

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

3 STATE OF WISCONSIN,
4 PLAINTIFF, MOTION HEARING
5 vs. Case No. 05 CF 381
6 STEVEN A. AVERY,
7 DEFENDANT.

8
9 **DATE:** JANUARY 4, 2007

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

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

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

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

21 JEROME F. BUTING
22 Attorney at Law
23 On behalf of the State of Wisconsin.

24 STEVEN A. AVERY
25 Defendant
Appeared in person.

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TRANSCRIPT OF PROCEEDINGS

Reported by Diane Tesheneck, RPR

Official Court Reporter

1 THE COURT: At this time the Court calls
2 State of Wisconsin vs. Steven Avery, Case No. 05 CF
3 381. This matter is scheduled this afternoon for a
4 hearing on a motion that was filed yesterday by the
5 State; specifically, a motion to exclude blood vial
6 evidence, or in the alternative, to analyze the vial
7 of blood. Will the parties present state their
8 appearances for the record, please.

9 ATTORNEY KRATZ: The State appears by
10 Calumet County District Attorney Ken Kratz,
11 appearing as Special Prosecutor. Norm Gahn also
12 appears as Special Prosecutor. And I should alert
13 the Court that this is Mr. Gahn's motion.

14 ATTORNEY STRANG: Good afternoon. Steven
15 Avery is here in person this afternoon. Jerome
16 Buting of Buting and Williams appears on his behalf,
17 as do I, Dean Strang of Hurley, Burish and Stanton.
18 I think that covers it.

19 THE COURT: All right. I will indicate for
20 the record that I have received -- I received by
21 fax, it probably came in last night, I read it this
22 morning, that is, the State's motion and the
23 memorandum that was submitted in support of the
24 motion.

25 I have also received and read the

1 defendant's response to the State's motion to
2 exclude the blood vial evidence. I will give the
3 parties a opportunity to briefly supplement the
4 memoranda with oral argument, if they wish.

5 Mr. Gahn.

6 ATTORNEY GAHN: Thank you, your Honor. I
7 believe that the Court can make an analysis under
8 the cited cases in our brief of **State v. Richardson**
9 and **State v. Denny**. The State will concede that
10 there may be some relevance to this vial of blood to
11 this trial, but I think that the analysis must go
12 further by the Court and to look at the probative
13 value of this and then to make a determination under
14 904.03 whether this would be a delay of the trial,
15 confusion of issues for the jury. And this complete
16 analysis must be done by the Court.

17 I note from the response by the defense
18 that at no time do they suggest or state that
19 there is -- this vial of blood is admissible.
20 And I believe that under the case law, that the
21 Court should rule that this is inadmissible
22 evidence for these reasons.

23 Conceding there may be some relevancy, I
24 believe that the probative value is very low.
25 And if one makes an analysis akin to the analysis

1 the Court made in *State v. Richardson*, you have
2 to look at all the assumptions that a jury is
3 going to have to make about this vial of blood.

4 Now, I'm making these assumptions along
5 a *Richardson* analysis knowing that the defense
6 has not filed or given any type of offer of proof
7 of how they plan to connect the vial of blood to
8 Teresa Halbach's SUV. But the jury is going to
9 have to make the assumption that the blood in the
10 vial is Steven Avery's. They are going to have
11 to assume that it was planted some time between
12 November 3rd and November 5th, or if they --
13 maybe it was planted October 31st, or
14 November 1st, or 2nd. But that type of
15 assumption implies that perhaps a police officer
16 murdered Teresa Halbach and cut up her body and
17 planted this to try and frame Steven Avery.

18 They would have to assume that the
19 police, or whoever planted it, knew that Teresa
20 Halbach was dead. And how could they know that.
21 The only way they could possibly know that would
22 be is if Steven Avery told them, or Mr. Dassey
23 told them -- and Mr. Dassey didn't say anything
24 until March 1st -- or one of the police actually
25 did the killing, or perhaps they got an anonymous

1 tip.

2 But there are so many factors out here,
3 and so many assumptions that would have to be
4 made, that this lends itself to confusion of
5 issues and misleading the jury and, really, a
6 purposeful attempt to distract their attention
7 from focusing on the true issue in this case, and
8 that is, whether Steven Avery murdered Teresa
9 Halbach.

10 But there's also going to have to be
11 assumptions made that some law enforcement
12 officer had access to this vial of blood somehow,
13 or was there complicity by the Clerk of Court's
14 in Manitowoc County, or was it just --

15 This isn't a case of negligence we're
16 talking about, you know, an intentional crime
17 committed by law enforcement officers, and
18 possibly along with the Clerk of Court's. This
19 is an appalling allegation that's being made.

