

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

3 STATE OF WISCONSIN,

4 PLAINTIFF, MOTION HEARING

5 vs.

6 Case No. 05 CF 381

7 STEVEN A. AVERY,

8 DEFENDANT.

9
10 **DATE:** MARCH 17, 2006

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

13 **APPEARANCES :**

14 KENNETH R. KRATZ & NORMAN GAHN
15 Special Prosecutors
16 On behalf of the State of Wisconsin.

17 DEAN ARTHUR STRANG & JEROME F. BUTING
18 Attorneys at Law
19 On behalf of the Defendant.

20 STEVEN A. AVERY
21 Defendant
22 Appeared in person.

23 * * * * *

24 **TRANSCRIPT OF PROCEEDINGS**

25 Reported by Diane Tesheneck, RPR

Official Court Reporter

1 THE COURT: At this time the Court calls
2 State of Wisconsin vs. Steven Avery. It's Case No.
3 05 CF 381. We're in court this morning to deal with
4 a number of motions that have been filed -- or this
5 afternoon. Will the parties state their appearances
6 for the record, please.

7 ATTORNEY KRATZ: State of Wisconsin appears
8 by Calumet County District Attorney Ken Kratz. I
9 appear as Special Prosecutor and lead counsel on the
10 case.

11 Seated with me is Norm Gahn, G-a-h-n,
12 Assistant District Attorney from Milwaukee
13 County. Mr. Gahn has been appointed by this
14 Court, also, as Special Prosecutor. The record
15 should further reflect that Jeff Froehlich,
16 Assistant District Attorney from Calumet County,
17 also is present in the courtroom.

18 ATTORNEY BUTING: Good afternoon, your
19 Honor, this is Attorney Jerome Buting of Buting
20 and Williams appearing with Mr. Avery. I'm
21 co-counsel.

22 ATTORNEY STRANG: And good afternoon, as
23 well. Steve Avery is here to the far right at
24 the table, Dean Strang of Hurley, Burish, Stanton
25 on his behalf as well.

1 THE COURT: Very well. I will indicate for
2 the record that I met with counsel briefly in
3 chambers before beginning today. The first order of
4 business that we are going to take up is the
5 defendant's motion for an order limiting public
6 disclosure. And I will also indicate for the record
7 that I had a brief telephone conference with counsel
8 about this motion a week or so ago.

9 I indicated at that time that I
10 believed, that under Supreme Court Rule 20:3.6,
11 that it's the Court's understanding that further
12 trial publicity, in the form of press releases or
13 other conversations with the press by counsel,
14 would be extremely limited by that rule. And I
15 encouraged the attorneys to meet with each other
16 and try and work out an agreement for any press
17 contacts that they felt were necessary before the
18 Court would take up the issue as a contested
19 matter.

20 But I can indicate for the benefit of
21 everyone, that under that rule, the circumstances
22 in which counsel for either party are permitted
23 to communicate with the press during the course
24 of legal proceedings are quite limited. And the
25 Court expects, and I have received assurances

1 from attorneys from both sides, that they are
2 fully aware of the rule and intend to comply with
3 it.

4 There are some exceptions in the rule
5 that apply, including discussion regarding
6 information contained in public records. And
7 it's my understanding, from speaking with the
8 attorneys, that that's the matter they are
9 intending to meet with each other about to reach
10 an agreement. Counsel, I will give each of you a
11 chance to comment on the record to confirm that
12 fact.

13 ATTORNEY KRATZ: Judge, I do confirm that
14 we have discussed this matter. Mr. Strang and I
15 are, I think, very close in our positions regarding
16 Rule 3.6 and public dissemination of information.
17 I'm quite confident that should there be any need
18 for any additional information, or should there need
19 to be an agreement reached on filing of public
20 information, that that can be accomplished between
21 Mr. Strang and myself.

22 THE COURT: Mr. Strang.

23 ATTORNEY STRANG: I think now that the
24 Court has reiterated the requirements of Supreme
25 Court Rule 20:3.6 and both counsel have acknowledged

1 those, that the Court, at the moment, need take no
2 further action on that motion. I would add that,
3 it's my recollection and understanding, in the
4 course of an off the record conversation, that the
5 State agreed, that for purposes of this motion and
6 the agreement such as it is that we have reached,
7 that the Calumet County Sheriff, other agents of the
8 state or of the Sheriff's Department, would be
9 embraced within the scope of our agreement.

10 Like Mr. Kratz, I also think that, with
11 a little bit of further talking, we ought not
12 have difficulty reaching some understanding on
13 future filings, or invited response for that
14 matter, which is something that I understand
15 Mr. Kratz also thinks worthy of discussion, and
16 I'm happy to do that.

17 THE COURT: Mr. Kratz, is that correct?

18 ATTORNEY KRATZ: That is, Judge.

19 THE COURT: All right. The Court, for the
20 time being at least, will hold that motion in
21 abeyance, with the consent of the parties and,
22 hopefully, you will be able to come to an agreement
23 that will resolve that matter.

24 The next motion has to do with the
25 State's motion to amend the Complaint and the

1 Information in this case and the filing in
2 opposition of that motion from the defense. I
3 have received both the State's request to amend
4 and a memorandum in opposition from the defense.
5 Before I get to you, Mr. Strang, I guess
6 technically it's Mr. Kratz's motion to amend.

7 ATTORNEY STRANG: And I wondered if I might
8 have a moment's indulgence, since we're being
9 broadcast as I understand and may be streamed, or
10 whatever the word is, on the web. I wonder if the
11 Court, perhaps, ought not address media rules here,
12 particularly intrusion into counsel table on either
13 side, filming during recesses, that sort of thing,
14 before we move forward.

15 THE COURT: Right. It was brought to my
16 attention, and normally we have been dealing with
17 the media matters through the media coordinator and
18 representatives of the television broadcast
19 stations, and there are a few things that counsel
20 asked me to bring up, which I will later.

21 The one that should be brought up
22 immediately is that the papers that are on the
23 desk of either counsel often contain privileged
24 information. So I'm going to ask the cameras who
25 are present in the courtroom, or the --

1 specifically, the video camera, not to zoom in on
2 papers on table which may be confidential. Is
3 that what you are looking for today, Mr. Strang?

4 ATTORNEY STRANG: That and the recess
5 issue, but the Court can deal with that at a time of
6 its choice.

7 THE COURT: Mr. Kratz, I will hear from you
8 then, first, on your request to amend the Complaint.

9 ATTORNEY KRATZ: Thank you, Judge. As the
10 Court knows, the State has filed a motion to both
11 amend the Criminal Complaint and the Criminal
12 Information, which is the formal charging document
13 in felony prosecutions. The State has cited two
14 separate cases authorizing, alternatively, the
15 filing of the Amended Complaint, and also the
16 requirement, or lack of requirement, for an
17 additional preliminary hearing upon the filing of
18 new charges.

19 The State reiterates that these new
20 offenses charging Mr. Avery with three separate
21 counts -- including first-degree sexual assault,
22 false imprisonment, and kidnapping -- are not
23 wholly unrelated to the original series of
24 charges.

25 I understand Mr. Strang has filed with

1 the Court a motion challenging, not the timing of
2 the filings, but the sufficiency of the
3 information contained in the Complaint. And with
4 approval of the Court, I will address those
5 issues at this time, unless the Court wants me to
6 wait until Mr. Strang makes his argument. I have
7 received his written argument and I'm prepared to
8 address the sufficiency of the Complaint argument
9 at this time, if the court would prefer I do
10 that.

11 THE COURT: All right. Mr. Strang, as we
12 discussed in chambers, it's my understanding the
13 defense is not challenging the State's right to
14 file, at this time, an Amended Complaint and
15 Information, but rather the sufficiency of the
16 Amended Complaint and Information that's been
17 proposed; is that correct?

18 ATTORNEY STRANG: That's the bottom line on
19 that point. The State, of course, needs leave of
20 the Court to file an Amended Complaint, or for that
21 matter, an Amended Information. Leave would be
22 withheld if the timing, or some other aspect of the
23 filing, were prejudicial to the defense, in and of
24 itself, and it's not. That's not my concern. It's
25 really the reliability, or the sufficiency of the

1 Complaint, with which I am concerned.

2 THE COURT: All right. I'm not sure which
3 one of you wishes to be heard first. Mr. Kratz is
4 proposing the amendment, and I'm sure he feels that
5 the Amended Complaint with the language included is
6 sufficient, but, Mr. Kratz, I will -- since it's
7 your motion, I'm going to let you start and briefly
8 summarize for the Court why you feel it is, and then
9 I will hear from Mr. Strang.

