene mapping or
10 modeling then and let's talk a little bit about
11 animations. Were you asked to create animations
12 as well?

13 A. Yes, sir, I was.

14 Q. And could you tell us about that process, please.

15 A. To create motion, essentially we need numerous
16 still images of those still renders. In fact, we
17 need about 30 of them for every second of motion
18 that we want to create. If you were to think
19 back perhaps to a child's toy where we would have
20 something in the corner and we flip through those
21 pages and we see that object changing or going
22 into motion, that's kind of what we're doing
23 here. We're putting image, after image, after
24 image to create that effect of moving through a
25 scene.

1 Q. Now, in lieu of, or instead of taking the jury to
2 the Avery salvage property in the middle of
3 February, did I ask you to create a walk through,
4 if you will, of the Steven Avery property, the
5 Barb Janda property, and the surrounding
6 curtilage?

7 A. Yes, sir, you did.

8 Q. And I know that we showed the Court your first
9 draft of that, it was probably last week
10 sometime; have you made some improvements to
11 that?

12 A. Yes, sir, I have made some minor changes to that.

13 Q. I have given you another exhibit, I think it's
14 Exhibit 3; is that right?

15 A. Yes, sir.

16 Q. Tell us what that is?

17 A. Exhibit 3 is the disk I gave you maybe an hour or
18 so ago with the final version of the animations.

19 THE COURT: And for the record, Judge, I
20 have given Mr. Strang his own version of that. And
21 I will be asking that the Court accept Exhibits 3 --
22 have I moved Exhibit 4, Janet, do you know?

23 THE CLERK: Yes.

24 ATTORNEY KRATZ: Yeah, Exhibit 3, then, I
25 would offer at this point to complete the record.

1 THE COURT: Any objection?

2 ATTORNEY STRANG: Not for purposes of this
3 hearing.

4 THE COURT: That exhibit is admitted.

5 Q. As I play this animation, Mr. Austin -- or let me
6 ask this first question, what improvements did
7 you make, and how long did it take to create, and
8 what kind of process was involved?

9 A. The version I gave to you last week, my draft
10 version, was completed at 15 frames per second,
11 meaning there were 15 images for every second of
12 animation. I felt it looked somewhat choppy. I
13 therefore re-rendered it at 30 frames per second,
14 which gives it a much more fluid sense of motion,
15 if you will.

16 I also felt that in that draft the
17 gravel did not appear as it should in the
18 animation. Because the way the software looks at
19 the reflection of light, the gravel essentially
20 appeared to sparkle. I, therefore, changed the
21 gravel texture so it doesn't have that reflective
22 capability to it.

23 Q. Once again, this animation, as well as all of
24 your other still images, do you believe that they
25 will assist, not only the trier of fact, that's

1 the jury, but other witnesses in explaining
2 evidence that's found or the relationship between
3 that evidence and fixed objects?

4 A. Mr. Kratz, as we put these 5200 pictures into
5 motion, or make them give that impression of
6 motion, that's going to help myself, you, jury
7 members, to be able to, again, see where items
8 are located to each other. As we go from one end
9 of the scene to the other, or then back around to
10 the backside, if you will, we're going to get a
11 better understanding of what exactly the geometry
12 is of that particular property.

13 Q. I'm going to play this DVD that's been created
14 and just invite you to chime in, if you will,
15 when that becomes appropriate.

16 ATTORNEY KRATZ: The record should reflect,
17 Judge, that this is Exhibit No. 3. And I have asked
18 Mr. Austin to -- to narrate as we go through.

19 Q. Go ahead, Mr. Austin.

20 A. Mr. Kratz, what I have done is, I started at the
21 southeastern portion of that property, if you
22 will. And we're going to come in by those --
23 that Dodge Caravan, which as we talked about
24 before, was identified to me as being of
25 evidentiary value. We are then going to pause in

1 front of that Caravan and identify it using a
2 beader, and that is text and arrow.

3 Q. Between this rendering and the one last week, did
4 you also remove some things?

5 A. I did change some of the text and I will bring
6 that up when we get to that point, what was
7 changed from the previous version.

8 Q. All right.

9 A. Forgive me, I did forget to tell you this
10 earlier, sir, another change I made is, I slowed
11 down the camera as we pan across the top of the
12 residence, so you will see it slightly slower as
13 we move from room to room.

14 Moving from the Caravan to the Steven
15 Avery residence, what we'll do is we'll fade that
16 roof out so we can see the interior of that
17 residence. Now, as we move between these rooms,
18 this is one of the changes I made. It's a little
19 bit slower than what you saw last week.

20 Q. As we're looking at all these images, how many
21 separate images are we actually seeing?

22 A. There's over -- For the entire animation
23 sequence, there's over 5200 images that were
24 rendered to create this.

25 Q. How long did it take to create this?

1 A. I utilized three separate computers to try to
2 speed up the process. I started last Friday and
3 I finished last night.

4 Q. So any delay wasn't intentional on your part?

5 A. No, sir. Moving from the residence to the
6 garage, similar to the still image you showed us
7 before, Mr. Kratz, we're going to fade the roof
8 out so we can see the inside of the garage.

9 Q. If you haven't added any images, all these things
10 that we're seeing were there while you were
11 taking the measurements; is that correct?

12 A. That's correct. From here, Mr. Kratz, we're
13 moving from the overview of the garage. We put
14 the roof back on, if you will, and now we're
15 looking at items behind the garage. And I have
16 added -- these were in last week's version. I
17 have added labels identifying Steven Avery
18 residence and we see we are now at the Steven
19 Avery garage.

20 Q. The darker area to the left, would that be what
21 is known as the burn area, or where some other
22 very important items, including some bone
23 fragments were found?

24 A. Yes, sir, that's my understanding. We're now
25 moving to the southeast. We're going to go

1 behind the Barb Janda property and we're going to
2 identify that residence, as well as the burn
3 barrels that were positioned behind that house.

4 Those burn barrels were there. I did
5 the forensic mapping, so those have been -- their
6 location was mapped. This is one of the changes
7 in the text. Previous to today that said,
8 Janda/Dassey burn barrels. I have taken the
9 names off, so it just says burn barrels there.

10 Q. Some other witness may identify who actually had
11 control of those burn barrels; was that the
12 reason for that change?

13 A. Yes. From those burn barrels we're now moving
14 back to the front of the Steven Avery property
15 and we're going to show the geometric location of
16 the burn barrel position there. And, again, when
17 we show the text here, this previously stated
18 Steven Avery burn barrel, it now just states burn
19 barrel when she show that header.

20 And this is, essentially, the end of the
21 animation generated here. We have seen those
22 images I discussed before, those 5,000 images,
23 and we're fading out to close off the animation.

24 Q. Now, this afternoon we're not going to show the
25 skeletal animations, but was roughly the same

1 process used to assist the jury, ultimately, and
2 probably through the narration of either an
3 anthropologist or a pathologist with what they
4 believe is some important evidence found in this
5 case?

6 A. Yes, the second animation you are referring to
7 was generated in exactly the same manner. It's
8 not as long, there's only slightly over 600
9 images to generate that one. And I don't know if
10 you viewed that last week, if you did, there are
11 no changes to it at all. That one was not
12 altered in any way.

13 Q. Finally, Mr. Austin, asked a little different way
14 and perhaps in more technical jargon, are the
15 images that you created, these computer generated
16 images, true and accurate depictions of the items
17 that are portrayed within them, at least to the
18 best of your ability to create them?

19 A. Yes, sir.

20 Q. All right. For purposes of this admissible
21 hearing, that's all I have of Mr. Austin. Thank
22 you, Judge.

23 THE COURT: Mr. Strang.

24 ATTORNEY STRANG: Thank you.

25 **CROSS-EXAMINATION**

1 BY ATTORNEY STRANG:

2 Q. And thank you, Mr. Austin. I just very briefly
3 want to understand the Total Station a little bit
4 better. When you say that device locates itself
5 in space, is this through the assistance of a
6 global positioning satellite?

7 A. No, sir. May I try to reexplain?

8 Q. Sure. Yes.

9 A. If I can. When I set the Total Station up, if
10 you take a point directly underneath that
11 instrument, essentially, that's our -- we call it
12 a zero point. If you're to think back to say
13 high school geometry, we have our X axis and we
14 have our Y axis, and we also have our Z axis,
15 which is our height. So that point directly
16 below the instrument, that we have created is
17 000. It will then will take the angle and
18 distance to you, sir, and then it would recognize
19 your position, then, both horizontally and
20 vertically.

21 Q. Okay. And does it do that by laser?

22 A. Yes, sir.

23 Q. So, it's sending laser beam and then measuring
24 the time back to a reflective surface or receptor
25 on the Total Station?

1 A. We have a -- it's a two-man operation, if you
2 will, sir. If the piece or the item we were
3 measuring was over by you, or if you were
4 standing by that, I would give you a prism, which
5 is on staff, and you would hold that directly on
6 that item, or directly over it, and, yes, it
7 would reflect back from that prism.

8 Q. So, what it's measuring then is not the item, but
9 the prism that someone is holding on or near the
10 item you are trying to map?

11 A. Correct. The Total Station knows, or we tell it
12 how tall it is by measuring it. We also tell it
13 how tall the prism is so it mathematically
14 calculates to compensate for that height. So it
15 still -- it's measuring to the prism, but what it
16 is determining is the coordinate to the item at
17 the bottom of the staff.

18 Q. Okay.

19 ATTORNEY STRANG: And I may need to have
20 the kind assistance of Mr. Kratz. May I call on
21 that?

22 ATTORNEY KRATZ: Please.

23 ATTORNEY STRANG: If we -- For example, if
24 we went to something with the four burn barrels
25 behind Barb Janda's trailer.