20 And there's so many assumptions, as I
21 said, would have to be made by the jury, that I
22 believe that this is a very low probative value
23 to this evidence. And when you have a low
24 probative value to the evidence, the analysis
25 under a 904.03 examination certainly shows how

1 this would be such a waste of time and confusion
2 of issues and distraction to the jury.

3 Because the Court, I believe from prior
4 ruling, especially when we argued the 904.04 (b)
5 other acts, other wrongs and crimes evidence, the
6 Court wants this trial to focus on whether Steven
7 Avery murdered Teresa Halbach and not get
8 sidetracked on other issues and collateral
9 issues. But if this vial of evidence comes in,
10 it is just fraught with other issues such as is
11 it Steven Avery's, who drew it, what happened
12 when it was at Laboratory Corporation of America,
13 who had access to it, what are the security
14 procedures at the Manitowoc County Clerk of
15 Court's Office.

16 There are just so many side issues and
17 collateral issues, that I believe that it
18 necessitates under a 904.03 analysis that this
19 evidence lacks, number one, probative value and
20 also would be a waste of time and confusion of
21 issues, for the jury. And we ask the Court to
22 not allow this evidence to come in.

23 I also want to address, I guess, sort of
24 a preemptive strike I would like to make on this
25 knowledge on our part, the State, and our access

1 to this vial of blood and the untimeliness of
2 notifying us about the existence of it.

3 I want the Court to know that the
4 prosecution team, I believe, exercised due
5 diligence in looking for this vial -- a vial of
6 blood. We recognized this early on and asked our
7 detectives to search for it. And we have
8 searched in all the places that one would expect
9 to find a vial of blood, crime labs, Manitowoc
10 County Sheriff's Department, law enforcement.
11 And as I said, we exercised due diligence looking
12 for it.

13 This vial of blood turns out to be in
14 existence, but there's really a few people who
15 knew about it. It was never in the control of
16 law enforcement. And to try and associate the
17 Manitowoc County Clerk of Court's office with law
18 enforcement is a stretch. This is a public
19 service. They serve the public. These are
20 people who have taken, I imagine, an oath of
21 office, and they have jobs, civil, and criminal,
22 and all the other things that go along with the
23 Clerk of Court's. They are not associated with
24 law enforcement at all.

25 And I was very surprised to see that a

1 vial of blood, to turn up there. But we did
2 look, and we looked to try and find it, because
3 we felt that if they want to pursue a planting
4 defense, fine, but how do you plant evidence if
5 there is no blood.

6 Now they have come up with this, but
7 this is information that was in the possession of
8 Mr. Avery, he could tell them, hey, blood was
9 drawn from me up in Fox Lake, or whatever it was,
10 in 1996. And this was also a Innocence Project
11 case, and that is something I think the defense
12 is more aligned with than prosecution are aligned
13 with.

14 And they had more of an opportunity to
15 know and find out the existence of this vial of
16 blood. And they knew about it at the latest in
17 July, July 20th. It could have been earlier.
18 But I believe that they viewed -- if they viewed
19 it so importantly, and wanted it sealed, they
20 should have told us about it.

21 I think they had a responsibility under
22 971.23, the discovery statute, to tell us about
23 this and give us the opportunity to test this.
24 Because this is -- this is the crux of the case,
25 this vial of blood now. And we need to meet the

1 defense and have the opportunity to test this
2 vial to meet their defense.

3 And the defense in this case, and I just
4 want to reiterate to the Court that, you're
5 talking -- this is -- you're talking about
6 people's reputations here. There is an
7 allegation that are going to be made by the
8 defense, and they have made them already, that
9 perhaps some law enforcement officer, someone
10 from Manitowoc County, who is sworn to protect
11 the public, to serve the public, took this vial
12 of blood -- and so callously disregard for the
13 Halbach family -- planted this evidence in a car
14 and didn't care who murdered Teresa Halbach.
15 This is appalling. This is a despicable defense.

16 And also they are saying that someone in
17 that Manitowoc County Courthouse, whether it be
18 through complicity, or slipshod operations, that
19 this place was just wide open for anybody to
20 willy-nilly walk in and get access to it. And
21 that's not what I found when I visited the
22 Manitowoc County Clerk of Court's Office. I
23 didn't find that at all. And it's just a
24 despicable allegation and defense and we need to
25 meet it, your Honor. We need to meet it full on.