10 ATTORNEY KRATZ: Thank you, Judge. Your
11 Honor, as this Court knows, any Complaint needs to
12 present probable cause, or proof to the level of
13 probable cause which requires a Court to look at the
14 facts contained within the four corners of the
15 Complaint, together with any reasonable inferences
16 that may be drawn therefrom.

17 Mr. Strang has complained about the
18 sufficiency of the information in the Complaint.
19 I might -- I might add that Mr. Strang, in his
20 written motion and -- excuse me -- in his written
21 pleadings, as well as other information, contains
22 a great deal of criticism of the State for
23 providing too much information within the four
24 corners of this Amended Complaint.

25 But this Court understands that

1 reliability of information within the four
2 corners of the Complaint is something that the
3 Court must find. And so the State, in providing
4 the detail that it did, argues that that was
5 necessary, absolutely required, for this Court to
6 make that finding of reliability.

7 Mr. Strang also argues that there are no
8 claims of physical evidence or other
9 corroboration in the Amended Complaint. The
10 State obviously disagrees. There is a lengthy
11 list of physical evidence that has been
12 recovered, that was seized, and in fact analyzed
13 in this case, which is all recited in the Amended
14 Complaint.

15 I'm not going to go item by item, but
16 the statements of now co-actor, Brendan Dassey,
17 in his recounting the behavior of himself and of
18 Mr. Avery that ultimately led to the death of
19 Teresa Halbach, as well as the other criminal
20 behavior, is quite detailed indeed. The State
21 does argue, Judge, that within those details, and
22 as I have mentioned, those details are
23 corroborated by physical evidence which is
24 recited for the Court within the four corners of
25 the Complaint.

1 Finally, Mr. Strang argues that if
2 Dassey's statement alone was the basis for this
3 particular prosecution, that at trial, it could
4 not stand besides the *Lilly* as well as the
5 *Crawford* case. And the State concedes that, at
6 trial, if the State intended to convict Mr. Avery
7 on Mr. Dassey's statements alone, without any
8 physical evidence, that they may be unable to do
9 so. Or if we attempted to introduce a co-actor's
10 statement, without an opportunity to
11 cross-examine, that would also be problematical,
12 require an advanced ruling.

13 But those are trial issues, Judge.
14 Those are issues that apply to Sixth Amendment
15 Confrontation and are unique to trial. I think
16 Mr. Strang, at page 9 of his brief, concedes
17 that, that although those rules appear to the
18 trial and not to an analysis under the Criminal
19 Complaint, Mr. Strang invites this Court to,
20 nonetheless, throw out the Complaint, just in
21 case, I guess, just in case the State intended to
22 only provide that statement. Well, the State
23 does not intend to provide only that evidence at
24 trial. But, again, these are trial arguments, it
25 has nothing to do with the Criminal Complaint.

1 When this Court reviews the four corners
2 of the Criminal Complaint, it will find probable
3 cause that the defendant committed each of the
4 violations as set forth. And as I have cited in
5 the **Burke** case, B-u-r-k-e, an additional
6 preliminary hearing is not required, based upon
7 the connection, or nexus, of the six criminal
8 behaviors that our alleged, that is, that they
9 are not wholly unrelated. We will ask the Court
10 grant leave to file the Amended Complaint and
11 Information. Thank you, Judge.

12 THE COURT: All right. Mr. Strang.

13 ATTORNEY STRANG: The proposed Amended
14 Complaint founder is not, of course, on a posit of
15 detail here but rather on the unreliability of the
16 detail that is included. Let me -- let me walk
17 sequentially here through the problem that confronts
18 the Court.

19 There was an original Complaint, of
20 course, that started this criminal case back in
21 November. It charged three crimes: First-degree
22 intentional homicide, mutilation of a corpse,
23 felon in possession of a firearm. The time to
24 challenge that Complaint, or probable cause
25 showing, is gone.

1 We don't -- It's established for
2 purposes of this motion and today's proceedings.
3 I raise it because, now, in it's proposed Amended
4 Complaint, that the State has incorporated by
5 reference -- as lawyers are fond of saying -- the
6 factual allegations in the original Complaint.
7 So, let's start there.

8 No one, no one presumably at the table
9 to my left, would contend that the original
10 Complaint, without the March 2 or whenever it was
11 additions, made out probable cause to believe
12 that Steve Avery committed first-degree sexual
13 assault.

14 No one, I assume, in the courtroom,
15 would contend that the original Complaint's
16 factual basis made out probable cause, or
17 anything close to it, on kidnapping or false
18 imprisonment, which are the other two new counts
19 in the proposed Amended Complaint.

20 So the incorporation of the factual
21 basis in the first Complaint, while I acknowledge
22 it, really adds nothing at all to our problem
23 here today, focusing maybe most usefully on the
24 first-degree sexual assault allegation that the
25 State wishes to toss into the mix of this case

1 now.

2 What is new in the proposed Amended
3 Complaint, as counsel acknowledges, is a
4 statement that Brendan Dassey gave, evidently, to
5 law enforcement officers in response to law
6 enforcement questioning, out of Steve Avery's
7 presence, and that now the State would -- would
8 like to use as a reliable basis for a finding
9 that he probably committed first-degree sexual
10 assault, and kidnapping, false imprisonment.

11 Again, it's not -- it's not a lack of
12 detail, there's a great deal of ugly detail that
13 the police say Mr. Dassey provided here. It's
14 the reliability as to Steve Avery that's the
15 problem. I'm delighted to hear counsel
16 acknowledge, in a fashion here today, that the
17 Dassey statement would be inadmissible, not
18 allowed, at trial, against Mr. Avery, absent a
19 chance to cross-examine Mr. Dassey in that
20 witness chair, or some similar chair. Not
21 admissible evidence against him.

22 I also acknowledge that a Complaint can
23 include the inadmissible. The Court can look at
24 that within the four corners of the Complaint.
25 But as *Knudson* and a variety of other Wisconsin

1 decisions, at least back to 1968 with **State ex**
2 **rel. Evanow against Seraphim**, and I'm sure
3 decisions before that, before I was born, as the
4 Court knows, hearsay or not, the factual
5 assertions in a Complaint have to be reliable.

6 The State here, in the Complaint,
7 alleges that these are presumptively reliable,
8 presumed truthful and reliable, I think is the
9 exact wording of the Complaint. In fact, of
10 course, the presumption is just the opposite.
11 It's just the opposite as a matter of law. The
12 U.S. Supreme Court has made that clear at least
13 by **Bruton** back in 1968, while we're on 1968
14 cases, **Lee, Williamson, Lilly**.

15 This is sort of beyond repetition at
16 this point. This is really very clearly
17 established, that when an accomplice or someone
18 claims he is an accomplice, is questioned by the
19 police and says, yeah, I was involved, you know,
20 but he was -- he was involved too, he did this
21 and that, and points to someone else, that's
22 unreliable stuff.

23 It's blame shifting. It's literally
24 finger pointing. And it's a very effective way
25 for an accomplice, caught cold or not, to sound

1 credible by acknowledging some involvement, but
2 to lay off blame, in part, or in large part, on
3 another person. Are the risks of that
4 particularly high when we're talking about a 16
5 year old boy who may be slow and being questioned
6 by two police officers, presumably without a
7 parent or a lawyer around? Yes, the risks of
8 that are particularly high, if we get into
9 specifics on reliability.

10 But the Court's, including the Wisconsin
11 Court of Appeals in *Myren*, which Mr. Buting and I
12 have cited, has been very clear that this stuff
13 is inherently suspect, inherently unreliable,
14 presumptively unreliable, just to quote bits and
15 pieces. So the State really can't claim the
16 presumption that the amendment tenders.

17 Neither does the Complaint offer
18 anything more than a presumption that Brendan
19 Dassey's statements are truthful and reliable,
20 not as to Brendan Dassey, but as to Steve Avery.
21 And that's where the problem is. They simply are
22 not, as a matter of law, reliable as to Steven
23 Avery; hence, the motion asking the Court, not to
24 strike the original three charges, of course, but
25 to deny the State leave here to file the three

1 new charges.

2 Timing is not prejudicial, that's not
3 the issue, as we have agreed. The reliability,
4 or rather the unreliability of the entire factual
5 basis here, there being as to first-degree sexual
6 assault, kidnapping, and false imprisonment,
7 nothing but an inadmissible, unreliable statement
8 by Brendan Dassey to support this Complaint.

9 Allowing it to be filed would require
10 the Court only later, when I filed a motion
11 challenging probable cause, to dismiss those
12 three counts. Again, there's no reason to do
13 that. The Court, on the grounds we have
14 articulated, ought deny leave to file this
15 proposed Amended Complaint, at least as to the
16 three new charges. That ruling would necessarily
17 moot inquiry into what is procedurally a
18 subsequent document in Wisconsin criminal courts,
19 which is an Amended Information.