1 ATTORNEY KRATZ: Give me the figure number,
2 Mr. Strang.

3 ATTORNEY STRANG: I don't have the
4 foggiest.

5 THE WITNESS: Mr. Kratz, can we look at
6 Figure 23.

7 ATTORNEY KRATZ: You certainly can.

8 THE WITNESS: It's on Page 24, would that
9 work, sir?

10 ATTORNEY STRANG: Beautiful, just fine.

11 Q. (By Attorney Strang)~ The barrels themselves, as
12 they are modeled here, look like they are
13 supposed to have holes in them; is that right?

14 A. I applied a rust colored texture to them. I
15 don't believe it is supposed to depict holes. It
16 is supposed to depict just a rusty color.

17 Q. Just something you picked off the digital pallet
18 that the program provides?

19 A. There's a library, if you will, that's with it.
20 And I did pick a rust color to give the
21 impression that it's a rusty barrel.

22 Q. Okay. I thought when we were having our virtual
23 flyer one that I saw dark spots that I took to be
24 holes in the barrels. Maybe -- Maybe it was my
25 imagination of what the image was supposed to be.

1 A. If there were dark spots on there, and I think I
2 do believe there are, it's designed just to --
3 just to show an old barrel, not designed to show
4 any type of hole.

5 Q. So, one who is looking at this and says, boy,
6 gee, there look like a lot of holes in those burn
7 barrels, is seeing something that's simply
8 supplied by your imagination, or the computer's
9 choice of replication of a background, or a color
10 that you have selected?

11 A. For the barrel, could someone get that
12 impression, from what you are telling me, yes.

13 Q. Okay. And I'm not trying to tell you, I'm just
14 asking you. I mean if it looks like a hole, that
15 doesn't mean there was a hole in the barrel?

16 A. Right. You said you got that impression so,
17 obviously, somebody could, yes.

18 Q. Or I could have serious mental problems, I
19 suppose. But setting that aside, if it looks
20 like a hole, that doesn't mean there is a hole
21 there?

22 A. In that case, again, that was a texture from a
23 library designed to show -- in fact, I believe it
24 was for -- simply for a burn barrel that I
25 utilized.

1 Q. Excuse me?

2 A. The texture I assigned it was from a library for
3 a burn barrel.

4 Q. Oh, okay. And just -- I'm just trying to get a
5 better feel for the -- I'm particularly
6 interested in the three dimensional process. You
7 consistently use the term model to describe the
8 images that you have created for the State. Why
9 do you use the term model?

10 A. That's the term that's mostly used in the
11 industry, if you will, the software program I'm
12 using is generally used in the jewelry or marine
13 or both design industries. And these are
14 generally referred to as models. I could just
15 the same refer to them as a three dimensional
16 scaled diagram, perhaps it's just a term that's
17 been instilled in me from when I received the
18 training.

19 Q. Sure, but one thing you mean to denote by
20 choosing the word model is that this is not a
21 photograph in the sense that people have
22 understood that term for the last 150, 160 years
23 or so?

24 A. That's correct. No, I would never try to state
25 this is a photograph of the scene. It's not.

1 Q. It's not a photographic depiction in the sense of
2 something that is as accurate as a photograph
3 might be?

4 A. I don't know if I agree with you on accurate, the
5 geometry here, everything is accurate.

6 Q. And I'm with you on that. I'm with you on
7 geometry and spatial relationships, okay. You
8 and I don't have any quarrel at all, at least for
9 now, about that, and I don't know that we ever
10 will.

11 But in terms of the details that a human
12 eye might take in, a hole in a metal burn barrel,
13 chipped paint on the side of the garage, graffiti
14 on the side -- I'm not suggesting there was
15 graffiti -- but graffiti on the side of a garage,
16 a broken window pane, a lone leaf left on a tree,
17 those sorts of visual details here, the model
18 doesn't even purport to capture?

19 A. That's correct. No, you would see those in your
20 crime scene photographs.

21 Q. So what the model is useful for, among other
22 things I guess, but primarily, is showing us
23 relationships in space, of one item to another,
24 for example, true?

25 A. Yes.

1 Q. Okay. And does the model -- or does the Total
2 Station, which you eventually download to the
3 forensic 3D software, does the Total Station do a
4 good job, for example, of capturing the
5 circumference of the opening at the top of a burn
6 barrel?

7 A. To map location of the burn barrel, each
8 particular one, what I would do is, I would take
9 three points on there. And I can use those three
10 points in the CAD software to create a perfect
11 circle, if you will. So, you know, I don't
12 actually go around and go over every half inch
13 with the prism. Three points, because that's
14 what I need to create a circle.

15 Q. Okay. So if we look at the four burn barrels,
16 what you have done with your partner who's
17 holding the prism for you on the stick, is you
18 have gone to three separate points on the top of
19 each one of those four burn barrels?

20 A. Correct. There would be three points on each
21 barrel, for those four there.

22 Q. Okay. And then the computer says, I know what to
23 do now, I will create a perfect circle?

24 A. Well, I have to tell it to do that. You know, I
25 will, essentially, in the software I have got

1 various options, editing, drawing tools,
2 etcetera. I will tell it, I'm going to draw a
3 circle and I'm going to give you three points. I
4 then identify those three points and my circle is
5 generated.

6 Q. Got it. So, again, within the limitations here,
7 if what we were interested in knowing is, you
8 know, how far from the side door on Barb Janda's
9 trailer is the cluster of four burn barrels, this
10 would be a very good tool for doing that,
11 correct?

12 A. If I wanted to -- Are you asking me if I wanted
13 to physically measure that distance using the CAD
14 environment, or to get a perspective view?

15 Q. A perspective view.

16 A. Then, yes, I agree, this would be the tool.

17 Q. Okay. And, indeed, I suppose you could use the
18 software to spit out the exact -- not spit out,
19 but to tell you, if you were to run a cord line
20 from the middle of the four burn barrels to the
21 door knob on the side door of the trailer, we
22 could get down to a fraction of an inch the
23 distance of that cord line, correct?

24 A. Yes, we could.

25 Q. But as to what the burn barrels actually look

1 like to a human eye, or would look like in a
2 photograph, we shouldn't be relying on the model
3 to give us?

4 A. I agree.

5 Q. Now, if we go back, with Mr. Kratz's assistance,
6 to Figure 9, is that possible?

7 ATTORNEY KRATZ: Sure.

8 Q. Okay. Now -- And I'm also going to be interested
9 in Figure 10 eventually. But on Figure 9, I see
10 what looks to me like rather dramatic shadows of
11 two lovely leafy trees, casting across the bottom
12 half of that picture.

13 A. Yes.

14 Q. Is that what that looks like?

15 A. Yes.

16 Q. And the measurements here were taken between
17 November 5 and November 12, 2005?

18 A. Yes.

19 Q. Okay. If I have my directions about right,
20 should I be alarmed by a catastrophic change in
21 the planet earth's orbit and tilt that I now have
22 a strong sun shining out of the northwest, in
23 early November, 2005, in the northern hemisphere?

24 A. If I can put this particular item in perspective,
25 and perhaps I should have done that with

1 Mr. Kratz. The page that this is on, on Page 14
2 of my report, is talking about the forensic 3D
3 software package. And the image right before
4 this one is one of the unrendered garage. And
5 this one is shown in my report directly
6 underneath it as showing a rendered version.

7 And my point here, the point is in the
8 report was to show how we can generate these
9 models with the various textures on them. This
10 is in no way -- This particular view is not -- or
11 with the shadows, is not shown any later in the
12 report when I'm talking about the scene models.
13 And these are actually not leafy trees, these are
14 the pine type trees that are up near the
15 residence that you are seeing. So I would not
16 try to purport that this is how it looked on
17 November 5th, 6th, 7th through the 12th, 2005.
18 This was to show the software.

19 Q. So how do the lovely long shadows of the pine
20 trees get in there.

21 A. I turned the sun on in this particular case to
22 show, again, the software's capabilities. You
23 will see in the other renderings, the sun I
24 actually have off. You will see some shadowing,
25 but the sun giving directionality has not been

1 turned on. I did not intend to depict any time
2 of day, specific time of day, in any of the
3 models you are seeing, you know, that are
4 designed to show you the actual scene or any
5 animation.

6 Q. Or to suggest the orientation of sun to the
7 scene?

8 A. No, I did not do that or did I have any intention
9 of doing that.

10 Q. Okay. And when we see trees in your models,
11 particularly the ones that are leafless, as they
12 might be in early November around here, they all
13 look the same to me. Are these simply trees that
14 the computer generates for the purpose of
15 suggesting that there is a tree in that spot in
16 space.

17 A. This software package allows me to actually
18 specify different types of trees and to specify
19 different seasons. You would see your apple
20 blossoms in the spring and apples in the summer.
21 I, for the purpose of being demonstrative of
22 their being a tree, I did not vary the trees at
23 all. So you are very correct in that all of the
24 leafless trees are the same. The only difference
25 is in their size.

1 Q. Okay. And in general, then, there's a certain
2 amount of artistry, if you will, on your part or
3 on the part of the operator turning the sun on or
4 off, selecting color palet, that kind of thing,
5 to help make this an attractive model, if you
6 will.

7 A. The intent is not to be attractive, if you will.
8 It's to show that there is a tree in this
9 position, that this item is a barrel. But do we
10 have some liberty, if you will, of picking what
11 tree is going to go in there, or what texture is
12 going to be there. I suppose. I do the best I
13 can to try to make that as close as possible.