1 And I'm asking the Court, first, to rule
2 that under a *Richardson* and also a *Denny*
3 analysis, how is the defense going to connect the
4 vial of blood in the Manitowoc County Clerk of
5 Court's Office to the SUV of Teresa Halbach. How
6 do they make that connection? Just by saying so,
7 it exists?

8 I mean, you could make that same
9 argument that if Mr. Avery donated blood, or one
10 was taken for a medical procedure, or blood was
11 drawn for any myriad of reasons, that, oh, just
12 because it exists, therefore, somehow, under all
13 those possible scenarios, the blood was taken by
14 someone and planted in the SUV. The connection
15 is there. It is not there. They have not met
16 the law under *Denny* or under a *Richardson*
17 analysis, so it should be excluded.

18 But if the Court does not wish to
19 exclude it, we ask the Court to allow us time to
20 test it. And we want to test it with the FBI.
21 That may take three to four months to test it, so
22 we would be asking for a continuance.

23 And the other concerns that we have are
24 the many, many potential appellate issues that
25 could come up, especially under a *Hicks, Moran,*

1 and **Armstrong** analysis on whether it be in the
2 interest of justice, or ineffective assistance of
3 counsel. There is evidence, a blood vial that
4 can be tested chemically, that can be
5 scientifically tested. And it can tell us
6 whether the blood in Teresa Halbach's car came
7 from that vial of blood. And I believe this case
8 is too important, we have come too far, too long,
9 and too many vicious allegations, against people
10 who are public servants or law enforcement
11 officers, have been made, that we must have the
12 opportunity to have that vial and do the testing
13 that we believe is suitable to meet their
14 defense. May I just have one moment, your Honor?

15 THE COURT: Go ahead.

16 ATTORNEY GAHN: That's all I have. Thank
17 you.

18 THE COURT: Mr. Buting. Or I got the brief
19 from Mr. Mr. Buting; is it Mr. Strang?

20 ATTORNEY BUTING: We may both respond at
21 different times, depending on the issues that come
22 up, but Mr. Strang will take the lead here.

23 ATTORNEY STRANG: One of the good things,
24 your Honor, that 8 or 900 years of history, with the
25 English common law and coming across the Atlantic to

1 the United States, has done for us is to make combat
2 in a courtroom ritual. And when the language
3 becomes very charged and the emotions become very
4 charged, as inevitably they will in a case in which
5 the most serious, horrible, and heinous crime is
6 alleged, it's good to have this tradition of
7 civility, and ritual control of a combat, to fall
8 back upon.

9 And I agree that the potential
10 implications, as opposed to the allegations that
11 we made, because we have made very few
12 allegations, we have tried to present facts at
13 this point and to explore things that we have
14 found in the Manitowoc County Circuit Court. But
15 I agree with my friend, Mr. Gahn, that the
16 potential inferences from this are, indeed,
17 despicable in the sense of being unspeakable, in
18 the sense of being horrible, and in the sense,
19 particularly, impossibly true.

20 And I go back to the starting point here
21 in noting the allegations that Steven Avery
22 murdered Teresa Halbach are despicable in the
23 very same way. The allegation that he had sex
24 against this young woman's will with her are
25 despicable, and vicious, in the very same way.

1 And unlike every law enforcement officer
2 of Manitowoc County, Mr. Avery doesn't go home at
3 night while he is under these sorts of
4 allegations. Presumed innocent though he may be,
5 he sits here today in custody.

6 And in large part, the issues that the
7 State raises now, the Court already has
8 addressed, after thorough briefing from both
9 sides, briefs filed in June, State's may have
10 actually been filed in May, I don't remember. I
11 know ours in response to the State's motion to
12 prohibit evidence of third party liability was
13 filed on or about June 26th.

14 And the Court has ruled, on July 10 of
15 last year, just exactly what the disclosure
16 obligation was on the defense for extrinsic
17 evidence of planting, has ruled on what
18 inferences we might pursue, or argue, without
19 extrinsic evidence of planting. And I am glad to
20 hear this afternoon that counsel for the State
21 does not reiterate the written argument made
22 yesterday, that our disclosure was untimely,
23 under this Court's orders. Because by the time
24 this Court set a schedule on July 10 for
25 disclosure of this sort of evidence, the trial

1 had been moved to October 16. That meant July 10
2 set a September 16 deadline.

3 Long before that deadline arrived,
4 August 22 arrived, and the trial was moved to
5 February 5. And after very thorough discussion
6 and disagreement to be worked through and an
7 exchange of drafts and going round and round and
8 making at least two, and maybe three trips,
9 between Mr. Buting and the defense investigators
10 and the Manitowoc County Circuit Court, we
11 decided to disclose this extrinsic evidence, or
12 arguably extrinsic evidence of possible planting
13 of Steven Avery's blood, to the State.