20 We also don't have to get to the
21 question of a preliminary examination, if the
22 Court denies leave to file the Amended Complaint,
23 because there's nothing on which to have a
24 preliminary examination at that point.

25 I could pause and let the Court say

1 something, but I will note that I very much
2 disagree were this Amended Complaint to be filed
3 with leave of the Court and then to withstand a
4 motion to dismiss on probable cause grounds; I
5 very much disagree that a preliminary examination
6 would be unnecessary, legally, as to those three
7 counts.

8 And I can get into **Burke**, and more
9 illuminating, **Bailey**, a decision that **Burke**
10 extends, or at least endorses. It's the facts of
11 both of those cases, suggest why, although their
12 new counts were not wholly unrelated to the
13 evidence adduced at the preliminary examination
14 here, these new counts would be wholly unrelated,
15 at least the first-degree sexual assault, and the
16 kidnapping. May not need to get there, so I will
17 yield the microphone.

18 THE COURT: Mr. Kratz, anything in
19 rebuttal?

20 ATTORNEY KRATZ: Just a couple of things,
21 briefly, Judge. Once again, if Mr. Strang and the
22 defense is allowed to extend these trial
23 confrontation principles to the Criminal Complaint
24 analysis, State argues that you would never, or at
25 least would be very difficult to ever charge

1 co-defendants, at least when one of the defendants
2 makes a statement and the other does not.

3 Again, they simply are not Complaint
4 principles, these are trial confrontation
5 principles. Let me also talk, then, to the
6 reliability question that Mr. Strang raises.
7 Reliability of statements of a co-declarant in
8 **Lilly** and in other cases cited by Mr. Strang,
9 don't just inculcate the co-defendant, don't just
10 point the finger at somebody else, but they are
11 also meant to exonerate the declarant.

12 That's not what we have here.
13 Mr. Dassey's statement in no respect, at least as
14 cited in the Amended Complaint, intended to
15 exonerate Mr. Dassey at all. Mr. Dassey
16 inculcates himself. He says I acted together
17 with my uncle, Steven, without threat, without
18 reprisal, knowingly and voluntarily engaging in
19 the same kinds of behaviors.

20 So when a defendant -- when a suspect
21 makes a statement, that against their own penal
22 interests, they deserve reliability. And that is
23 much distinguished from the kinds of statements,
24 again, that were offered in **Lilly** and others.
25 That's all I have got, Judge. Thank you.

1 THE COURT: All right. First of all, there
2 have been a number of reported decisions, especially
3 United States Supreme Court decisions, in recent
4 years involving the admissibility of the statements
5 of co-defendants at trial where the State seeks to
6 introduce the statement, not through the actual
7 person of the co-defendant, but as hearsay
8 testimony.

9 And the law in that regard has changed a
10 good deal in recent years against the State and
11 in favor of the defense, culminating with the
12 **Crawford** case, which held, as close as you can,
13 as a black letter rule, that if a co-defendant's
14 testimony is going to be used against the
15 defendant, the co-defendant in virtually all
16 cases has to testify.

17 But I think it's dangerous to simply
18 equate those cases to the situation where you are
19 dealing with a Complaint and whether or not the
20 statements of a co-defendant can be used as a
21 basis for a Complaint. The closest case from
22 Wisconsin on the facts, that I could find, is a
23 1974 case called **Ruff versus State**, which dealt
24 precisely with this issue, that is, whether or
25 not a Complaint could be based on the statement

1 of a co-defendant that implicated the defendant.

2 I will read a little bit from that
3 decision. The Court asked: Was the Complaint
4 legally sufficient to establish probable cause?
5 The defendant admits the sufficiency of the
6 Complaint to establish probable cause that the
7 alleged crimes had been committed, but challenges
8 the sufficiency to establish probable cause that
9 the defendant committed the crimes.

10 The part of the Complaint which names
11 the defendant is based upon statements made to
12 police officers by the defendant's accomplices,
13 Charles Flowers and Willy Payne. Such statements
14 were hearsay, but a Criminal Complaint may be
15 based on hearsay.

16 The Court goes on in that case to hold
17 that, the statements against penal interest made
18 by a co-defendant can be used as a basis for
19 probable cause in a Complaint where the statement
20 is not the statement of the co-defendant
21 essentially attempting to exculpate himself, that
22 is, there can be cases where a co-defendant is
23 simply trying to blame someone else.

24 But where the statements are
25 interrelated, such that the co-defendant is

1 implicating himself at the same time he's
2 implicating someone else, I believe the law in
3 Wisconsin, as it applies to Criminal Complaints,
4 remains, that such statements can be used where,
5 when considered in context, they have sufficient
6 indicia of reliability. And based on my review
7 of the Complaint, I do believe that that's the
8 case here.

9 I recognize that some of that rationale
10 has been criticized in the cases that have led to
11 testimony in those cases not being admitted where
12 it doesn't come from the co-defendant himself at
13 trial. But that's based primarily on
14 confrontation clause issues under the United
15 States Constitution. And I'm not aware of any
16 decision that has used the same rationale to say
17 that the statements of a co-defendant cannot be
18 used to supply a probable cause in a Complaint.

19 So, for that reason, I believe that the
20 statements of Mr. Dassey contained in the
21 proposed Amended Complaint can be used as a basis
22 for the Complaint. And I believe that with those
23 statements, the Complaints are sufficient as they
24 have been filed. I believe that's the only basis
25 on which the Amended Complaint is really being

1 challenged. So, the Court is going to grant the
2 State's motion to file the Amended Complaint.

3 I think implicit in Mr. Strang's
4 argument is that he may have other issues related
5 to that matter that he wishes to argue. So,
6 Mr. Kratz, I will direct you to prepare the order
7 allowing you to file your Amended Complaint.
8 And, Mr. Strang, I will give you the opportunity
9 to file additional pleadings, if you wish,
10 regarding whether your client is entitled to a
11 preliminary examination, based on the Amended
12 Complaint.

13 ATTORNEY STRANG: I can do that within 10
14 days after the order is signed, if that's sufficient
15 for the Court.

16 THE COURT: All right. I will allow you to
17 do that. At the end of today's proceedings, I can
18 see we may have to do some scheduling. But for now,
19 I will give you 10 days to file your motion in that
20 respect. Let me ask this, do the parties anticipate
21 any additional issues other than the defendant's
22 right to a preliminary examination on the Amended
23 Complaint, relating strictly to the Complaint and
24 the proposed Amended Information?

25 ATTORNEY STRANG: We can short circuit the

1 one I would see which is, I will move now to dismiss
2 the three new counts for want of probable cause,
3 relying on the arguments I have already made. And
4 if I heard correctly, the Court ruled that, with the
5 Dassey statements in, as a factual basis, there is
6 probable cause. I disagree and I will make the
7 motion, for the purpose of making it clear, that I
8 do want those three counts dismissed once the
9 Amended Complaint is filed.

10 THE COURT: All right.

11 ATTORNEY STRANG: But don't need to brief
12 it separately.

13 THE COURT: Okay. Anything further on the
14 Complaint issue before we move on?

15 ATTORNEY KRATZ: No.

16 THE COURT: All right. The next issue that
17 the Court will take up is the defendant's motion to
18 assure fair forensic testing, which involves a
19 request by the defense to either be present when the
20 State Crime Lab performs analysis on items that have
21 been seized in the course of the investigation in
22 this case, or in the alternative, to have the
23 testing procedures videotaped. And if I understand
24 correctly, Mr. Buting, you will be making the
25 defense argument on this issue?

1 ATTORNEY BUTING: Yes, your Honor.

2 THE COURT: I will hear from you at this
3 time.

4 ATTORNEY BUTING: The defense motion is
5 somewhat unusual, but I think given the nature of
6 this case and it's unique history, I think it's
7 appropriate, especially in light of concerns that
8 were raised earlier, before either Mr. Strang or
9 myself became involved in the case, about possible
10 bias from law enforcement, that I would think the
11 State would actually welcome efforts to make the
12 testing process more transparent.

13 And that would be by allowing a defense
14 representative to be present during any portions
15 of the testing where they are handled -- where
16 the evidence gets handled by the analyst or
17 technicians and/or to videotape those portions of
18 the testing process to ensure, or at least to
19 limit the possibility of there being any
20 contamination that may occur of the evidence in
21 the lab once it gets there, either accidental or
22 otherwise.

23 I believe that, although there are no
24 cases that have specifically addressed this
25 issue, I think the Court does have authority to

1 do so by considering Statutes 165.79 and 971.23
2 together. The first allows the Court to order
3 the Crime Lab to perform tests on the defense
4 behalf under certain circumstances.