14 Q. No. And please don't take this as an attack.
15 And by attractive, I understand you are not
16 planning to send this home so mom can put it on
17 the refrigerator. But it's designed to give us a
18 sense of reality, or the illusion of reality of a
19 real scene, correct?

20 A. The design is to give you an idea. And I
21 mentioned these buzz words before about geometric
22 perspective and spacial relationships.

23 Q. Right.

24 A. But to give you an idea of how that scene is laid
25 out. It's not, as you mentioned before, it is

1 not designed to give you a photograph, or a
2 photographic image of what that scene looks like.

3 Q. So whether to color the garage, or what color to
4 make it, whether to turn on the sun, or leave the
5 sun turned off, you know, which direction the
6 shadows should fall, whether there should be
7 shadows, how to color the gravel, these are all
8 just decisions you have to make, in good faith.
9 I'm not suggesting anything to the contrary. But
10 these are just artistic decisions, for want of a
11 better word, in presenting something that looks
12 other than just shades of gray?

13 A. Yes, those are decisions that I made.

14 Q. Okay. And then there's, you know, you don't have
15 to buy into the label artistic, I don't mean
16 anything by it. I don't mean to pick a fight by
17 that. But in addition to those kinds of
18 decisions that you made, in creating your
19 exhibits here, there are also some decisions that
20 were made either by Mr. Kratz, or by Mr. Wiegert,
21 or Mr. Fassbender, primarily, correct?

22 A. As to the colors that were used?

23 Q. No, no, other decisions as to the depictions;
24 specifically, what items would be included?

25 A. Oh, yes.

1 Q. Okay. And those decisions simply were made by an
2 advocate, or people on one side of this lawsuit,
3 for demonstrative purposes?

4 A. Can you say that one more time. I did not
5 understand the lawsuit part.

6 Q. Sure. Some of the decisions about what to
7 include, simply were made by either Mr. Kratz, as
8 one of the lawyers for the State, or one of the
9 two lead investigators on the case, or their
10 purposes of showing or demonstrating what they
11 would like to show or demonstrate.

12 A. Yes, that's correct.

13 Q. Okay. Now, I'm quite certain, knowing these
14 gentleman somewhat, that they didn't ask you to
15 include anything that was made up, made up out of
16 faux pas. And you also were on the scene,
17 correct?

18 A. Yes.

19 Q. So, did you satisfy yourself that the things you
20 were asked to include in fact were things present
21 at least at some time between November 5 and
22 November 12th?

23 A. If I understand your question correctly, are you
24 asking if I'm satisfied everything I have
25 depicted was at that scene during that time?

1 Q. Yes.

2 A. Yes.

3 Q. Okay. Nothing was added in. In other words, if
4 we -- if we go to Figure 41, again, with
5 Mr. Kratz's help.

6 A. Overview of the garage, sir?

7 Q. Yes. Yes, with the roof peeled off. So, if we
8 go to that, there, in fact, was, looks like a
9 John Deere lawn mower or tractor, present in the
10 scene at some point while you were there?

11 A. Yes, sir.

12 Q. There were two snowmobiles, each a flank of the
13 Suzuki Samurai, not just one?

14 A. Yes.

15 Q. Okay. But now, to go in the other direction, or
16 the converse of this, there also were items
17 present that have been omitted from these models,
18 correct?

19 A. Yes. Omitted or not measured. There were a lot
20 of debris, for lack of a better word, in that
21 garage.

22 Q. Okay. So while we haven't added anything in that
23 wasn't there, we have taken out some things that
24 were there?

25 A. Taken out or they weren't measured when I was

1 there.

2 Q. And if they weren't measured, they cannot be
3 included?

4 A. If they weren't measured, then you are not going
5 to see them in there, denoted as being in a
6 specific location.

7 Q. So someone looking at this Figure 41, for
8 example, unless he or she was able to look at a
9 photograph taken at about the same time, would
10 not understand that the garage, in fact,
11 contained a whole lot more items and clutter than
12 it appears to in the model?

13 A. I believe I understand your question. Like if I
14 were to look at the -- there's a table back here
15 denoted in silver or grayish color. There were
16 items on that table, if you will. There were --
17 I can even tell you what they are: Parts, or
18 boxes, or other items. No, I denoted the
19 location of that table, but not everything that
20 was on it.

21 Q. Right. In fact, your recollection is that the
22 table top was all but covered with junk and
23 miscellaneous things.

24 A. Yes.

25 Q. Okay. Likewise, the garage floor was not

1 covered, but quite cluttered with all kinds of
2 parts and miscellaneous stuff?

3 A. There were more items in that garage than what
4 were depicted in this particular perspective.

5 Q. Perhaps the most striking example of this, if you
6 went to Figure 31.

7 A. The residence over here?

8 Q. Yes.

9 ATTORNEY STRANG: Is your Honor able to
10 follow along?

11 THE COURT: Yes, I am following along. I
12 have hard copies of the exhibits and I'm looking at
13 them.

14 Q. Okay.

15 ATTORNEY KRATZ: Do you need something from
16 me?

17 ATTORNEY STRANG: Figure 31 would be great,
18 just for the spectators.

19 ATTORNEY KRATZ: With or without arrows?

20 ATTORNEY STRANG: Right now, either is
21 okay. Very well.

22 Q. If the uninitiated took the model in Figure 31 as
23 an entirely accurate representation of the way
24 Mr. Avery's home looked, one would conclude that
25 at least as to his living room and dining room,

1 he had a fairly minimalist philosophy of interior
2 design.

3 A. In fact, I documented that in my narrative too,
4 sir, that items in those rooms were not measured,
5 you know, what the furniture that was there.

6 Yes, without -- if they weren't shown a crime
7 scene photograph, or they weren't told that this
8 is designed just to show relationships of certain
9 objects, yeah, they would not probably have an
10 understanding that there were other items there.

11 Q. Things like couches, and chairs, and fairly large
12 pieces of furniture?

13 A. I remember two chairs. I don't remember having a
14 couch.

15 Q. Okay. But in other words, there's some
16 significant pieces of furniture that just aren't
17 here?

18 A. That's correct.

19 Q. Okay. And so the things that are included
20 reflect some editorial judgment on the part of
21 the State in this instance?

22 A. Or items that I, like I say, I didn't actually
23 get to the chairs that you were referring to
24 there by the time our warrant ran out that day.
25 So, yeah, there's also some judgment on my part

1 when I was in there as to what items I could get
2 to in the time allotted.

3 Q. Fair enough. Fair enough. And throughout making
4 these slides, in a number of ways, you were
5 guided by the requests of, let's just say agents
6 of the State, in directing you on which of the
7 available items that actually were there should
8 be included and which should be omitted from the
9 image or the model?

10 A. Yes, that's correct.

11 Q. Now, in explaining that such direction is common
12 in your work, you told the Court that this is
13 common to rely on one side or the other in a
14 lawsuit, for that sort of direction?

15 A. The bulk of the work that I do, as -- as
16 Mr. Kratz pointed out, is -- is in crash
17 reconstruction.

18 Q. Yes.

19 A. And a lot of the diagrams that I do for crash
20 reconstruction, we don't show everything in those
21 aspects either. We'll actually usually collect
22 more information than we need, or on the flip
23 side, we can't show every single crack that's in
24 the pavement.

25 So that's what I meant by it's

1 relatively common to only show certain aspects or
2 for certain things to be omitted. You know, I'm
3 never going to intentionally omit something of an
4 evidentiary value for either side, but I think it
5 would be impossible to show everything.

6 Q. And that's not where I'm going. What I'm saying
7 is, you are getting your direction from one side?

8 A. Yes.

9 Q. Not from two sides?

10 A. That's correct.

11 Q. And because you are employed by the Wisconsin
12 State Patrol, when would the defense ever be, in
13 a criminal case, the defense ever be suggesting
14 what should be included and what not included in
15 a model?

16 A. Typically, that has not happened. I did offer to
17 Mr. Kratz, you know, that we could add additional
18 items if there was something that you
19 particularly wanted displayed or shown in there.
20 I haven't heard anything back on that yet. But,
21 no, typically we don't call the defense attorney
22 up and say what do you want in the diagram. Or,
23 you know, I guess I haven't had a chance where
24 they have approached me and said can you add
25 this. I have been asked in court to draw in

1 where something was on a diagram but, no, not the
2 scenario that you are portraying. That's not
3 happened to me.

4 Q. It's the first I'm hearing of it too. And, you
5 know, they are entitled to create their own
6 demonstrative exhibits. They just are, just the
7 same way I am.

8 The point is, you are someone at the
9 technical reconstruction unit of the Wisconsin
10 State Patrol Academy more typically would assist
11 the prosecution in preparing such exhibits?

12 A. That's correct and that's how it was in this
13 case, as you point out, yes.

14 Q. Here we can use this just as well as anything,
15 the -- the items that are shown, all of them were
16 mapped with the forensic station or the Total
17 Station?

18 A. No, a lot of these items were manually -- the
19 measurements were manually recorded. It would be
20 possible, but very difficult, to set the
21 instrument up in a small bedroom, as you will,
22 that we had here in the residence. It was
23 quicker just to manually, if you will, measure
24 those positions.

25 Q. Fair enough. Fair enough. And those

1 measurements may have been taken at different
2 times, by different people?

3 A. No, I took -- the measurements that you are
4 seeing here were taken by me on the last date.
5 So, obviously, they are going to be at different
6 times, but I was in there at one, you know, all
7 at one time frame, if you will.

8 Q. Okay. And, again, don't -- I'm just using this
9 demonstratively so to speak, okay, so don't get
10 carried away with just the image of, but in
11 general, the images we have seen, the mapping,
12 whether done by the Total Station, or done
13 manually, was done at different times?