14 Not 30 days before trial as the Court's
15 order required, but 60. And not to pursue this
16 ex parte, as we had intimated in chambers we were
17 considering at one point, but to pursue it in
18 open court, in an unsealed fashion, and with
19 service upon our adversaries.

20 Those weren't easy decisions, but the
21 fact is that disclosure was not just timely here,
22 it was 30 days before the deadline that the Court
23 set after considering exactly the **Richardson**
24 argument and the **Holmes vs. South Carolina**
25 argument to which Mr. Gahn harkens back today.

1 The issue, as I understand it here,
2 primarily, is disclosure, and now, where do we go
3 from there. To the extent the State is arguing
4 to exclude evidence of possible planting, the
5 Court's ruled on that. I don't know, unless
6 there are questions from the Court that there's a
7 need to revisit the briefing and the rulings on
8 that earlier, particularly since the timing of
9 disclosure now ought be resolved, because we more
10 than complied with the Court's timing order.

11 The vial clearly will be admissible.
12 Its availability and proximity to members of the
13 Manitowoc County Sheriff's Department comes in on
14 undisputed facts to the extent of the location of
15 the Clerk's Office, the location of the Sheriff's
16 Department, the location within the Clerk's
17 Office of two boxes or cartons that contain the
18 1985 Avery file.

19 And the 904.03 analysis, I think,
20 benefits in a sense, from stepping back just a
21 little bit, again, and understanding that from
22 the beginning counsel for the State has
23 estimated, as I recall, that it would take four
24 to five weeks to present the State's
25 case-in-chief against Mr. Avery on the despicable

1 allegations that the State hopes to prove. And
2 that perhaps a week would be sufficient for the
3 defense case-in-chief in responding to those
4 allegations.

5 Now, recently the State has suggested
6 that if there aren't some stipulations from the
7 defense this maybe four to five weeks is tight
8 for the State's case-in-chief. And I will say
9 this, one week is still adequate, or better than
10 adequate, for the defense case.

11 So if we're to have a discussion about
12 all the linkages that would have to be made, and
13 all the witnesses that would have -- who would
14 have to be called, the balance pretty clearly
15 here tips in favor of the defense and against an
16 argument that this is collateral, or a waste of
17 time.

18 This evidence goes directly to the
19 integrity of some of the most damning evidence
20 against Mr. Avery that the State intends to
21 offer. And that's the very small amounts of his
22 dried blood that the State will say were found in
23 Teresa Halbach's Toyota.

24 He's been saying from the beginning, to
25 anybody with a microphone and TV camera,

1 initially in early November, 2005, that if his
2 blood was in the Toyota, somebody planted it. So
3 that hasn't been any secret about his defense and
4 his view of the facts.

5 We, as his agents, to a large extent,
6 played the hand that he dealt us, looked down the
7 road to which he pointed us. That the State
8 didn't look in the same places we did, alters not
9 one wit this irreducible fact, the evidence here
10 uncovered in the Manitowoc County Circuit Court,
11 in the Clerk of Court's Office, was as available
12 to the State, or to a member of the public, as it
13 was to the defense.

14 I don't know that I'm going to go
15 farther on arguing admissibility, because that's
16 not primarily what we're here for today. But I
17 do want to address the matter of further testing
18 and an adjournment, and I think Mr. Buting is
19 better equipped to speak to the specifics of
20 possible testing.

21 We have tried and failed to get him,
22 Steven Avery out on bail. It's been 14 months.
23 It's been solitary confinement. And it's been
24 under conditions where the taping of his every
25 word, other than to counsel, for one reason, has

1 been used assiduously for the other reason, of
2 gathering evidence by the State. And if he is to
3 remain in custody, we will and do oppose the
4 adjournment of this trial. We want it to go
5 forward on February 5, if he is to remain in
6 custody.

7 Now, the question of the State's ability
8 or interest in testing can be separated from an
9 adjournment. And, again, after talking about it
10 with Mr. Buting, and his conversations with
11 Mr. Gahn, who is a candid and accessible
12 adversary, we believe that the blood in the vial
13 that was found in the Clerk's Office can be
14 partitioned, divided in a way that does not
15 prejudice the defense and that would allow the
16 State to undertake the testing it seeks to do.