5 And if the Court has the authority to do
6 that, then this is a lesser remedy, or request,
7 which is simply to allow the defense to
8 participate in observing, not to interfere with
9 the process itself, and to necessarily then be
10 present during the generation of the results of
11 the tests, which are disclosable anyway under
12 971.23. And all this would do is move up the
13 time when those rules get disclosed, that is, at
14 the time that the State learns them, the defense
15 representative would also be there and also learn
16 them.

17 There are, I think, very unusual
18 circumstances in this case that warrant that.
19 The remedy that the State suggests in their
20 response objecting to our motion, is independent
21 testing. Independent testing can work in some
22 instances and to some degree, but not if material
23 is already contaminated.

24 A repeated independent test of
25 contaminated evidence does nothing towards

1 getting at the truth, it simply repeats or
2 confirms the original erroneous results. The
3 State also suggests that, in addition to that, by
4 the way, having independent tests done subsequent
5 to the State's test, can also build an additional
6 delay.

7 I don't know how long it's going to take
8 for the State to complete the tests that they
9 have not yet done. That would be, presumably, on
10 items that were seized in the March 2nd, I think
11 it was, search warrant. But an independent test
12 would necessarily have to take place after that.
13 And that could be while Mr. Avery is at least
14 presently incarcerated.

15 The bail issue, we'll be dealing with
16 later, but if he remains incarcerated then that
17 works to his disadvantage by requiring him to sit
18 in jail longer, just because the State resists
19 transparency in the process, at this point,
20 allowing a defense view of what goes on in the
21 Crime Lab. So independent testing is not a
22 adequate remedy to the concerns that the defense
23 has in this particular case.

24 The State also, in it's written
25 objection, complained that somehow this would

1 jeopardize the accreditation of the State Crime
2 Lab if an outside observer were allowed in. And
3 I don't see that at all. Nothing that they cite
4 in their written brief indicates that.

5 Accreditation requires that a lab comply
6 with security and control and methods, which are
7 not always done, by the way, despite the fact
8 that they are supposed to be accredited. But
9 those could also be complied with very easily
10 with the defense expert who might be present.

11 I have spoken with a defense expert who
12 has done this in other labs, in various states,
13 including recently Illinois, I believe also
14 Maine. It's done very easily. He is clothed in
15 surgical type scrubs, mask, same way that the
16 State analyst should or would be.

17 He is also -- has no objection to the
18 State's concern that -- that the Crime Lab has a
19 process whereby their staff provides their own
20 DNA genotype, so that in the event results should
21 come up, or would come up, that would show that
22 there's some other DNA in it, if it turns out to
23 be the analyst's, then it could be discarded as
24 evidence -- as indication of contamination. The
25 defense expert would also be willing to do that.

1 So, I don't see anything about the way
2 that the Crime Lab is set up in it's testing that
3 would prohibit, or make it somehow a threat or
4 jeopardy to their accreditation to allow a
5 defense representative to be present simply
6 observing what's going on. The State also cites
7 in their written opposition a number of older
8 cases where the Courts did rule that it was
9 not -- or they denied defense motions to do
10 similar types of observations.

11 But one reason that this motion is
12 brought in this case is because of what we have
13 learned, what the public has learned, about Crime
14 Labs all over the nation in the last five, six
15 years. I cite to some law review articles that
16 talk about the studies that have been done.

17 Now 17 states, Crime Labs in 17
18 different states, have been found to have either
19 had fraudulent behavior by some of the analysts,
20 or erroneous test results, incompetence,
21 everything, the entire spectrum of problems that
22 result in false tests, that, in some instances in
23 Kansas, resulted in the correct suspect being
24 released, going out and committing another
25 offense. And in other instances, innocent people

1 being wrongly identified through DNA testing and
2 only later, fortuitously, was it determined that
3 the mistake was made.

4 The FBI lab, once considered the most
5 prestigious, elite lab in the world, went through
6 a horrible scandal of disclosure of, not just
7 mistakes -- and there were many, many instances
8 of that -- but also deliberate, fraudulent
9 conduct resulting in one of their analysts being
10 convicted of a misdemeanor for fraudulent
11 reporting on DNA reports. That went on for two
12 years before the lab discovered it.

13 Now, I'm sure the State will say more
14 different, this is Wisconsin, we have a very fine
15 lab here, it's never been proven to have
16 fraudulently or erroneously come up with test
17 results that have affected a case. But I am also
18 quite sure that the prosecutors in courts and
19 public believe that in all of those other states,
20 in each of those cases.

21 And yet we now know otherwise. We now
22 know that these kinds of mistakes do take place
23 and there is worldwide discussion on what to do
24 about the problems with Crime Labs. DNA evidence
25 has considered this with programs like CSI on TV

1 and other things like that, considered this the
2 ultimate proof, the pristine evidence one way or
3 the other. But that's only true so much as the
4 Crime Labs in this country and in this state are
5 competent, fair, and able to produce correct
6 results.

7 Therefore, what we're suggesting is,
8 given the implications of what has gone on in
9 this case, or what was implied anyway, earlier,
10 before we became involved, we think that the best
11 way to resolve, to assure that that doesn't
12 extend further into the testing process, is to
13 simply allow transparency.

14 That's all we're asking, no
15 interference, just transparency to allow a
16 defense representative to be present during the
17 handling of the evidence, or in the alternative,
18 a less favored alternative. But at a minimum,
19 something that certainly wouldn't cause any
20 contamination, would be to videotape at any time
21 when the analysts are handling the evidence
22 itself.

23 There's periods of time when it's sort
24 of cooking in the incubator, and it wouldn't need
25 to be filming that portion, but when it's taken

1 out, when it's moved from one step in the process
2 to the next, that could certainly be recorded and
3 preserved and that would, I think, lessen the
4 likelihood of there being any implications of
5 wrong doing or mistakes down the road. I think
6 there is authority for it. It's in the Court's
7 discretion to grant it and that's what we ask.
8 Thank you.

9 THE COURT: All right. Mr. Strang, do I
10 understand that Mr. Gahn is going to be addressing
11 this issue? Mr. Kratz, I'm sorry.

12 ATTORNEY KRATZ: Yes, Mr. Gahn.

13 THE COURT: Mr. Gahn.

14 ATTORNEY GAHN: Thank you, your Honor. I'm
15 going to rely upon the brief that I filed in
16 response to their request to be present for the
17 testing or, in the alternative, to have it
18 videotaped and just amplify a few portions of that
19 brief.

20 Again, the defense has cited no
21 authority, or any statutory authority, or case
22 precedent, to authorize them into the Crime
23 Laboratory, or for videotaping of the procedures
24 that go on in the Crime Laboratory. I must
25 emphasize to the Court that in a Crime

1 Laboratory, especially with DNA testing, the
2 issues of security and contamination are just of
3 the utmost importance.

4 And they are so very important in the
5 accreditation process of a Crime Laboratory. And
6 any time that you lessen that security, or allow
7 the potential to introduce other contaminants
8 into the Crime Laboratory, that's going to place
9 that accreditation into some jeopardy.

10 The State has cited three cases where
11 that issue has come before appellate courts and
12 they have ruled against the defense. I guess,
13 your Honor, you have to understand what happens
14 at the Crime Laboratory. We're talking about a
15 huge number of items here of evidence. This is
16 not just one item that is coming into the Crime
17 Lab. It's just a huge number of items.

18 And when the Crime Lab gets these items
19 of evidence, they are going to be screened, first
20 of all, and that can take a couple of days. And
21 once it's been screened, and they believe there
22 may be something of potential value to submit to
23 some type of DNA testing, then that's when the
24 extraction process takes place. And that can
25 take, also, a couple of days.

1 The problem is, once the extraction
2 process is finished, the items are batched. And
3 what happens is, other analysts may batch, with
4 this case, items that they are testing for their
5 cases. And then there's what's called the
6 quantitation. And this is a very important
7 process, which is, again, days and days later.

8 And once they realize how much DNA is
9 present, whether there is a certain quantity,
10 then the analysts, again, determine which are
11 going to be set up for the amplification process.
12 And then you still have a number of other
13 processes that can take two to three weeks to
14 complete.

15 The intrusiveness, the burdensome nature
16 of their request, would make it almost impossible
17 for a Crime Lab to operate when you are looking
18 at so many items of evidence, and the process,
19 and how the process -- how the analysis process
20 takes place.

21 The Crime Lab is accredited. They
22 follow very strict, stringent, national
23 standards. And one of the reasons for writing
24 such strict national standards is that the
25 defense is given, in their discovery process, and

1 it's routinely done in Wisconsin, they are given
2 the bench notes. They are given the protocol.
3 They are allowed to see the quality assurance
4 guidelines as followed, the gene scan data, the
5 genotype RE-data.