14 A. Oh, I'm sorry, I misunderstood your question.
15 Yes, they were all done, you know, in the course
16 of one day. Then we would call it a day, go
17 home, come back the following day, reset up, or
18 do a different area, or finish that location.

19 Q. And during the time you were on scene, doing the
20 mapping, there were 50 or 100 other law
21 enforcement officers also on the scene, executing
22 at least a couple of search warrants; you were
23 aware of that?

24 A. Yes. They were never in the immediate area we
25 were working in. It's a very large area,

1 obviously.

2 Q. Right.

3 A. A lot of the searchers were down in the -- where
4 the vehicles were in the salvage yard. But,
5 yeah, I do know, for example, that there were
6 probably 60 of my co-workers that were out there
7 doing searches.

8 Q. Okay. And you have no way of knowing what items
9 law enforcement officers may have moved before
10 you got around to mapping the dimensions and
11 location of those items?

12 A. If that happened, I wouldn't know.

13 Q. I would like to go briefly to the skeleton model.
14 Just an unlabeled image. There we go. Great.
15 That works fine. This thing actually came off a
16 CD that the FBI sent to you?

17 A. Yeah, I contacted their -- was it their
18 Structural Imaging Unit -- I would have to look
19 at the particulars, and requested a -- Structural
20 Design Unit of the FBI and requested a skeletal
21 model in a standard CAD, be in a drafting format.
22 They sent me what's called a DXF file, which
23 means drawing exchange file, that my software
24 could also read. So, yes, I did obtain this from
25 the FBI.

1 Q. Okay. And was the -- was the depiction on the
2 FBI's CD or DVD, whatever it was, a photograph,
3 or was that image itself a computer generated
4 image of some kind?

5 A. What they gave me was, you know, for lack of a
6 better term, we discussed it before, was a three
7 dimensional model. It was actually the CAD file,
8 if you will, would have been similar to my final
9 overall scene of the Avery property. This was
10 just a file, if you will, of a female skeleton,
11 which then I can move around in 3D space.

12 Q. Sure.

13 A. Or put the texture, or label accordingly. So it
14 wasn't a picture they gave me, was the actual
15 model itself.

16 Q. Again computer generated?

17 A. Yeah, a computer electronic file. Yes.

18 Q. Yes. And as to whether it was a female skeleton,
19 you simply you relied on the label assigned to
20 the file?

21 A. I trusted the FBI. And I trusted Dr. Eisenberg
22 to confirm, yes, this is female.

23 Q. Okay. And if you know, do we have a height on
24 this skeletal model?

25 A. On the model itself?

1 Q. Yes.

2 A. I think -- I think I have it right around 5 feet.
3 I would have to go back and look, sir.

4 Q. But in any event, that's a number you could give
5 us, or dimension you could give us as height?

6 A. Of the skeleton?

7 Q. Yes.

8 A. Yes, I could go back and see what that was.

9 Although, everything -- if I were to adjust that
10 model's height, everything would be
11 proportionate, meaning if I made it 5 feet tall
12 or if I made it 20 feet tall, the relative size
13 and proportion would remain the same.

14 Q. Okay. So this can't be taken to depict any
15 particular person, in other words?

16 A. No, that's not my intention here at all. It was
17 to help Dr. Eisenberg to point out specific bone
18 locations.

19 Q. Right. The knee bone connects to the shin bone,
20 and one can see where the knee bone would be in
21 relationship to the shin bone?

22 A. Yes.

23 Q. Okay. That's fine. So let me go to some
24 specific questions. And here it will be useful,
25 not so much to use the screen, but just the

1 binder we have here, we all have the same one.

2 A. Okay.

3 Q. Now, we have been describing three dimensional
4 models. But of course, none of them are, right?
5 We're looking at the flat pieces of two
6 dimensional paper, or flat images on a screen?

7 A. Yes, it's a flat screen.

8 Q. The illusion of the third dimension is
9 perspective provided by mathematical algorithm?

10 A. Yes.

11 Q. The design of the software itself, or the design
12 of the algorithms that create the illusion of
13 three dimensional space are not something that
14 are your work product?

15 A. That's correct.

16 Q. Not something in which you are expert?

17 A. No, I'm not a programmer.

18 Q. So this is -- this is a commercially available,
19 or proprietary software package that somebody in
20 the Wisconsin State Patrol Academy purchased and
21 you use.

22 A. The first part of your question is correct. The
23 Wisconsin State Patrol Academy did not purchase
24 this. This is something that, as a trainer of
25 the software, that I have from them. So this is

1 not something the State Patrol has purchased yet.

2 Q. Sure. Okay. And that will teach me to ask
3 compound questions. If we go to Figure 17?

4 A. The exterior of the trailer, sir, or the
5 residence, rather.

6 Q. Yes, looks like that to me. You have no idea
7 what, if anything, duck tape may have to do --
8 duck tape under the porch may have to do with
9 anything in this case, do you?

10 A. No.

11 ATTORNEY STRANG: Do we have a labeled
12 version of that?

13 ATTORNEY KRATZ: Sure.

14 Q. Okay. But somebody asked you to include some
15 duct tape --

16 A. Yes, that's correct.

17 Q. -- in this figure. And didn't give you exactly
18 where the duct tape was supposed to be?

19 A. No, that's based off of a photograph.

20 Q. So, quite honestly, you simply tell us you here
21 that are doing an approximation?

22 A. Yes.

23 Q. Again, whether duct tape has anything to do with
24 anything, you have no idea?

25 A. That's correct.

1 Q. Okay. Likewise, in Figure 18, you refer to a
2 number of items, a vehicle bench seat, a mallet,
3 tire cords, a rake, and here, again, you tell us
4 placement is to be deemed as being approximate,
5 correct?

6 A. Yes, sir.

7 Q. So this is something that you just decided where
8 to put these items in the model?

9 A. I tried to do the best I could to explain in the
10 narrative here as to how the items were placed.
11 The one you pointed out here, yeah, they had been
12 moved before I forensically mapped that location.
13 I relied on photographs taken by the State Patrol
14 Trooper Jim Reese, to put those items in place.
15 So I did do what I could to note which items were
16 mapped and which were based on photographic
17 evidence.

18 Q. But we could look at the photographs, if he
19 wanted to know where the items were.

20 A. Which I did in this case. But now our view here,
21 we've moved up to -- I don't know what our
22 elevation is here, looks like somewhere around 50
23 feet, looking down, so we can see the entire
24 area.

25 Q. So if we wanted to pretend we were 55 feet tall,

1 now we can do that.

2 A. I don't think the intention would be for play
3 acting, just to get a good overview.

4 Q. Right. But that's the point of view so to speak.

5 A. Yes.

6 Q. Okay.

7 THE COURT: Excuse me, Mr. Strang. Let me
8 ask just one question. The approximate location,
9 based off of the photos, is that a number of photos,
10 or one photo that showed all these items?

11 THE WITNESS: There were several photos I
12 was able to utilize. I can't tell you, your Honor,
13 how many I had at that point. Trooper Reese did
14 take several shots behind there with the camera.
15 And for some of these, if it was possible, I also
16 utilized aerial photographs so that we can see the
17 vehicle bench seat in one of those. But if I could
18 use -- the more I could use, obviously, the better.

19 THE COURT: Go ahead, Mr. Strang.

20 Q. There were a number of area photographs taken,
21 some of which you used to assist you?

22 A. Yes.

23 Q. Were any of those done with a zoom lens?

24 A. I would have to look at my notes to see what
25 Trooper McConnell did or what type of camera he

1 had, or focal lens. I guess I don't know because
2 I wasn't involved in those.

3 Q. And it's not worth the time. Did you look at
4 them digitally?

5 A. Yes.

6 Q. Okay. So we know they were digital photographs
7 at least?

8 A. Yes.

9 Q. And, therefore, we could use Photoshop, or
10 something on the computer, to enlarge or minimize
11 the view of part of those photographs.

12 A. That is correct. There were also some
13 non-digital pictures that I believe were arranged
14 to be taken by DCI, which showed items also.
15 Those were not digital, but you could look at
16 them and see.

17 Q. Okay. If you go to Figure 32 --

18 ATTORNEY KRATZ: Labeled?

19 ATTORNEY STRANG: Either way.

20 Q. -- this is the bathroom?

21 A. Yes.

22 Q. Okay. There's a bathroom door, but it looks like
23 the doorway has disappeared?

24 A. The material on the -- I'm going to use a laser
25 pointer here, sir.

1 Q. Sure.

2 A. The material on this wall is the same as the
3 material on this wall. And you see this, this is
4 a shadow from this wall coming down. It's going
5 to be in the rendering or perhaps how we're
6 displayed here was printed.

7 There is an opening here, but because
8 the wall behind it is identical in texture, it
9 gives us the illusion, if you will, in that
10 picture, that it's a solid wall. But we do see a
11 shadow from this back wall in here, which shows
12 us that there really is an opening there. If I
13 would have made this wall darker or this wall
14 darker you would see a difference.

15 Q. I would see a doorway?

16 A. Yes. Do you see what I mean about the shadow
17 that's back here? The shadow is actually on that
18 hallway wall, so that's why we're seeing it
19 inside, by looking through the door.

20 Q. Okay. So, it's not a situation where there was
21 an error in measurement or something that caused
22 the computer to think there was no doorway into
23 the bathroom?

24 A. No, it's the fact that I have the same texture on
25 that wall as I do on the other wall and that in

1 this particular render gives us that -- I don't
2 want to say optical illusion, for lack of a
3 better term, it appears to us that that door is
4 missing.

5 Q. Here, again, this isn't another example where
6 you, quite forthrightly, in the report, told us
7 that you are approximating the location of the
8 guns?