17 I am assured by Mr. Gahn, and I accept
18 his word entirely that, moreover, even the very
19 small amounts of dried blood in the Toyota RAV
20 are sufficient to allow partitioning or to allow
21 testing by the State, without full consumption or
22 spoliation of that dried blood evidence. I take
23 him at his word. He is an expert in the area of
24 blood and DNA.

25 So I think, that as a matter of testing,

1 the Court can fashion conditions that do not
2 prejudice Steven Avery and that would allow the
3 State to pursue the course of testing, any course
4 of testing it may wish. The admissibility or
5 relevance of the results of that testing, I
6 cannot address and the Court cannot address at
7 this point. Nobody has briefed it. We know very
8 little about the proposed EDTA testing.

9 The track record of admissibility in
10 case law is not good, but it is also not terribly
11 extensive. But, again, this is a separable
12 issue, in the sense that testing can go forward.
13 Admissibility and relevance of results of
14 testing, or opinions formed on the basis of
15 testing, can be addressed later, when there's
16 more, factually, to work with.

17 But if the State wants to test, and if
18 Mr. Avery is to remain in custody, the trial
19 ought go forward while the testing process is
20 going forward. If Mr. Avery is instead to be
21 released on stringent conditions that would
22 assure the community's safety, and realistically
23 remove any slight risk of flight he may
24 represent, then the calculus changes entirely
25 for the defense.

1 We would not oppose an adjournment under
2 those circumstances. We don't pursue testing
3 ourselves. We don't know that we will. We
4 aren't asking to. But we understand why the
5 State wants to pursue that testing. And we also
6 understand the potential ramifications, largely
7 unknowable now, but certainly imaginable, of
8 testing results that might cast doubt about a
9 verdict previously rendered in this case.

10 So, if this man could go home at night,
11 as the law enforcement officers do, and as the
12 rest of us do, with a GPS bracelet on his ankle,
13 or checking in every day to the Two Rivers Police
14 Department, or whatever the conditions are that
15 send him home, we would not oppose the State's
16 request for an adjournment to test.

17 We may well oppose in the end the
18 admissibility, the relevance of those test
19 results, but that, again, is something the Court
20 could address with the benefit of knowledge of
21 the test results, presumably, and a chance to
22 look at the type of testing that was done, the
23 protocols, and what the case law may have to say
24 about the admissibility of similar tests.

25 We have not sought defense testing at

1 this point ourselves, because as Mr. Buting said
2 the last time we were in court, we don't know of
3 a test that can be done that would be productive
4 or helpful. A federal decision from 2005 that
5 Mr. Buting uncovered, has a federal judge writing
6 in her decision that the FBI stopped doing the
7 very testing that Mr. Gahn now says the FBI will
8 do.

9 Mr. Gahn's information is fresher and,
10 again, this is a man who knows what he's doing
11 and is candid. But our best information had been
12 that the FBI wasn't in this business.

13 Mr. Buting can address the other lab
14 that the State has identified as being a possible
15 site for testing, and I have no basis on which to
16 dispute the State's assertion that there are, in
17 this whole country, but two laboratories capable,
18 presently, of doing this testing, the FBI and a
19 private laboratory the State has named.

20 Realistically, for reasons Mr. Buting can
21 address, the private laboratory may not be a good
22 choice for either the State or the defense.

23 So, I hope I have been clear. I
24 understand why the State wants to test. If the
25 presumption of innocence that he enjoys were

1 undergirded and backstopped here by letting him
2 sleep where innocent people, or presumptively
3 innocent people sleep, we would not oppose an
4 adjournment.

5 The Court may deny the adjournment for
6 its own reasons, but not over our objection, if
7 bail were modified so that he didn't spend 4 more
8 months, after 14, in jail, presumptively
9 innocent, in solitary confinement, and with his
10 every word to his loved ones listened to by
11 police, for potential evidence.

12 If that state of life is to continue
13 until he is tried, then Steven Avery opposes an
14 adjournment, thinks that testing could go forward
15 without prejudice to him, but reserves the right
16 to challenge or support, conceivably,
17 admissibility or relevance of test results and
18 opinions flowing from those test results.

19 And I would like to turn it over to
20 Mr. Buting to go give the Court a little bit
21 better sense of why the 30 day testing option
22 with a private lab may, in the end, not be
23 feasible for either the State or the defense.

24 THE COURT: Mr. Buting.

25 ATTORNEY BUTING: Judge, just to give you a

1 little bit of background, I looked into this. And
2 part of what we were doing when we discovered the
3 possibility that Mr. Avery's blood vial may be in
4 the Clerk's Office and recall that all we knew was
5 that there was a box that said it was in there, the
6 books we did not open until the Court granted
7 permission in December.