6 It's all designed so that an outside
7 expert can look at the protocol, can look at the
8 process, the analysis that was done, and
9 determine whether it was followed, so that
10 defense is not left without anything in this
11 case. They are open to all the paperwork and the
12 analytic process through the DNA typing.

13 Having someone in and trying to video
14 tape it, again, would be so burdensome and such
15 an order were granted, I think the Court can
16 appreciate, if every defendant were allowed to
17 have an expert go in to look, or a videotaping
18 done, you could almost shut down the Crime
19 Laboratory.

20 There are so many sensitive items that
21 are out at the Crime Lab. It's evidence from
22 cases all over the State of Wisconsin. It's a
23 very, very, sensitive issue and security is
24 paramount. So I would ask the Court --

25 One other issue I would like to address

1 is the unnamed independent expert. I don't know
2 what were the circumstances of this independent
3 expert, or what the circumstances were to go into
4 an Illinois Crime Lab and observe. In all
5 candor, I will admit to the Court, I have heard
6 of cases where that is done, or there's an
7 agreement between the defense and the prosecution
8 to send the item for independent testing. But
9 those generally are cases where there is one
10 critical piece of evidence and there will be a
11 total consumption of that evidence.

12 Then you get into issues of what is
13 materially relevant, what is potentially
14 exculpatory evidence, and you get into an **Arizona**
15 **vs. Youngblood** analysis. That's generally where
16 those cases come about, where it is just one
17 piece of evidence that could be inculpatory, or
18 it could be exculpatory. And the defendant has
19 no other comparable means of getting that
20 evidence analyzed.

21 Under those circumstances, I have heard
22 of where the defense and the State would get
23 together and maybe agree on an independent lab to
24 do it, or perhaps agree upon the -- a defense
25 expert viewing that process. But that is the

1 rare case. And -- From my understanding and from
2 the knowledge that I have.

3 So I would ask the Court to grant our
4 position and that the defense not be allowed in
5 to observe the testing, or to videotape it,
6 mostly because of just the burdensome nature it
7 would have upon the Crime Lab and the security
8 issues and just the integrity of the whole Crime
9 Lab set up. Thank you, Judge.

10 THE COURT: Mr. Buting, anything else?

11 ATTORNEY BUTING: Just briefly, your Honor.
12 As to the question of burdensome, there being so
13 many items, I seriously doubt that in this case,
14 because from what I understand from prosecution,
15 that most, if not all, of the items originally
16 seized back in November in this case have been
17 tested. So, we're really only talking about items
18 that are seized as a result of the most recent
19 search warrant.

20 And I don't think there are that many of
21 them that were seized, and probably a very small
22 percentage of them that, that when looked at,
23 will have any area that would be worthwhile to
24 test. So there may only be a handful, five, six
25 items perhaps, that in this case will still be

1 tested.

2 So I don't understand the argument that
3 it's so burdensome, because there are so many
4 items. There's no reason those can't all be run
5 at the same time. That would not -- In fact, it
6 would probably be the normal course, if there's
7 one analyst working on this case, which I
8 understand there would be.

9 Yes, through discovery, the State does
10 provide bench notes and raw data and that sort of
11 thing, which can be helpful to an expert, but it
12 says nothing about the potential of
13 contamination, cross-contamination between items
14 of evidence. None of that can be found after the
15 fact. That's the problem.

16 That's why, it's that very reason that
17 the State, in order to become accredited, has to
18 take all kinds of precautions to try and prevent
19 that. But accreditation, some of these other
20 labs, where these problems have been developed,
21 have been accredited, and have thought that they
22 had very good, sound protocols that were being
23 followed and, low and behold, they discover
24 that's not the case.

25 Finally, as to the question of whether

1 there is -- It's true that perhaps these motions
2 are more likely granted or agreements made when
3 there is one item of evidence that will be all
4 used up in the course of the testing, but at this
5 point I don't know whether that's going to be the
6 case here or not. I don't know yet.

7 I don't think the State knows that, that
8 there is sufficient, or that there would be, if
9 they find an area that would be worthy of
10 searching for DNA, that it would be sufficient to
11 guarantee a separate half of it, or whatever
12 sample, for a subsequent, independent test. And
13 I don't think they are going to know that until a
14 number of things happen --

15 One, they eyeball it and look at it,
16 whether it's cloth, or concrete, or whatever it
17 may be. And, secondly, only after they have run
18 it through a process to determine whether there
19 is an amount that's quantifiable, that's enough,
20 enough DNA present to try and test it further.
21 So we may find ourselves in that situation where
22 there is nothing left for the defense to test,
23 once the State completes its.

24 The last point is that I would ask, or I
25 guess maybe to make clear as a matter of a Brady

1 Demand, orally, I can follow up with something in
2 writing. In the event the Court does not grant
3 this motion, I do want to make it clear that we
4 do consider raw data, notes, charts, things of
5 that matter, and preservation of sufficient
6 quantities of future testing to be considered
7 Brady material that could be exculpatory, that
8 could point to other individuals.

9 And that would include DNA fingerprints,
10 all types of forensic evidence. That would also
11 include, particularly in this case, any test
12 results that prove positive for law enforcement
13 DNA, which in most cases are simply discarded as
14 erroneous mistakes, but in this case, given the
15 history, we view as Brady material that should be
16 preserved for subsequent review by the defense.
17 So with that I would ask the Court to grant the
18 motion.

19 THE COURT: All right. For purposes of
20 today's hearing, I'm taking up the motion as it's
21 been filed. I'm not going to comment on the last
22 items that you mentioned. I'm specifically dealing
23 with the defense request to either observe testing
24 by the State Crime Lab or to have that testing
25 videotaped.

1 The first issue I looked at was whether
2 or not there was a due process right on the part
3 of the defendant to observe such testing. I,
4 actually, before I got the State's response,
5 looked at the New York case that's cited, that is
6 ***New York vs. Monigas***, which is a case that
7 involved a request, I believe, precisely
8 identical to that that was made here. And the
9 Court in that case ruled that there was not such
10 a due process right. I have not been able to
11 find any case that creates a constitutional right
12 to observe testing in cases like this. And I
13 don't understand the defense to be arguing that
14 there is any such authority.

15 I next look at the Wisconsin Statutes.
16 We do have a statute that has been mentioned, I
17 think by both parties, that deals with this
18 issue; specifically, Section 165.79 (1). That
19 reads in relevant part as follows:

20 Evidence, information and analyses of
21 evidence obtained from law enforcement officers
22 by the laboratories -- and I understand it to
23 mean the State Crime Lab there -- is privileged
24 and not available to persons other than law
25 enforcement officers. Nor is the defendant

1 entitled to an inspection of information and
2 evidence submitted to the laboratories by the
3 State, or of the laboratory's findings, or to
4 examine laboratory personnel as witnesses
5 concerning the same, prior to trial, except to
6 the extent that the same is used by the State at
7 a preliminary hearing and except as provided in
8 Section 971.23.

9 Upon request of a defendant in a felony
10 action, approved by the presiding judge, the
11 laboratories shall conduct analyses of evidence
12 on behalf of a defendant. No prosecuting officer
13 is entitled to an inspection of the information
14 or evidence submitted to the laboratories by the
15 defendant, or of the laboratory's finding, or to
16 examine laboratory personnel as witnesses
17 concerning the same, prior to trial, except to
18 the extent that the same is used by the accused
19 at a preliminary hearing and except as provided
20 in Section 971.23.

21 The statute was discussed in the case of
22 ***State of Wisconsin vs. Franszczak,***
23 ***F-r-a-n-s-z-c-z-a-k,*** a 2002 Wisconsin Court of
24 Appeals case. And in that case, the Court
25 essentially says that the statute means what it

1 says and that is, that the State Crime Lab
2 performs testing on behalf of the State. It's
3 not subject to disclosure or discovery, except as
4 provided by the statute. And, likewise, if it
5 provides discovery on behalf of the defendant,
6 that the State can't get at the information,
7 except in the circumstances provided for in the
8 statute.

9 I'm not going to decide today whether or
10 not there might be some special circumstances
11 under which the Court could grant the request
12 made by the defense in this case. I don't see
13 anything in the statute that expressly prohibits
14 it, but at least the statute seems to suggest
15 that, in the ordinary course of things, absent
16 some extenuating circumstances at a minimum, the
17 legislature doesn't contemplate the statute
18 granting a request like this.