9 A. That's correct. And you're right, that is
10 mentioned in the report.

11 Q. If we go to Figure 36-A now, you may not know
12 enough about this case to understand this, but
13 this sort of model is something that the lawyers
14 have been probably spending a fair amount of time
15 looking at. And I have seen photographs
16 depicting the same basic area.

17 So just for the Court's benefit, there
18 are a very noticeable pair of men's slippers just
19 to the left of the key in the photographs, of the
20 same area that you have modeled here. Have you
21 seen those photographs too?

22 A. Yes, I was given a singular photograph in this
23 case to show me the location of that key. And I
24 was asked to put that key in. I am aware of the
25 slippers they are talking about.

1 Q. And the outlet on the wall?

2 A. That's correct.

3 Q. Okay. So is that the kind of thing that you are
4 simply told, don't bother about the outlet on the
5 wall, don't bother about the slippers, just show
6 us the approximate location of the key?

7 A. I was asked about the outlet on the wall by the
8 prosecution, and that one I would have had
9 difficulty putting in without having
10 measurements. I did not measure the outlets or
11 light switches when I was there. I felt
12 comfortable putting the key on the carpeting on
13 the floor, but I did not feel comfortable in
14 putting the outlet in.

15 Q. An earlier draft of this -- and I understand it
16 was just a draft -- had no key fob on the key
17 correct?

18 A. That's correct.

19 Q. No little blue or purple strap. Were you asked
20 to add that back in?

21 A. That didn't exist at that point, in the previous
22 draft. I believe you are referring to the one I
23 had delivered to you back in December, what was
24 in there was a generic key, if you will. It was
25 not the actual key or a model of the key that was

1 found.

2 After that version came out, I was asked
3 to put in, if you will, the actual key. So I was
4 given access to it. I took measurements of that
5 key and, hence, you see it in this particular
6 version.

7 Q. Okay. And as we go through, we don't need to
8 stop particularly on each one of these, but
9 Figures 37 and 38, you have got cross-hatched
10 areas, shows approximate locations of things; is
11 that again based on photographs, or just
12 somebody's description to you of where bleach or
13 duct tape was found?

14 A. Yes, and yes. There were photographs of both of
15 these items. In fact, looking at my photographs
16 that I took when I was in the residence, the
17 bleach you are referring to in Figure 37 was in
18 place. But, yes, those are based on requests
19 they be in and/or based on statements and
20 photographs.

21 Q. Go to Figure 44, if you would.

22 A. Yes.

23 Q. Now, here some color has been added for
24 highlighting, specifically, blue color, correct?

25 A. You are referring to the truss. I apologize, my

1 version is black and white.

2 Q. Do you have the -- Do you have your little --
3 your writing at the top, your captioning?

4 A. Yes, you are referring to the mark, I can see it
5 in the one Mr. Kratz put up. Yeah, I thought
6 that was a blood print?

7 Q. Now, the blue coloring is something added by you?

8 A. Yes.

9 Q. Just to highlight an area?

10 A. Yes. I believe as I wrote here, it was shaded
11 blue to make the area differ from the remainder
12 of the other sections of the trusses. I did that
13 to show a location.

14 Q. The location is where at least someone told you
15 there were some marks on a ceiling truss?

16 A. I actually, when we surveyed -- This part, we did
17 use the Total Station for and myself and other
18 officers involved saw those marks ourselves. So
19 that actual location is correct on these. As to
20 do they have any value, I don't know. But we
21 mapped out that location and we put -- I put them
22 in there.

23 Q. Whether the marks themselves that you have
24 highlighted have anything to do with anything,
25 you have no idea?

1 A. That's correct, sir.

2 Q. The next slide, Figure 45 -- Are we using, in
3 Figure 45, the scene as it looked in March, 2006
4 or the scene as it looked in November, 2005, as a
5 starting point for the model?

6 A. The original model -- and if I'm not following
7 you, please, please stop me.

8 Q. Oh, sure.

9 A. The original model that's here is based on
10 forensic mapping that I did back in November of
11 2005. Now, what my intention to depict here is
12 items that were denoted by investigators in March
13 of 2006.

14 Apparently they had gone back in and
15 found some items of evidentiary value. And
16 that's what this and the following photograph are
17 designed to -- excuse me -- I mean photograph
18 image, are designed to depict, is items that they
19 noted during that examination.

20 Q. But the items themselves were among those that
21 were mapped in November, 2005, or were they
22 simply added in, based on new information in
23 March, 2006?

24 A. The paint thinner, I think, as I talked about
25 before, I didn't map the items that were on top

1 of that particular bench. I did observe, after
2 reading the reports and looking back at my
3 photographs that I took when I was in the garage,
4 the paint thinner was in place. I can't tell you
5 exactly, say it's 3 inches over, 4 inches back.
6 I can't do that.

7 Q. Sure.

8 A. That's why it says approximate.

9 Q. Was the blackjack creeper?

10 A. The blackjack creeper was in place when I was
11 there. And that one I could put in based on the
12 items around it. It's right up against that air
13 compressor and by the welder, so I had no
14 difficulty in putting that in.

15 Q. Although, you had not mapped it?

16 A. No, the location of the blackjack creeper was not
17 noted; however, the compressor behind it, there
18 is a lawn mower in front of it, a waste paper
19 basket, and a welder right there. So that was --
20 I was very confident in putting that in place.

21 Q. All right. Very briefly, we don't even -- I
22 don't think we need the images because they don't
23 have figure numbers, but there are some close up
24 views of the skeletal model showing defects, what
25 you have described as defects, or probably Dr.

1 Eisenberg described as defects, in the mental
2 foramen and in the parietal bone, true?

3 A. Yes, sir.

4 Q. And on those you simply picked, or Dr. Eisenberg
5 has picked at random, which side of the head to
6 use as in modeling those defects?

7 A. I believe that -- I guess I don't feel
8 comfortable discussing that. I was directed that
9 it's the left side of the head at this particular
10 location of the parietal bone. Again, as
11 Mr. Kratz pointed out, that's well outside of my
12 area of expertise. I generated these models
13 under her supervision and for Dr. Eisenberg.

14 Q. Okay. I'm interested in the text then, I guess,
15 just to nail that down on page 56.

16 A. I'm there, sir.

17 Q. You write, in part, however, it is unknown from
18 which side of the mandible the fragment
19 originated. For demonstration purposes only the
20 model shown below depicts the left side of the
21 head.

22 ATTORNEY KRATZ: Judge, I'm sorry, the
23 mandible is the jaw.

24 ATTORNEY STRANG: Right. Yes, it is.

25 ATTORNEY KRATZ: Dr. Eisenberg will testify

1 exactly where the defect is on the cranial defect.
2 But other than that, your Honor, the text is what it
3 is.

4 THE COURT: I must have a different Page
5 56, because my Page 56 doesn't show a jaw.

6 A. I'm sorry, Mr. Strang, could you repeat the
7 question.

8 Q. Well, the question was, am I right that simply
9 for purposes of illustration here, what you are
10 saying at least is, you are using the left side
11 of the mandible.

12 A. I believe, and thank you for refreshing my memory
13 on this one, what I did in that case, that I
14 showed one of the mental foramen which, again,
15 well outside my area of expertise, my
16 understanding is it's a opening for a blood
17 vessel in the jaw. There's blood on each side of
18 the jaw. I depicted one of them. I believe the
19 text says after that, that the mental foramen on
20 the right side of the jaw is similarly located.

21 Q. Very well. Technically, if you were asked, would
22 it be possible to start with, you know, Figure
23 31, for example, and then add in one arrow or
24 label at a time, like a PowerPoint presentation,
25 to use something much simpler, with which I'm

1 familiar with?

2 A. You are asking that could be done?

3 Q. Yes, could that be done technically?

4 A. Oh, yes.

5 Q. Without an unreasonable amount of work?

6 A. No, it would not be unreasonable at all.

7 Q. Okay. What you have given us here are all or
8 nothing. All the labels, or none of the labels,
9 on the figures that -- for which we can choose
10 labeled or unlabeled?

11 A. Yes. What I did was I gave -- obviously, I
12 couldn't do that in the report. Essentially, as
13 you said, it's all or nothing here.

14 Q. Right.

15 A. What I gave Mr. Kratz was 4 X 6 prints and
16 electronic versions of either, yes, all or
17 nothing. But, no, it would not be any difficult
18 amount of work to separate those out, or to put
19 them into a PowerPoint presentation.

20 Q. There's nothing magic about PowerPoint, but my
21 point -- my point simply was, if some of the
22 labels were acceptable to the Court or the
23 parties, and not others, is that something you
24 could do without a great deal of trouble?

25 A. If that were the decision, and either you or

1 Mr. Kratz were to direct me as to what has to be
2 done, yes, we could make that happen.

3 Q. Okay. And similarly, no big deal to take out
4 words in some of the labels, if that was the
5 decision? So, in other words, it could be
6 garage, rather than Steven Avery's garage, just
7 for example?

8 A. That's correct. And just to go a step further if
9 I may, sir.

10 Q. Sure.

11 A. In the animation, that would be relatively easy
12 also.

13 Q. Okay.

14 A. The difficulty would be if we had to re-render
15 some of those approaches, that would take a
16 lengthy amount of time. But the textural parts
17 in there can be altered rather simply.

18 Q. All right. And I think my last question is, the
19 new DVD that I was just given this afternoon, do
20 you think that, without any purchase of
21 proprietary software, I could pop that in a
22 laptop and run the virtual tour, or stop it, or
23 sort of use the exhibit as well?

24 A. Yes, there's nothing proprietary about it. It's
25 written to an M-PEG 2 Format, meaning any DVD

1 player can read that.