8 But in my research, it did not appear
9 that there was a credible lab available to do the
10 kind of testing that Mr. Gahn now says the FBI is
11 doing. And I don't know anything about their
12 protocol and whether this is credible or not.

13 But what I do know is that the kind of test he is
14 talking about, this EDTA test, to be able to try
15 and measure whether there is this preservative
16 that is found in blood vials, certain blood
17 vials, whether that can be detected in a
18 bloodstain at a crime scene, never came up until
19 the middle of the O.J. Simpson trial, at which
20 point the FBI, for the first time, while the
21 trial was going on, developed some sort of
22 testing protocol.

23 Their expert was called, actually by the
24 defense in the O.J. case, and was very helpful to
25 the defense, and ultimately very embarrassing to

1 the FBI, who was part of the whistle blower
2 allegations in the very lengthy investigation
3 that the FBI lab did of misconduct, or
4 negligence, or sloppy practices in their lab.
5 And that analyst, who had testified about the
6 EDTA test, was called to task for that very
7 testimony and that very test.

8 Since that case, a few cases have gone
9 forward where it's almost -- in fact, it is
10 always the defense that seeks to use this kind of
11 a test to determine -- and in most cases I think
12 it's been post-conviction -- but to determine
13 whether or not the blood may have been planted
14 that was found at the crime scene.

15 The alternate lab that the State
16 mentions in their motion, National Medical
17 Services located in Willow Grove, Pennsylvania,
18 has been severely discredited. And for that
19 reason, we didn't come to the Court and ask that
20 they do such a test.

21 The federal case that Mr. Strang was
22 referring to, for some reason I could not find on
23 Westlaw, but it is in public record. It is on
24 the website, PACER website, for the United States
25 District Court and the Southern District of

1 California, it's **Kevin Cooper vs. Jill Brown**,
2 Warden of San Quentin. And the District Court
3 Judge issued a very thorough, 160-page decision,
4 describing the protocol that was used for EDTA
5 test in that case.

6 About 26 pages of the 160 concerned that
7 one issue, the EDTA protocol, how it was devised.
8 There were affidavits filed by the FBI in that
9 case, that federal judge says in a footnote that,
10 Although the FBI had been testing during the O.J.
11 Simpson case, they were no longer in the business
12 of doing EDTA tests. So when I saw that, my
13 knowledge was that, really, there was nobody
14 credible still doing these kinds of tests.

15 THE COURT: What's the year of the case?

16 ATTORNEY BUTING: The decision came out in
17 June of 2005. I didn't copy the whole 160 pages so
18 I don't have that, but the Case No. -- the local
19 Case No. is 04-CV-656 and I have a PDF I could
20 certainly forward to the Court, that I was able to
21 download from their website.

22 In that case the defense used
23 Dr. Ballard from this National Medical Services.
24 And he was so severely discredited by not only
25 this court, but a prior court, **New Jersey vs.**

1 **Pompey**, that I just want to read this so that you
2 realize that, frankly, that alternative is not on
3 the table as far as I can see, from either side,
4 to try and submit testing to there.

5 What the court found in **Pompey**, as
6 repeated in this **Cooper** case, is that
7 Dr. Ballard's analytical methods were haphazard
8 and unreliable.

9 In sum, he used valid science, gas
10 chromatography/mass spectrometry, to obtain a
11 product, glibly and unscientifically dismissed
12 EDTA sources other than the purple-topped tubes,
13 and took a gargantuan leap to a conclusion that
14 is unsupported by science, facts in the record,
15 or even common sense.

16 Ballard skewed the presentation of his
17 data, obscured the significance of his findings,
18 and changed his hypotheses to suit defendant's
19 tampering theory. Ballard did not demonstrate
20 that his conclusions were predicated on a
21 reliable foundation. Rather, his constant
22 equivocations discredited his method of reasoning
23 and, thus, rendered his ultimate conclusion
24 worthless.

25 So I say this just so that it is very

1 clear, I do not see that lab as any option for
2 either side. And, therefore, we're left with, if
3 Mr. Gahn's information is correct, I have no
4 reason to doubt, but his information apparently
5 now is that the FBI is back in the business of
6 doing this. I don't know how they do it. And I
7 would certainly reserve the opportunity to
8 challenge the reliability or methods of protocol
9 that they use, and may want to discuss with this
10 Court further, how that should be done if that's
11 -- testing is granted. But, clearly, the FBI is
12 the only option, so I can understand why that is
13 the State's preference. Thank you.