19 I will also note that, although there
20 have been incidents of mistakes in other Crime
21 Labs, and I think any time you are dealing with
22 human beings that's always a possibility, I'm not
23 aware that our State Crime Lab has ever been
24 involved in this type of a thing. And as the
25 State noted in the brief, it was actually the

1 State Crime Lab's tests in the defendant's prior
2 case that resulted in him being released from
3 prison after being wrongfully convicted. And the
4 State fully acknowledges that fact.

5 So based -- For those reasons, I don't
6 believe there's a basis here for granting the
7 defendant's request and I'm going to deny the
8 State's motion regarding forensic testing.

9 ATTORNEY GAHN: The defense motion, your
10 Honor.

11 THE COURT: The defense motion for forensic
12 testing. I'm certainly not foreclosing the parties
13 from coming to an agreement, if they do. Anything
14 that expedites the process and makes both parties
15 feel assured the testing is being done properly is a
16 benefit to all. But in the absence of that, the
17 statute seems to contemplate, as a general rule, a
18 different approach and, therefore, the Court is
19 denying the defendant's motion.

20 The last item to deal with today is the
21 motions that have been made by each of the
22 parties for modification of bail in this case.
23 The defense made its motion first, so I will hear
24 from the defense first. Will that be Mr. Strang
25 or Mr. Buting?

1 ATTORNEY STRANG: Mr. Strang.

2 THE COURT: Mr. Strang.

3 ATTORNEY STRANG: We have no quarrel
4 with -- today with the reasonableness of the amount
5 of bail set by the Court here, working off of the
6 half million dollar number. Our motion goes to the
7 surety or the security that the Court would accept,
8 as a financial condition, to reasonably assure
9 Mr. Avery's appearance in court, as he is required,
10 and the safety of the community.

11 And what we're asking here is for the
12 Court to allow the posting of property, the
13 tendering of a mortgage, or can be done with a
14 Quitclaim Deed that then is not filed by the
15 County Clerk unless bond conditions are violated.
16 But there are different ways to accomplish using
17 real property as security to meet the financial
18 aspect of the bail condition.

19 Mr. and Mrs. Avery, who are behind me,
20 are willing to post all of the property they own
21 in the world, the Manitowoc County property, the
22 Marinette County property. We have had that
23 appraised for fair market value. The combined,
24 unincumbered value of those properties well
25 exceeds the half million dollars in bail that the

1 Court has set.

2 These are solvent sureties, in other
3 words, and the Wisconsin Statutes have absolutely
4 no presumption against, or bias against, the use
5 of property to secure appearance and compliance
6 with bail conditions, as opposed to cash. Real
7 property as opposed to cash or other personalty.

8 The Corporation Counsel for the County
9 of Manitowoc filed a letter of his own raising
10 concerns. And I think that Corporation Counsel
11 misapprehends the very purpose of posting
12 property. The issue here is not what value the
13 Avery Salvage Yard or a property near Crivitz
14 might have to Manitowoc County. The issue is its
15 fair market value and, more importantly, it's
16 value to Steve Avery or the people he loves and
17 care about him.

18 The point, of course, is not for the
19 property to come into legal ownership of
20 Manitowoc County. The point is that if he didn't
21 follow conditions of bond, his parents would
22 lose, literally, the farm. That's the level that
23 we have to assure a defendant's compliance with
24 conditions of release, that the Court sets.

25 So, without wading into DNR issues or

1 other issues really, fundamentally, the
2 Corporation Counsel's concerns miss the point of
3 Chapter 969. There's no real question here that
4 the fair market value, regardless of what
5 Manitowoc County might pay for the property, the
6 fair market value of the property well exceeds
7 the half million dollars in cash.

8 As a practical matter, unless the Court
9 modifies bail, he is not getting out. As a
10 practical matter. Now, the Court knows, I know,
11 perhaps some in the public or some in the media
12 even have forgotten, that he's innocent. As he
13 sits here today, he is legally presumed innocent.

14 I mean, we can dress him up in something
15 that makes him look like he, you know, jumped off
16 a Monopoly game board or something. He's a
17 get-out-of-jail-free card come to life. But he
18 is innocent as he sits here today.

19 And, you know, he had his Thanksgiving
20 meal, as a presumptively innocent man, in the
21 jail. He had his Christmas meal, as a
22 presumptively innocent man, in the County Jail.
23 He is heading toward his Easter meal, as a
24 presumptively innocent man.

25 And all of this delay is necessary,

1 nobody is quarreling with the delay. But the
2 earliest, as I understand it, that he's going to
3 have a full chance to be heard, and to put the
4 State to its burden of proof here to prove what
5 it alleges, will be after his Labor Day meal, as
6 things stand, if he is not out.

7 Ten months is a long time to sit, if you
8 are presumptively innocent. And this is someone
9 who is sort of sensitive about sitting in custody
10 when he's innocent, and I understand that. He's
11 got no history of trying to evade justice,
12 skipping court. If anything, it's justice that
13 once evaded him.

14 He's lived right here in Manitowoc
15 County all his life. Lives on the parent's
16 property. This is -- This is not just a
17 homestead, but it's a place on which the family's
18 business, you know, from which it derives its
19 entire livelihood. He is not going to put that
20 at risk.

21 The reasonable perception here is he is
22 not going to put that at risk by failing to abide
23 conditions of release. His parents would stand
24 to lose everything, if he did, as would he. I
25 mean, it's his livelihood that is made on this

1 property as well.

2 The State here has relied on angry
3 letters that he wrote to his ex-wife, who
4 divorced him while he was in prison for a crime
5 he didn't commit. Those were written, the most
6 recent of them, according to Judge Hazlewood in
7 his transcript, was 15 years ago now, in 1991.
8 They were angry, they were aggressive.

9 His wife was trying to deprive him of
10 any further contact with his young children. I
11 guess I would be angry too, in his circumstance,
12 particularly where I'm sitting in prison on
13 something I didn't do, which is exactly the
14 situation he was in at the moment.

15 So it's not to excuse angry, aggressive,
16 ugly letters that he wrote 15 years, 17 years, 19
17 years ago. It is to put them into a context that
18 suggests they say very, very, little today about
19 whether he will come back to court when he's
20 supposed to and whether he will stay in his
21 house, as he's supposed to, other than when
22 conditionally allowed to leave by this Court.

23 Once we get past letters to his ex-wife,
24 now we're into the State offering past criminal
25 acts that are getting near a quarter century old.

1 We're getting into the State offering convicts
2 who only now are coming forward and saying,
3 presumably, or at least tacitly suggesting, get
4 me out of jail and I will testify that this guy,
5 you know, talked about building torture chambers,
6 and all kinds of other stuff, that inmates didn't
7 bother to report for the 15, or 18 years, or
8 whatever it's been since they say they heard it
9 from Avery.

10 This is all so much nonsense, honestly.
11 Really, so much nonsense. The State has been out
12 and searched the Avery property, with consent,
13 probably five times or more. With search
14 warrants, at least a couple times, maybe three,
15 something like that. Nobody had a torture
16 chamber. No torture chamber on the Avery
17 property, in the trailer he lived in, or anywhere
18 else.

19 So it's really, some of that is beneath
20 further comment. But what's not is the Court's
21 ability to fashion non-monetary, non-financial
22 conditions as well. And Steve Avery wanted me to
23 tell the Court, and invite the Court, to impose
24 any other non-monetary conditions it sees as
25 appropriate here, including increasing the

1 restrictiveness of the conditions of release
2 already set, since we have moved to modify.

3 Something your Honor might reasonably be
4 concerned about is, if he's out of jail, are we
5 going to be asking that he be allowed to go down
6 to Madison to see me, or down to Brookfield to
7 see Mr. Buting. And the answer is, no, we will
8 come to him. He can be restricted to Manitowoc
9 County. Electronic monitoring wouldn't be a bad
10 idea and is fully acceptable to Steve Avery.
11 Very controlled time out of the house or away
12 from the property, fully acceptable to Mr. Avery.

13 If the Court wants him to report in
14 person to the Two Rivers' Police Department, or
15 some other law enforcement agency, on a regular
16 cycle, fully acceptable to Mr. Avery. And, of
17 course, I would expect, that in the process of
18 posting real property to secure the bail that the
19 Court has set, that the State would want to look
20 at the appraisals, want to look at title and any
21 encumbrance to it. And I'm wholly prepared to
22 share all of that information with the State.

23 Indeed, the Avery's, the senior Avery's,
24 have gone to the trouble of retaining
25 Mr. Krajnek, a local lawyer here who does real

1 estate work, to assist in assembling the
2 information that would be necessary to secure
3 bail with real estate, rather than cash. So,
4 that is -- that's our request here today. I know
5 the State has a competing motion, but perhaps
6 it's better in my place to respond to the State's
7 argument in that respect.