2 Q. Okay. And that can be stopped or backed up, that
3 kind of thing, by the person running the laptop?

4 A. Yes, just as if you were going to put a regular
5 movie in there, you could pause it, or reverse,
6 or fast forward.

7 ATTORNEY STRANG: Thanks. That's all I
8 have.

9 ATTORNEY KRATZ: Nothing for this hearing,
10 Judge.

11 THE COURT: All right. Your witness is
12 excused. We'll take our break at this time, give
13 the reporter a rest. Come back in 15 minutes.

14 ATTORNEY KRATZ: Judge, on this issue we
15 don't anticipate any more testimony; do you want a
16 brief argument?

17 THE COURT: I will hear the argument after
18 we get back.

19 ATTORNEY KRATZ: What time do you want us
20 back?

21 THE COURT: Fifteen minutes, quarter to
22 four.

23 (Recess taken.)

24 THE COURT: At this time we're back on the
25 record, I will hear argument on the defendant's

1 motion regarding the animations. I think,
2 Mr. Strang, we'll let you go first, I'm sure you
3 know exactly what the objections are.

4 ATTORNEY STRANG: Sure. I think we can
5 narrow the scope considerably. In the end, I don't
6 think there will be any real problem at all with the
7 skeletal model. And I can work through with
8 Mr. Kratz or his colleagues any minor issues that
9 remain.

10 But I think -- I think where we're
11 heading on that is that they have already removed
12 color highlights on bones, which was good. And
13 we're probably heading toward unlabeled images,
14 first, and then adding labels as a witness
15 describes, you know, whatever it is that the
16 arrow would come in for. And I don't think that
17 editorial content of the labels on the skeletal
18 model would be any issue at all. They are just
19 really using formal names for bones. So I think
20 that will wash out.

21 I will talk a little bit about
22 proportion and, you know, get a better
23 understanding of that now that I have a
24 foundation from Trooper Austin on that. But I
25 don't expect that the Court will need to address

1 that and we probably would withdraw the motion so
2 far as the skeletal models go -- or model.

3 The Avery property, you know, this
4 northwest corner of the 40 acre parcel will
5 present some difficulty, perhaps, and just to
6 describe what it is for the Court. I don't have
7 a good vocabulary for this because, at least to
8 me, not being involved in, you know, air crash
9 cases or personal injury cases, where a great
10 deal of money is at stake, computer generated
11 animations are new to me, even though they are
12 not new to the profession, particularly.

13 But the concern, if I can articulate it,
14 is that the models come so close to a realistic
15 or photographic quality that it's easy to forget
16 that they just are not. The photographic eye of
17 a video camera picks up everything within it's
18 field of focus and there's no opportunity for
19 somebody to say, well, I want this flower pot in,
20 but the watering can over there, I want that
21 taken out.

22 Now, obviously, with digital photographs
23 we actually can do that kind of thing now. But
24 in the traditional sense, a video recording or a
25 photograph gives a true depiction. These do not.

1 But what's included is so deceptively good -- and
2 I don't mean in a pejorative sense perceptively,
3 but it's so realistic appearing that it's easy, I
4 think, for a juror to forget that he or she is
5 looking at a collection of pixels that reflects
6 editorial judgment on everything other than the
7 geometry.

8 And I will simply take the geometry and
9 the spatial relationships off the table here.
10 I'm not concerned about the accuracy of the
11 algorithm. I'm not concerned about the accuracy
12 of measurements, whether they are manual or done
13 with the Total Station device. That can be
14 developed easily enough and understood by way of
15 foundational questions on direct, or a few simple
16 questions on cross-examination. And jurors then
17 can understand that, well, you know, there may be
18 some slight human error in spatial relationships.
19 Not worried about that, or the geometry, if the
20 Court will.

21 Where I get worried is things like holes
22 in burn barrels. That kind of thing, it is very
23 easy to assume that there really must be a hole
24 in the burn barrel if it looks like there's a
25 hole in the burn barrel.

1 Or easy to assume that, you know, the
2 dog was standing out at the end of his leash, if
3 he's standing out at the end of his leash in the
4 depiction here. It's all that much easier to
5 lose track of the fact that we're not depicting
6 anything as it would have been, necessarily, on
7 October 31, 2005.

8 We just -- There's no way of knowing.
9 These are later creations based on later
10 measurements. We'll also have to work some on
11 labeling, but my expectation would be that
12 collaboratively the State and the defense could
13 come to some agreement on labeling as to the
14 trailer and the Janda trailer and the surrounding
15 yard, for want of a better word.

16 We may even get -- We may, we're not yet
17 today, but we may get to some agreement on
18 something like the image that has a rake and tire
19 cords and a mallet and a number of items shown in
20 approximate locations. It may be that if the
21 State introduces photographs taken during the
22 same week, that photographically show the scene,
23 it may be that I'm a lot less concerned about a
24 demonstrative representation once the jury
25 understands, here are the photographs and here's

1 the diagram, which, you know, which is really
2 intended just for argument or illustration and
3 not for pictographic accuracy. We're not there
4 yet, we may be able to get there on that topic.

5 The greatest concern and the one on
6 which we probably do need the Court's help is the
7 garage. The garage, as depicted in the models
8 here, really is materially different than the
9 garage was in real life. And I say to myself,
10 here, this is where the differences are so
11 material that, you know, an actual jury view of
12 the garage would be better than a virtual tour of
13 the garage.

14 And the problem may be exasperated by
15 the fact that for whatever reason, at least the
16 photographs that Mr. Buting and I have seen of
17 the garage, aren't particularly good and they are
18 not particularly numerous. So I don't know,
19 here, that -- there may be photographs I have not
20 seen, not that they haven't been given to me, but
21 just that there's such a mass of photographs, I'm
22 not sure I have looked at every photograph we
23 have.

24 But it may be that there are photographs
25 I have not seen or things that could be blown up

1 that would allow the jury to see the garage as it
2 actually was. Because the differences are
3 material and they may be material to arguments
4 that the State wants to make. They could
5 potentially become misleading if one is relying
6 on the -- on the computer model only as to the
7 garage.

8 Could something fit in the garage; could
9 something have been laid down in the garage; the
10 truss marks; the marks on the truss. I have no
11 reason to think that the State will be able to
12 show the relevance here at all of marks on a
13 truss, so to have an image that takes the roof
14 off, gives the juror a view that, as the witness
15 said, probably is not humanly possible to have.

16 And then on top of it, highlights
17 something that may have nothing at all to do with
18 anything, in fact, as far as I know does have
19 nothing at all to do with anything relevant or
20 probative here. It becomes unfair. So that --
21 that -- the garage really is where most of the
22 points of contention lie. And whether we can get
23 there with photographs that would allow the jury
24 to take them proper in a fair context, a
25 demonstrative model of the garage, I don't know.

1 And, you know, as I say, the trailer,
2 would I be much happier with just a video camera
3 walk through, which may or may not have been done
4 at the scene, I don't know. I think it would be
5 more accurate, but there probably are enough
6 photographs in the end, or there may be enough
7 photographs of the trailer that we can live with
8 modeling as long as the Court gives a good
9 instruction on what a demonstrative exhibit may
10 or may not be used for properly.

11 THE COURT: Mr. Kratz.

12 ATTORNEY KRATZ: Thank you, Judge. I
13 appreciate Mr. Strang's concessions regarding
14 admissibility. And that's what this hearing is.
15 It's not to decide the weight that a jury may give
16 to these items, but simply whether or not they are
17 admissible.

18 We're left with, then, the standards of
19 admissibility for demonstrative evidence, which
20 is one of the simplest formulas for a Court to
21 apply in admissibility hearings. And it's simply
22 whether it will assist the jury and whether the
23 probative value may be outweighed by
24 countervailing factors, the 904.03 analysis.

25 Demonstrative evidence in and of itself

1 is certainly admissible. As Mr. Austin
2 testified, if a citizen can come down from a
3 witness stand and draw an intersection on a chalk
4 board without one measurement -- without it being
5 at all to scale and that's admissible, there
6 shouldn't be any question regarding admissibility
7 of these kinds of images; that is, with in excess
8 of 4100 measurements and being perfectly, not
9 only to scale, but of geometric proportions.

10 Here's a case, Judge, **State vs.**
11 **Peterson**, the 1998 decision in Wisconsin, just
12 cite it just for the record, at 222 Wis. 2d, 449
13 which describes the thing that I'm talking about;
14 that is, the determination of admissibility
15 requires this Court consider the degree of
16 accuracy in the recreation; the complexity and
17 duration of the demonstration; whether there is
18 other available means of proving the same facts;
19 and those risk factors that I talked about, that
20 is the risk that may impact on the fairness of
21 the trial.

22 This Court has heard from Mr. Austin and
23 I think there's no question as to the accuracy of
24 these images. And I also think there is no
25 question that it will assist the trier of fact.

1 The only real objection that I can envision would
2 be in the area or the point where we talk about
3 it being cumulative; that is, the State even
4 recognizes that we do reach a tipping point that
5 there may be a time when too many demonstrative
6 exhibits are being offered.

7 But to reach that level, Judge, we're
8 talking about so far down the path of relevance
9 and so many exhibits, that we really aren't
10 talking about a relevancy issue anymore; we're
11 talking about the same exhibit being shown over
12 and over. The State certainly doesn't intend to
13 do that.

14 That's why these are State exhibits.
15 That's why these are animations rather than
16 simulations. And let me just parenthetically,
17 Judge, describe for the Court and argue that we
18 aren't talking simulations we're talking
19 animations, which are simply representations of
20 objects that are shown within them and that
21 includes the animation.