14 THE COURT: Mr. Gahn.

15 ATTORNEY GAHN: Just very briefly, your
16 Honor. I think you can see that the defense at
17 least agrees that there's something important about
18 doing this testing, that traditionally it's been
19 requested by the defense and has generally come up
20 on post-conviction motions. The FBI does do this
21 testing. I have spoken with them on a number of
22 occasions, yesterday was the latest that I spoke
23 with the chemist, toxicologist who would be doing
24 this testing for us.

25 I do not, as I stated in the brief, for

1 the Court's information, I said there were two
2 places. I do not care to send it to National
3 Medical Services. We want to send it to the FBI.
4 That's where I believe the history, and
5 experience, and methodology used by them is --
6 will be to our benefit, should there be an
7 admissibility hearing down the road.

8 But I think that the defense recognizes
9 the importance of doing this testing. And if, as
10 they say, this vial of blood goes to the
11 integrity of our evidence, we have to test it,
12 your Honor. And we have to test it at a
13 credible, meaningful laboratory.

14 I don't think there is any way around
15 this. We either test it now, or test it later.
16 And the cases, I believe, under whether it be
17 ineffective assistance of counsel, or whether it
18 be the interest of justice, it's going to be
19 tested later. That's my belief. And I think
20 that our -- the history of these cases in
21 Wisconsin indicates that it would be prudent to
22 do it now instead of later.

23 THE COURT: Do I understand that, although
24 the National Medical Services Laboratory is
25 mentioned in your brief, that you share Mr. Buting's

1 opinion of their capabilities of doing this testing?

2 ATTORNEY GAHN: Let me put it this way, I
3 share that there has been prior cases, or especially
4 the case, the **Cooper** case, Mr. Buting, that that is
5 in existence, and the National Medical Services,
6 Dr. Ballard, did not fair well. Yes, I agree. And
7 I do not care to send it there. Now, whether they
8 have -- No, I agree, I do not believe that that is
9 an appropriate lab to send it to.

10 THE COURT: And with respect to the FBI
11 testing, has something changed at the FBI since
12 Mr. Buting indicates they were criticized in the
13 previous case.

14 ATTORNEY GAHN: I don't know, your Honor I
15 don't know that they stopped doing it. I'm not
16 aware of that. When I talked to the FBI -- I just
17 do not know about that. All I know is that they can
18 test it and they can quantify it.

19 I want to say something else. There are
20 a few differences, though. And I know that
21 Dr. Ballard did get beat up in some courts, and
22 he did make some stretches and leaps in his
23 conclusions. But as I recall the cases I read,
24 and they are probably the same that Mr. Buting
25 read, you were talking about, he was a defense

1 witness.

2 And they were talking about blood that
3 was on fabrics, like on a person's shirt. There
4 is a diffusion of that blood throughout the
5 shirt, and it is difficult to try to determine
6 the volume of what that blood would be, or what
7 would be the volume of the EDTA in that, as
8 compared to the volume of EDTA that's in the
9 blood.

10 I don't ever recall a case that I read
11 where they had the actual purple-topped tube
12 where they say it's coming from to make a
13 comparison, so that's a difference.

14 The other difference is is that
15 according to the records that the defense
16 provided me, Laboratory Corporation of America,
17 two days after this blood was drawn by the nurse,
18 made a spot card of it. So that is almost a
19 control that would be very helpful in the
20 interpretation of this case, if that control is
21 still in existence.

22 Now, I have a call out to Laboratory
23 Corporation of America. I talked to a Meghan
24 Clement, and as I said in my brief, there are a
25 lot of questions still we have to investigate and

1 look at. But if that spot card is available,
2 then you have sort of like a control, that was
3 taken right after the blood was drawn.

4 And that spot card, usually, are very
5 fresh. They are free of any type of
6 contaminates. And that's the purpose of them.
7 You could get an EDTA level right there. And the
8 other thing is, that we have blood that is on,
9 like, the vinyl of the car, on the metal portion,
10 and good photographs of it, things that there
11 isn't any excuses, that one could possibly make a
12 rational determination of the volume that is
13 there.

14 And that's the difference with this
15 case, than the ones I read where Dr. Ballard, I
16 think did make some leaps, a few leaps from this
17 fabric evidence, and whether it contained blood
18 that would have come from a purple-topped tube.
19 But we have the tube here. I also believe that
20 if we get it, we could make some type of
21 quantitation.