8 THE COURT: All right. Mr. Kratz.

9 ATTORNEY KRATZ: Thank you, Judge.

10 Mr. Strang is correct, the State does have a
11 competing motion that we filed. Actually, the other
12 side of Mr. Strang's motion, the other side of the
13 coin, if you will, is our second motion, that is,
14 our motion to increase cash bail. And I'm going to
15 take this opportunity then to first argue that,
16 since it addresses those same factors that
17 Mr. Strang has argued.

18 The State no longer believes that a
19 \$500,000 cash bond is appropriate. The Court may
20 recall that this State originally requested a
21 \$1,000,000 cash bond to secure Mr. Avery's future
22 court appearances. But this Court can, and I
23 believe should, take into consideration new
24 factors, that is, what we have learned since the
25 last time we addressed bond.

1 Since the last time I was before this
2 Court and addressed bond, substantial changes
3 have occurred in this case. Now, Mr. Strang can
4 sit here and presume Mr. Avery to be innocent; I
5 don't have to do that. And when I make these
6 arguments to the Court, the statute, 969.01 (4),
7 is on the State's side in that regard when it
8 invites, in fact, requires the Court consider the
9 character and strength of the State's case.

10 Now, the character and strength of the
11 case against Steven Avery, I will argue, has
12 changed dramatically since we last visited this
13 issue. The detailed statements given by what I'm
14 calling the co-actor, the co-perpetrator in this
15 case, speak directly to the nature, number, and
16 gravity of offenses. And to leave bond at the
17 previously issued, I believe does a disservice
18 not only to this particular case, but does not
19 reflect Mr. Avery's likelihood of appearing at
20 future court appearances.

21 Those other factors that I previously
22 argued, including the degree of violence used,
23 there's new information as to those. I had
24 already argued the prior criminal record, the
25 fact that other crimes have been committed while

1 Mr. Avery was out on legal status, that he's now
2 been bound over for trial.

3 New information, though, on our request
4 to increase cash bail to \$2 million, includes the
5 allegations of his plans to flee the
6 jurisdiction. The alternatives to cash bail not
7 being warranted, as cited by Manitowoc County
8 Corp Counsel, and what I'm arguing is one of the
9 most important factors, that is, Mr. Avery's
10 character.

11 Those items contained in the
12 affidavit -- again, an affidavit, something more
13 than mere allegations, but something contemplated
14 by the motion practice in the State of
15 Wisconsin -- sets forth some specific acts of
16 violence, some specific plans of Mr. Avery that I
17 think are very important as to the State's
18 request for the increase in cash bail. And,
19 therefore, I make that request, your Honor, to
20 raise cash bail, to deny any kind of surety or
21 property bond and to increase the cash bail
22 previously authorized, to \$2 million.

23 I am prepared, Judge, although as I
24 mentioned, included in a formal detailed motion
25 and affidavit, to argue the denial of bail. But

1 I didn't know if the Court wanted to address the
2 first motion, or what I have characterized as the
3 other side of Mr. Strang's motion, first. But I
4 am prepared to proceed, your Honor.

5 THE COURT: With respect to the motion to
6 deny bail, that's a request that has not been made
7 to me before in another case. But as I read the
8 statute, and I reread it this morning, I believe it
9 involves a testimonial hearing, an evidentiary
10 hearing, with fairly extensive description. It
11 involves, essentially, a mini trial.

12 ATTORNEY KRATZ: It does, Judge, and that's
13 why I have stopped. I have the witnesses. I have
14 officers prepared for that. I don't know how much
15 time the Court has set aside for that. Let me also
16 indicate that, depending on how the Court and
17 Mr. Strang wants to proceed, it may even contemplate
18 calling other witnesses, or providing writs, or the
19 like, for what the Court calls a mini trial.

20 I don't disagree with that procedure as
21 contemplated in the statute, that's why I'm
22 stopping at this point and, I think, asking the
23 Court to rule on Mr. Strang and my motion.
24 Frankly, Judge, depending on that motion, the
25 State may ask in another manner to be heard on

1 the denial motion.

2 THE COURT: Mr. Strang, I'm looking now for
3 your response to the motion to increase cash bail.
4 I'm not seeking comment on the motion to deny bail.

5 ATTORNEY STRANG: Okay. It's -- A lot of
6 this is so academic that one wonders why the State
7 wants to talk about it. The original charges, the
8 first one, carries a mandatory life sentence. And
9 then we have got 12 and a half years of possible
10 confinement on one charge, beyond that. And I
11 haven't even looked recently, seven years, or five
12 years, or something on the other one. But once you
13 are at mandatory life, you know, adding on more
14 exposure, really doesn't alter the calculus much for
15 a defendant in deciding whether he's going to stick
16 around or try to make a run for it.

17 In terms of his proclivities, boy, I
18 mean, I didn't notice much in my television back
19 in early November, any inclination of him to
20 avoid anybody, a camera, a police officer. He's
21 consenting to searches. He's talking to anybody
22 who wants to search him. He's going up to the
23 family's cottage, to be sure, a cottage they have
24 had for decades up in Crivitz. Everybody knows
25 where he is.

1 There's nothing here, not only in the
2 lead up to this arrest, but in his earlier cases,
3 to suggest that he tries to runaway or avoid
4 obligations to come to court. There's just
5 nothing. Not a bench warrant, as far as I know,
6 at least nothing the State has tendered to the
7 Court. So, you know, and adding -- we could add
8 a hundred more charges here, if creative counsel
9 wanted to do that, and it wouldn't really change
10 the functional incentives that have been in place
11 since this case was charged with a first-degree
12 intentional homicide count.

13 Beyond that, you know, I note under our
14 statutes, and specifically 969.08 (5), it is a
15 little bit ambiguous here. If he were out on
16 release and the State alleged that he violated
17 conditions of release and wanted to tighten up or
18 add conditions to address a violation of
19 conditions of release once he's out, if that were
20 the State's request, we would be entitled to a
21 hearing. And the State would bear the burden of
22 proof by clear and convincing evidence, in
23 establishing both the violation and the need for
24 some tighter conditions.

25 Now, it is ambiguous because one also

1 can read the same statute, 969.08 (1) or (5) as
2 allowing the Court, on the State's motion, to
3 increase conditions of bail. So, I'm not hanging
4 my hat, so to speak, on this entirely. But it's
5 passing strange to say that if you were out, you
6 know, increasing cash from half a million dollars
7 to \$2 million as a response to some violation of
8 conditional release would entitle me to a hearing
9 at which there is an intermediate standard of
10 proof.

11 But when he is not out and has no
12 realistic prospect of posting half a million
13 dollars in cash, that's not happened, would have
14 happened by now if that was anywhere within the
15 realm of possibility, that the State, with no
16 showing other than statements of inmates or 20
17 year old allegations being filtered through a law
18 enforcement officer's affidavit now can quadruple
19 the amount of bail that the Court is being asked
20 to set.

21 THE COURT: Anything else, Mr. Kratz?

22 ATTORNEY KRATZ: No, not on this issue,
23 Judge. Thank you.

24 THE COURT: I'm going to take a brief
25 recess. I have my notes from the prior bail hearing

1 in chambers. I'm going to look at them and then
2 I'll come back.

3 ATTORNEY BUTING: Your Honor, could we deal
4 with that issue of recess with regard to cameras and
5 filming at this time, if we're going to break the
6 proceedings?

7 THE COURT: Yes, for purposes of today's
8 hearing, I'm going to ask the camera folks to
9 shutdown during the recess. The court proceedings
10 aren't going on during that time and the parties are
11 entitled to speak with each other privately during
12 that time.

13 ATTORNEY BUTING: Thank you.

14 (Recess taken.)

15 THE COURT: I did take the opportunity to
16 go back and review my notes from the last bail
17 modification motion hearing. I'm not going to
18 repeat all of the findings and matters I relied on
19 at that time because of the fact that the defense in
20 this case is not disputing the current level of bail
21 at \$500,000.

22 But I think it is worthwhile to review
23 the things that have changed since the last bail
24 modification hearing, as I view them. I will
25 note that, based on the Court's decision today,

1 the Court has allowed the filing of additional
2 charges against the defendant. The number and
3 gravity of the offenses are greater, as are the
4 penalties that the defendant faces. Though, as
5 noted by defense counsel, the penalties under the
6 existing charges are already significant.

7 The Court further notes that the level
8 of violence alleged in the Complaint is greater
9 than it was before, based on the new allegations.
10 And the Court, while keeping in mind that the
11 defendant is innocent until proven guilty -- and
12 the Court makes no comment on what the final
13 disposition in this case might be, a jury will
14 obviously make that determination -- but the
15 statutes do direct the Court to take into
16 consideration, in setting bail, the strength of
17 the evidence that has been presented.