22 Simulations, Judge, are when a computer
23 is asked to draw conclusions from data. Those
24 are the reconstructions and the like and that
25 isn't what we're talking about here. This Court

1 need not approach any analysis about the science
2 that's involved since that appears to be
3 unconverted.

4 And so for this hearing, Judge, I am
5 asking the Court rule on admissibility of the
6 scene images, both interior and exterior, as
7 being of the accuracy contemplated by a trial
8 court. They will assist the trier of fact and
9 there is no risk of a fairness problem.

10 Mr. Strang is free to describe or supplement any
11 of these animations or computer -- excuse me,
12 we're talking about computer images, with
13 photographs.

14 We are not prohibiting the defense, nor
15 have we ever, of the creation of their own
16 diagrams or their own renderings. These are
17 State exhibits and the jury will certainly be
18 told that. So we're asking the Court, again,
19 rule on the admissibility of the -- both the
20 interior and exterior property images.

21 As far as the skeletal images, I
22 appreciate, again, Mr. Strang's concession and
23 withdrawal of his objection. Dr. Eisenberg, I'm
24 sure, will talk about the bones and those all
25 appear accurate representations.

1 And then, finally, Judge, as to the
2 animations, that is the moving images, the 5200
3 images that are placed side by side, in lieu of,
4 or instead of, a jury view; I don't know what
5 better way we could have created something to
6 show the jury spatial relationships,
7 relationships of evidence to known and fixed
8 objects.

9 There's nothing that I believe that is
10 unfair or prejudicial in what we have seen. And
11 so, not just for opening statements, your Honor,
12 but when other witnesses may be asked to use
13 these images, I will ask leave of the Court to be
14 allowed to do that.

15 Let me also assure the Court and
16 Mr. Strang that I expect that we'll still have to
17 deal with relevance or materiality issues,
18 especially with things like the garage, or
19 trusses, or the like. But as far as whether or
20 not these images are admissible, the unbalance
21 and Exhibit 4 are all of the images that have
22 been provided to the Court. With the testimony,
23 which I would ask the Court to adopt, of
24 Mr. Austin, we'll ask the Court accept those as
25 demonstrative evidence in this case. That's all

1 I have.

2 THE COURT: Mr. Strang.

3 ATTORNEY STRANG: I'm in full agreement
4 with Mr. Kratz that animation presents no separate
5 problem; that is, if the image is fair and not
6 materially misleading and, therefore, potentially
7 helpful to the jury and the ability to move or
8 change the point of view in the image is not
9 objectionable.

10 And I disagree that there's no
11 simulation involved here, but there certainly is
12 no dynamic simulation in the sense we don't have
13 a 747 taking off and then a depiction of a
14 catastrophic failure and resulting explosion, for
15 example.

16 The simulation we do have is the removal
17 of the rooftops, which is a simulation. Now,
18 that isn't so much my problem as it is things
19 like highlighting parts of a truss or, you know,
20 labeling things in an editorial and potentially
21 misleading kind of way. So I don't know,
22 although there is some simulation here, I don't
23 know that it's a problem in and of itself.

24 The real problem where this stops
25 becoming helpful to a jury is where it tends to

1 mislead a jury into believing that the scene
2 looked very different than it actually looked.
3 And that's primarily an issue of the garage,
4 which if it can't be offset by good photographs
5 of the garage as it actually was during the
6 evening of November 5, I think there we do have
7 something that's not helpful to the jury because
8 it confuses or misleads the jury.

9 And the Court either would have to
10 exclude that or be very careful about both the
11 cautionary instruction with it and any labeling.
12 I would ask the Court to exclude altogether any
13 highlighting as really not helpful and, indeed,
14 affirmatively unhelpful.

15 THE COURT: All right. The parties have
16 both cited to the Court to the case of **State vs.**
17 **Peterson**, 1998 Court of Appeals case. And although
18 that case deals with a videotape that was taken
19 later, the Court agrees that much of the rationale
20 and the explanation of the law in that case appears
21 to apply here.

22 The Court in that case indicated that
23 before a videotape demonstration could be
24 admitted, it would have to be demonstrated that
25 it was conducted under conditions reasonably

1 similar to the conditions existing at the actual
2 event. The same standard I think will apply
3 here; that is, the animations, are they
4 reasonably similar to what the appearance was at
5 the scene at the time.

6 The case goes on to provide, even if
7 this foundation is established, the trial court
8 may, in its discretion, include the videotape
9 demonstration upon a finding that the probative
10 value of the tape is outweighed by its
11 prejudicial affect. As I understand the defense,
12 that may be part of its argument with respect to
13 the garage.

14 At this point in time, the parties have
15 asked for guidance and I'm going to attempt to
16 give some guidance. It's difficult. I'm not in
17 a position to address the motion to the extent it
18 asks me to specifically exclude something,
19 because I don't have enough foundation.

20 For example, the garage. At this point,
21 I don't know enough about the evidence to know
22 what the significance of clutter in the garage is
23 going to be. I would say at this point, based on
24 the defense's concern, I would want to see a
25 foundation from the State laid before that

1 particular image would be allowed in. That's an
2 image that shouldn't be used as part of an
3 opening statement presentation.

4 With respect to some of the other
5 concerns expressed by the parties, for example,
6 the concern that the jury might feel that the
7 animation shows holes in the burn barrels;
8 there's further language in **Peterson** where the
9 Court says, if enough of the obviously important
10 factors in the case are duplicated in the
11 experiment and if the failure to control other
12 possibly relevant variables as explained and if
13 the jury is aided, the Court should let the
14 evidence in.

15 As I viewed that particular exhibit, I
16 wasn't struck by the fact that it looks like
17 there's holes in the burn barrel, but I agree
18 from looking at it that perhaps that's a possible
19 conclusion the juror could come to. In the
20 Court's mind, that type of thing can be fairly
21 easily explained away by simply saying that that
22 type of detail is not attempted to be shown by
23 this exhibit. In many cases, I suspect there's
24 going to be photographs that do provide more
25 detail and can certainly help put any animation

1 into perspective for the jury.

2 With respect to the concerns about any
3 labeling that is disputed, it seems to me that's
4 easily enough addressed by requiring a witness to
5 lay a foundation before any labeling comes in,
6 unless it is agreed by the parties ahead of time.
7 It certainly wouldn't be unusual for a witness to
8 get up to a blackboard at a trial and draw a
9 diagram and say here is where I found the key or
10 whatever it was. And as long as there is a
11 witness that testifies to the location of
12 something like that, it seems to me that the
13 computer aided images can be a useful means of
14 showing the jury what it is the witness is
15 testifying to.

16 Something like the truss marks in the
17 garage, which I have to confess at this point I
18 have no idea what the significance of them might
19 be, that type of thing would require foundation
20 before an exhibit showing -- pointing an arrow to
21 truss marks, would be admissible.

22 There would have to be a prior showing
23 that there's a foundation that a witness found
24 something there and also the Court would have to
25 hear any objections as to relevance. I don't

1 know what relevance marks on a truss might have.

2 With respect to the exhibits showing
3 approximate locations, the labels would depend
4 on, No. 1, the significance of a precise
5 location. If there's a rake or a mallet in a
6 yard and whether it's one foot one way or the
7 other doesn't make a tremendous difference.
8 Approximate location may well be enough. If its
9 location is vital and its precise location can
10 not be determined, that could be a different
11 story.

12 I'm not sure, based on the evidence
13 presented and what I know at this point that I
14 can provide the parties with much more guidance.
15 It appears that the defense is willing to
16 acknowledge the concept of the relevance of some
17 of these computer exhibits and that there's --
18 objections are only going to be raised to certain
19 exhibits. That's all the guidance I can give the
20 parties at this point.

21 ATTORNEY STRANG: I can help a little bit
22 more too, just to clean things up. Mr. Kratz has
23 some actual photographs that he intends to use as
24 PowerPoint slides in his opening and the photographs
25 are not objectionable in the opening presentation.

1 THE COURT: Okay. Obviously, the opening
2 has to be addressed at this point because the
3 opening comes before there is any evidence. Are
4 there -- Is there a dispute as to any computer
5 generated exhibits that the State wishes to use in
6 its opening that the defense objects to?

7 ATTORNEY STRANG: I have seen them. I'm
8 trying to remember if the garage is one of the
9 slides and I can't. I just don't remember.

10 ATTORNEY KRATZ: There is one image, Judge,
11 of the interior of the garage. Let me -- I had
12 offered it because this is where two bullet
13 fragments were found. I can replace this, probably,
14 with a photo, evidence tent 9 and 23A. And until
15 that foundation is reached, if this will satisfy
16 Mr. Strang and with leave of the Court, I will
17 simply replace this with a photo. There's nothing
18 special about this, Judge, that I have to --

19 THE COURT: Well, again, for further
20 guidance of the parties and I -- I have some
21 reservations, because at this point Mr. Strang is
22 indicating there may not be any photos that show
23 what it really looked like. But if you had a photo
24 that showed how cluttered the garage was and it was
25 followed immediately by an exhibit such as this,

1 just to show the location of the evidence, the jury
2 would then have both an idea -- a clear idea from
3 this exhibit of where the evidence was found and a
4 clear exhibit -- idea from the photo of exactly what
5 the garage looked like and I would probably admit
6 both of them.

7 ATTORNEY KRATZ: I intended to do that.
8 And, in fact, Judge, you have this photo of the
9 garage. And, in fact, in my opening, it is intended
10 to put the computer animation right after this
11 photo. This is a March 1st photo. Does show the
12 clutter. Shows tent 9, does not show tent No. 23,
13 which, for the Court's information, it would be --
14 or the second bullet.