22 The problem is this, if you look on that
23 Exhibit 3, that the defense sent us in their
24 initial brief, from Laboratory Corporation of
25 America, I can't tell whether they removed one or

1 two milliliters. I don't know what tube this is.
2 I don't know if the nurse drew the full container
3 of the tube. I don't even know the size of the
4 tube.

5 All these questions we are trying to
6 answer. And we have only -- And it's been very
7 difficult over the Christmas and New Year's
8 holidays finding people, mostly everyone is
9 operating under a skeletal crew in their offices.
10 We are trying to do, which in contact people,
11 that had we known about this back in July we
12 could have done it. And apparently the defense
13 has not pursued any of that.

14 And I believe that they just like the
15 fact that there's this vial there. And they are
16 going to just draw their conclusions and try and
17 get the jury to speculate what all the
18 possibilities could have happened to that vial.
19 That's a -- We want to get to the truth. We want
20 to test this. And I believe we must test it.

21 THE COURT: And what's the -- your brief
22 indicates that -- that the FBI will require three to
23 four months, is that because the test takes that
24 long or some other reason?

25 ATTORNEY GAHN: I think it's a

1 recalibration of their instrumentation.

2 THE COURT: Explain that to me.

3 ATTORNEY GAHN: Well, from my
4 understanding, is that every -- during
5 accreditation, you have to recalibrate all your
6 instruments that you do whatever your tests are on.
7 They are in that process of doing the recalibration
8 of their instrumentation. That's my understanding
9 of why it's three to four months.

10 THE COURT: And is there -- Do you know
11 whether or not there's anything that can accelerate
12 that schedule? Do they understand that this case is
13 scheduled to go to trial in a month?

14 ATTORNEY GAHN: Yes, I have made that clear
15 as far as -- and I asked and, no, they cannot do
16 that within that time frame.

17 THE COURT: All right. What I'm going to
18 do today is take under advisement this weekend the
19 request of the State to adjourn the trial. That's
20 one of the issues that's raised here. And I want to
21 spend some time to think about that.

22 With respect to the other issue that's
23 raised concerning the frame-up evidence, if you
24 will, I did go back and take a look at my notes
25 from July. And this is one case where I didn't

1 pay enough attention to my own notes. I did
2 indicate in my notes to myself, that if there was
3 going to be evidence introduced in support of a
4 frame-up defense, that it should be dealt with by
5 a motion in limine ahead of time.

6 At this point, the Court has been
7 informed by the defense that the blood vial in
8 the Clerk's Office would form the basis, or maybe
9 the key element, of a defense case regarding an
10 alleged frame-up. I don't know what other
11 evidence the defense may be contemplating
12 introducing as part of that defense. And in
13 order to conduct an appropriate analysis under
14 **Richardson** as to whether such evidence should be
15 admissible, I have to know what it is.

16 We have a motions hearing scheduled for
17 January 19th. What I'm going to order is that
18 the defense provide the Court, in the form of a
19 motion in limine, that whatever evidence it
20 intends to introduce on the issue of a frame-up
21 defense, by next Friday, so that I can review
22 that evidence and we can be prepared to deal with
23 the motion on the 19th of January. I will, on
24 the issue of the request for and adjournment, get
25 back to the parties early next week --

1 Is there anything else today, keeping in
2 mind we still have, and I think we're still going
3 to keep it, the 9:00 status conference tomorrow?
4 I want a telephone status conference. I want
5 to -- just to inventory things that have to be
6 addressed before we proceed on the 19th.

7 ATTORNEY STRANG: There's one more thing
8 today. We have, tomorrow, at the end of the day, a
9 deadline on expert disclosure and also *Denny*
10 disclosure. I think we can hit -- I think we can
11 hit the expert disclosure.

12 We could hit the *Denny* disclosure, but I
13 have lost a lot of time this week because of this
14 issue, and an unexpected trip to court, and also
15 because of the cancellation of a flight on
16 Tuesday morning, back from a weekend away, and
17 would like the opportunity to file, by Monday at
18 noon, the *Denny* response, rather than by tomorrow
19 at 4:30. I ran that by Mr. Kratz, I'm sure he is
20 not wild about it but, as always, he is courteous
21 and I think doesn't have any objection, but of
22 course that's the Court's call.

23 THE COURT: Any objection from the State?

24 ATTORNEY KRATZ: That's a professional
25 accommodation I'm willing to provide, Judge, not a

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problem.

THE COURT: All right. That's acceptable to the Court. Anything else today?

ATTORNEY KRATZ: No, not today, Judge. Thank you.

THE COURT: Very we'll, we're adjourned for today.

(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 19th day of February, 2007.

Diane Tesheneck, RPR
Official Court Reporter

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