18 And this is no longer purely a
19 circumstantial evidence case, based on the new
20 allegations made by the State. And the Court
21 would have to characterize the strength of the
22 evidence at this point as greater than it had
23 been in the past.

24 The State has also alleged that a
25 statement on behalf of the defendant that at one

1 point in the proceedings, before his initial
2 arrest, he considered flight. I think that
3 that's not -- as it's stated, it's not an
4 unequivocal statement.

5 It may reflect just the defendant's
6 thought at the time. There is no evidence he has
7 actually tried to flee the jurisdiction or
8 anything like that, but it was made at a time
9 before the charges were actually filed. And to
10 the extent the defendant ever would have
11 considered flight, the reasons would be greater
12 at this stage than in the past.

13 Finally, although it may not be the most
14 significant consideration, based on the fact that
15 the defendant has now retained private counsel,
16 is not represented by the Public Defender's
17 Office -- and the Court has been informed that
18 was as a result of a settlement of a lawsuit --
19 the defendant's ability to give bail is somewhat
20 greater than it has been in the past.

21 Taking those factors into account, the
22 Court believes that the bail in this case should
23 be increased from \$500,000 to \$750,000 and I'm
24 going to order that bail be increased in that
25 amount. Because of the severity of the offenses

1 involved and the possible penalties that the
2 defendant faces, the Court concludes in this case
3 that cash bail is necessary.

4 I'm not going to allow a bond to be used
5 in lieu of cash. I will note to the extent that
6 the defendant's family has assets, they could, of
7 course, borrow against those assets and obtain
8 cash. I'm aware of that. But both because of
9 the severity of the offenses and the possible
10 penalties, primarily for that reason, the Court
11 is going to have bail remain at a cash figure and
12 the amount will be \$750,000.

13 Now, before we conclude today, Counsel,
14 I believe going back to one of the earlier
15 motions, it appears we're going to need another
16 motion date. I hope you brought your calendars
17 with you. And, Mr. Kratz, I didn't say it, but
18 if you still intend to pursue your motion to deny
19 bail, I'm not going to start that at 10 minutes
20 to 4 today.

21 I think, even though you may have
22 witnesses here, I believe that the defense should
23 have an opportunity to produce evidence of their
24 own, if they wish. I believe they have that
25 under the statute and I think they would be

1 entitled to specific notice that we're going to
2 have such a hearing before we proceed. So I
3 won't require you to make that decision today.

4 ATTORNEY KRATZ: If I may suggest, Judge,
5 if the Court is going to be setting another motion,
6 if the Court would give me leave to provide the
7 Court with sufficient notice before that time to be
8 heard at that new time, or to withdraw my motion one
9 way or another, I can alert the Court what I intend
10 to do.

11 THE COURT: All right. Counsel, you may be
12 contemplating the filing of other motions that I
13 haven't heard about today, so rather than me
14 suggesting a date to you, I will let the attorneys
15 tell me when you would like to meet next. I know
16 there was going to be a defense motion relating to
17 the Complaint.

18 ATTORNEY STRANG: Yes.

19 THE COURT: And it sounded to me like
20 perhaps sometime less than a month from now.

21 ATTORNEY STRANG: I'm going to bring a
22 motion relating to the right to a preliminary
23 hearing on the three new charges, which the Court
24 has now ruled, in denying bail or property bond, are
25 significant and add something. And I guess for

1 purpose of a preliminary hearing, I share that to a
2 degree. And I had suggested that within 10 days --
3 what I said earlier was from the Court signing
4 Mr. Kratz's proposed order I can file a motion, but
5 the fact is I can do it 10 days from today. I don't
6 need to wait for a written order since I understood
7 the Court's ruling.

8 THE COURT: All right. So you are going to
9 file a motion within 10 days relating to any
10 challenges you have to the Amended complaint, which
11 the Court today allowed to be filed.

12 ATTORNEY STRANG: Right. Say by the 27th,
13 which would be 10 days, if that's acceptable.

14 THE COURT: Mr. Kratz, any objection?

15 ATTORNEY KRATZ: No. At the same time, I
16 didn't know if Mr. Strang intended to include the
17 issue of the preliminary hearing.

18 ATTORNEY STRANG: That is the issue.

19 THE COURT: Yes, that's my understanding.

20 ATTORNEY KRATZ: If I may also ask, Judge,
21 I don't know if Mr. Strang believes that oral
22 argument is required or if the Court would be
23 satisfied with just written argument, my ability to
24 respond and then just your ruling.

25 THE COURT: Are the parties willing to have

1 that matter decided on written briefs?

2 ATTORNEY KRATZ: That's fine, Judge.

3 ATTORNEY STRANG: Sure. And if the ruling
4 goes our way, then we would have to have a telephone
5 conference for purposes of scheduling a preliminary,
6 I suppose.

7 ATTORNEY KRATZ: That's right.

8 THE COURT: I'm worried about things
9 getting backed up. I would like to set contingent
10 dates that you reserve on your calendar, so that if
11 something has to be done it can be done. I don't
12 want the calendar to get out of hand here. I do
13 have the entire morning of April 13th available. I
14 would ask the parties how they feel about that.

15 ATTORNEY STRANG: It's not an issue here,
16 but for what it's worth, I know Passover begins that
17 day. I'm clear that day. Mr. Buting has to be in
18 another circuit court in the state.

19 ATTORNEY BUTING: Judge, at 1:30 I have to
20 be in Waukesha on an oral argument.

21 THE COURT: All right.

22 ATTORNEY BUTING: I suppose if it takes
23 about -- if we broke by 11:30.

24 THE COURT: I think that would work. We
25 could start at nine. Let me do this. I'm just

1 going to hold that date for now. And depending on
2 the motions that the parties file, if a hearing has
3 to be held, I would like to hold it on that date.

4 And I would also like to be kept
5 informed by the parties of progress being made
6 with respect to discovery and testing, so that if
7 there are any motions that have to be filed, they
8 can be filed in a timely manner and I can hear
9 them, so they don't jeopardize a September trial
10 date.

11 ATTORNEY STRANG: I don't want to sit on my
12 hands here and not give the Court fair warning, but
13 I think it's at least possible with the March 1,
14 March 2 developments, and now presumably further
15 testing and much material and discovery that the
16 State can't disclose to us because it doesn't have
17 it yet, I think the September 5 trial date is very
18 questionable.

19 It's not a calendar problem for me, I
20 just think it's very questionable. And I can
21 understand why the Court would not want to move a
22 date once one is set, so I don't want to sit here
23 and sound like I'm acquiescing or not raising at
24 least the concern that, for all the reasons we
25 have discussed today, just scheduling like bail

1 consideration and, you know, what charges Mr.
2 Avery is facing, all of these things may also
3 have an affect on trial scheduling.

4 THE COURT: Mr. Kratz, I don't know if you
5 have any information yet about the timing of the
6 testing that's going to be done.

7 ATTORNEY KRATZ: On Monday, Judge, we -- we
8 meaning myself and the investigator involved in the
9 case -- intend to meet directly with the Crime Lab
10 to get those answers. And so once we have a
11 timetable, I would be happy to provide that to
12 Mr. Strang and Court.

13 THE COURT: All right.

14 ATTORNEY STRANG: The Court's ruling on the
15 motion concerning fair forensic testing means that
16 now, necessarily, the only avenue open to the
17 defense would be sequential testing once the State's
18 private testing is done, so that -- I don't know
19 that we'll do that, but we may. That's what's left
20 to us.

21 ATTORNEY KRATZ: If I can be heard. We
22 have offered what's already been tested already for
23 retesting. Defense hasn't taken us up on that yet,
24 we'll see if they do. That is already available for
25 retesting. That decision should be able to be made

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before this new testing is done, Judge.

ATTORNEY STRANG: That's absolutely true,
as to stuff seized in November, absolutely so,
agreed.

THE COURT: All right. Is there anything
else either party wishes to take up this afternoon?

ATTORNEY BUTING: Judge, one other matter.
When you mentioned other motions that we might need,
we may be able to just short circuit that. If
Mr. Kratz is willing to today, I could file a motion
for return of property -- I'm informed that
co-counsel has already spoken to the State and
reached some agreement on that, so that's fine.

THE COURT: All right. Anything else this
afternoon?

ATTORNEY KRATZ: No, Judge.

THE COURT: If not, we're adjourned for
today.

ATTORNEY KRATZ: Thank you.

ATTORNEY STRANG: Thank you.

(Proceedings concluded.)

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 25th day of April, 2006.

Diane Tesheneck, RPR
Official Court Reporter

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