15 THE COURT: Is the defense satisfied that
16 if the other exhibit immediately follows this one
17 that it's not objectionable? I'm assuming this is
18 what the defense means by clutter; it would qualify
19 as clutter in my book.

20 ATTORNEY STRANG: Yeah, and there was -- a
21 whole vehicle is missing here, of course. This is
22 in March. But -- Well, let me say this, I mean, I
23 have no objection to the use of this photograph in
24 the opening statement. This is something that's
25 going to be admissible and, indeed, we have

1 stipulated the foundation or authenticity --
2 authenticity I should say of I think every
3 photograph the State wants to offer. This would be
4 relevant.

5 THE COURT: Well, for purposes of ruling on
6 the opening, I will, since I'm seeing both exhibits
7 now, if this exhibit is part of the opening and if
8 the objection to the garage photo is that it doesn't
9 accurately depict the amount of clutter in the
10 garage, if the computer exhibit immediately follows
11 this one, I think it's allowable. To me, the
12 combination of the two adequately informs the jury
13 of other relevant variables that have to be
14 explained and this photo certainly appears to
15 explain those variables.

16 ATTORNEY KRATZ: Very well, thank you,
17 Judge. Do I understand, then, that the balance of
18 the images that have been provided both to counsel
19 and to the Court will be met without objection?

20 THE COURT: Well, I think Mr. Strang
21 objected to a series of labeling items. Possibly --

22 ATTORNEY KRATZ: No, for opening, Judge.

23 ATTORNEY STRANG: Oh, for opening.

24 ATTORNEY KRATZ: For my opening images,
25 that's what we're talking about now, I thought.

1 ATTORNEY STRANG: What other images?

2 ATTORNEY KRATZ: There's one of the house,
3 this one.

4 ATTORNEY STRANG: I didn't think there was
5 any problem with that image.

6 ATTORNEY KRATZ: Very well, thank you.

7 THE COURT: I would say this, if you are
8 showing that in the opening and if there's a series
9 of pieces of furniture that are missing and I see
10 this one appears to have more furniture than the
11 other one I looked at, but it would be helpful in
12 the opening to at least make a mention to the jury
13 of limits that apply to the animation. Since they
14 will be seeing it at a time when they haven't
15 received any evidence.

16 ATTORNEY KRATZ: Very well, thank you.
17 That actually takes care of two of our motions
18 today.

19 THE COURT: Are there any other items
20 related to the computer generated animations that
21 require addressing at this time?

22 ATTORNEY KRATZ: I will -- And I appreciate
23 the Court's direction and general statement as to
24 admissibility. I will continue to work with
25 Mr. Strang between now and next week, when offered.

1 I suspect that Trooper Austin will give a version of
2 what he did today and perhaps the non-objectionable
3 images can be shown. And, then, before and until
4 those foundations are laid, we can address those
5 more objectionable images as the trial unfolds.
6 That seems to be the most reasonable approach. But,
7 once again, I will discuss that with Mr. Strang.

8 THE COURT: All right. There is one other
9 issue on the agenda today and that was the original
10 instructions or the preliminary instructions to be
11 given to the jury prior to trial. I have provided
12 the parties previously with a draft of instructions
13 the Court was proposing to give.

14 The statute that covers this provides
15 that, if the Court gives additional instructions
16 beyond the ones specified in the statute, they
17 shall be disclosed to the parties before they are
18 given. And either party may object to any
19 specific instruction or proposed instructions of
20 its own to be given prior to trial. It's my
21 understanding at least the defense had
22 instructions it wished to submit; I don't know
23 about the State.

24 But given the hour and the fact I'm not
25 sure what the parties will be doing this weekend,

1 but I know I will be in my office, let me suggest
2 this, if either party wishes to either object to
3 instructions I have included or propose
4 additional instructions that it requests be
5 given, you can put those in a Word document and
6 email them to me. I will get them this weekend
7 and on Sunday I will email back to you the
8 proposed opening instructions that I will give,
9 after consideration of any suggestions from
10 either party. Will that work?

11 ATTORNEY GAHN: I just have one quick one
12 that I think would solve it all if we could do it,
13 if you want to just hear about it. One thing that I
14 propose through it, under the 110, under your first
15 degree intentional homicide, when you have elements
16 of the crime, I think that it states here that
17 before the jury can find the defendant guilty --
18 says the defendant or Brendan Dassey. I think
19 that's troublesome because I think we need to cross
20 out Brendan Dassey. We have to focus on -- because
21 the jury could find Brendan Dassey committed this
22 and by reading this also find Steven Avery guilty.

23 THE COURT: Well, just wait a minute. The
24 State is the party charging party to the crime here.
25 And I believe that, granted, you wouldn't get,

1 reading from just that sentence alone, what you are
2 asking for, but if you move on to the jury's
3 instruction portion, you have to find you have to be
4 satisfied by a reasonable doubt that the defendant
5 committed both elements of the crime or that he
6 intentionally aided and abetted.

7 If you're going by the party to the
8 crime theory, the first element is that someone
9 else in this case, Mr. Dassey, committed the
10 crime. And then you have to go on to find that
11 Mr. Avery aided and abetted. I think that's
12 taken from the form instruction.

13 ATTORNEY GAHN: I read it as if, if they
14 were to find Mr. Dassey committed the offense that
15 they could find the defendant -- I just think it
16 would be clearer if we left the name out of Brendan
17 Dassey and just said the defendant comma and either
18 do one of four things: Either put as a party to a
19 crime, or put as a principle, or as an aider and
20 abettor, or put as a person concerned with the
21 commission of a crime, or fourth, as a person who is
22 a party.

23 I have seen it done all those four
24 different, or in concert with another, and leave
25 the name Brendan Dassey out. I wonder what

1 Mr. Strang thinks of that because I don't think
2 it's beneficial to Mr. Avery.

3 THE COURT: Well, Mr. Strang.

4 ATTORNEY STRANG: I do have my own
5 objections to it from a different angle. And I like
6 -- I like the Court's idea of putting this in
7 writing. And if I -- I think Word comes as part of
8 the Windows Office Suite, so it's probably on this
9 box somewhere. I always use Word Perfect.

10 THE COURT: I think even if you send it in
11 Word Perfect I could open it.

12 ATTORNEY STRANG: In other words, the Court
13 does not want it in PDF because that would require
14 retyping.

15 THE COURT: Right.

16 ATTORNEY STRANG: Okay.

17 THE COURT: Yes.

18 ATTORNEY STRANG: Let me figure -- I will
19 try -- I will try to figure out how to get into Word
20 and address it. But -- But as to a preview, I think
21 the Court has created a duplicity problem by -- by
22 joining together the first degree intentional
23 homicide and the mutilation of a corpse counts.

24 And I, too, have some concerns about the
25 way that Brendan Dassey is added to the

1 substantive elements under 1010. Although, I
2 mean, Brendan Dassey is the person as to whom
3 Steven Avery is supposed to be the party to the
4 crime. I mean, that clearly is the State's
5 theory, so I don't know that Mr. Dassey ought to
6 come out altogether.

7 THE COURT: If both parties prefer to -- I
8 joined them because they are both charged as a party
9 to the crime. If both parties want completely
10 separate instructions for each one, I will honor
11 that request.

12 ATTORNEY STRANG: Let me work on it. We'll
13 obviously copy each other on any emails. What I can
14 do, the Court has a note, the pages aren't numbered,
15 but the Court asked, does the defense wish that I
16 notify the jury of the agreement that Mr. Avery had
17 an unreversed felony conviction, on the felon in
18 possession charge?

19 THE COURT: Yes.

20 ATTORNEY STRANG: And I do, I think we
21 ought to be just upfront with the jury about that.

22 THE COURT: Okay. I don't know that that's
23 -- I think I have been informed that it was the
24 intention of the parties to place that on the
25 record, but I don't know that it's been done yet.

1 ATTORNEY STRANG: My intention is to
2 stipulate away the second element of felon in
3 possession of a gun. We will not challenge the
4 second element. The jury should consider it proven;
5 that is, that the defendant had been convicted of a
6 felony before November 5, 2005.

7 THE COURT: As long as I have your comments
8 by 7:00 Sunday morning, that will be fine.

9 ATTORNEY STRANG: We can exchange email
10 addresses off the record.

11 THE COURT: Okay. Anything else this
12 afternoon?

13 ATTORNEY KRATZ: We'll probably be
14 submitting ours this afternoon yet, Judge, but if I
15 could just have a moment.

16 ATTORNEY FALLON: Your Honor, there is one
17 other matter that I would -- I think the Court is
18 aware, that I will be submitting correspondence to
19 the Court and Mr. Strang will respond at some time.
20 Hopefully we can get that done by Sunday, but that
21 may be a tall order, as well. But there's that one
22 other matter that I will be sending correspondence
23 on.

24 THE COURT: I understand. And I understand
25 that sometime before Monday morning I'm going to

1 receive something on that; that's my understanding.

2 ATTORNEY STRANG: Maybe -- The jury is
3 coming at -- or we're starting at 9:00 with the jury
4 on Monday?

5 THE COURT: Yes.

6 ATTORNEY STRANG: Maybe we ought to be here
7 at 8:00.

8 THE COURT: I think that would be -- well,
9 at least by 8:30.

10 ATTORNEY KRATZ: We'll be here at 8:30;
11 that's fine, Judge.

12 THE COURT: Okay.

13 ATTORNEY KRATZ: That's all. Thank you.

14 THE COURT: All right. We're adjourned for
15 today.

16 (Proceedings concluded.)

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1 STATE OF WISCONSIN)
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2 COUNTY OF MANITOWOC)

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

Dated this 10th day of September, 2007.

Diane Tesheneck, RPR
Official Court Reporter

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