

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

3 STATE OF WISCONSIN,

4 PLAINTIFF, 05 CF 381

5 vs. Case No. 05 CF 381

6 STEVEN A. AVERY,

7 DEFENDANT.

8 **DATE:** September 28, 2009

9 **BEFORE:** Hon. Patrick L. Willis
Circuit Court Judge

10 **APPEARANCES:**

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

13 KENNETH R. KRATZ
Special Prosecutor
14 On behalf of the State of Wisconsin.

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

17 SUZANNE L. HAGOPIAN
Attorney at Law
18 On behalf of the Defendant.

19 MARTHA K. ASKINS
Attorney at Law
20 On behalf of the Defendant.

21 STEVEN A. AVERY
Defendant
22 Appeared in person.

23 **TRANSCRIPT OF PROCEEDINGS**

24 Reported by Diane Tesheneck, RPR

25 Official Court Reporter

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

5 ATTORNEY FALLON: Good morning, your Honor,
6 may it please the Court, the State appears by
7 Assistant Attorney General Tom Fallon and District
8 Attorney Ken Kratz as Special Prosecutors.

9 ATTORNEY HAGOPIAN: Steven Avery appears in
10 person with his attorney, Suzanne Hagopian, and
11 Martha Askins.

12 THE COURT: Very well, we are here this
13 morning on the defendant's post-conviction motion.
14 I will note for the record the defendant has filed a
15 post-conviction motion seeking a new trial on two
16 separate grounds.

17 The defendant alleges, as the Court
18 understands the motion, that the trial court
19 committed error by excluding evidence of third
20 party liability at the trial; and second, the
21 defendant alleges the trial court committed error
22 by improperly excusing a juror with a claimed
23 family emergency, following the first day of
24 deliberations. I will stop here, Attorney
25 Hagopian, and ask if you want to rephrase that.

1 I briefly summarized it, but.

2 ATTORNEY HAGOPIAN: No, that's fine.

3 THE COURT: Very well. One note, at the
4 outset, the Court did grant the defendant's request
5 to submit a portion of the post-conviction motion,
6 that is, documents relating to the claimed error in
7 excusing the juror, under seal. I did that with the
8 understanding that, following the evidentiary
9 portion of today's hearing, those documents would be
10 released. And I will issue an order, following the
11 hearing today, releasing all of the documents that
12 have been filed in connection with the
13 post-conviction motion, from their sealed status.

14 I will also indicate that, before
15 today's hearing, the parties filed briefs on the
16 issue of whether or not the juror who was
17 excused, who is the subject of that portion of
18 the post-conviction motion, would be permitted to
19 testify at today's hearing.

20 The parties indicated to the Court they
21 took opposite positions on that question and the
22 Court permitted the parties to file briefs with
23 the Court. Those briefs are included in the
24 documents which will be -- which were originally
25 admitted under seal, but which will be released

1 at the conclusion of today's hearing.

2 The State challenges the defendant's
3 offer of that testimony both on grounds of
4 relevance and as being prohibited by Section
5 906.06 of the Wisconsin Statutes. With respect
6 to the relevance of the proffered testimony, the
7 defense agrees, and the Court agrees, that as it
8 relates to some of the defendant's arguments, the
9 testimony would be irrelevant. That is, for
10 example, to the extent the defendant alleges that
11 the Court committed structural error in the
12 procedure that was used to exclude the juror, the
13 evidence would not be relevant.

14 However, the defendant argues that,
15 under other of its theories, specifically the
16 possibility that an appeals court would require
17 that the defendant show prejudice as a result of
18 the Court's actions, the evidence could have
19 relevance. And the Court agrees that both as it
20 relates to the defendant's allegations of
21 prejudice and the claim of ineffective assistance
22 of counsel -- Whoever has the child in the back
23 of the room is going to have to leave the
24 courtroom immediately. To the extent it relates
25 to the prejudice claim and the ineffective

1 assistance of counsel claim, the evidence could
2 have relevance and the Court will, therefore,
3 allow the excused juror to testify.

4 In addition, there's an issue of whether
5 or not the evidence is prohibited under Section
6 906.06 (2), which is a statute that in general
7 prohibits testimony from a juror when it's used
8 to impeach a verdict. Specifically, the
9 introductory portion of the statute reads as
10 follows: Upon an inquiry into the validity of a
11 verdict or indictment, a juror may not testify as
12 to any manner or statement occurring during the
13 course of the jury's deliberations.

14 The Court accepts the defendant's
15 arguments that while the type of testimony
16 described in the statute is of the type that
17 would be prohibited should the verdict be
18 questioned, in this case the evidence is offered
19 for a different purpose, that is, as it relates
20 to the procedure used to excusing the juror and,
21 therefore, the statute does not prohibit the
22 juror from testifying.

23 That is not to say that anything the
24 juror might say would be relevant, but the Court
25 concludes that the juror is not prohibited from

1 testifying in any respect, for those reasons.
2 Unless there's something further from either
3 party at this time, Attorney Hagopian, you may
4 call your first witness.

5 ATTORNEY HAGOPIAN: Very well, thank you.

6 THE COURT: Just a second.

7 ATTORNEY FALLON: Your Honor, thank the
8 Court for the ruling. We do have a motion to
9 sequester expected witnesses.

10 THE COURT: Any objection from the defense?

11 ATTORNEY HAGOPIAN: No.

12 THE COURT: Very well, any other witnesses
13 who will be testifying should be excused from the
14 courtroom at this time. I see Attorney Strang
15 leaving the courtroom. Are there any other
16 witnesses in the courtroom who the defendant intends
17 to call?

18 ATTORNEY HAGOPIAN: Our investigator, I
19 think, is going to leave.

20 THE COURT: Very well.

21 ATTORNEY FALLON: We're not going to oppose
22 if the investigator wishes to stay, because Officer
23 Wiegert is here on our behalf as well. So we don't
24 have any objection if their investigator wishes to
25 remain here, because we intend to have Officer

1 Wiegert present, not anticipating calling him, but
2 one would never know.

3 ATTORNEY HAGOPIAN: All right. Thank you.

4 THE COURT: Okay. That's acceptable to the
5 defense then, so the defense investigator and
6 Officer Wiegert may stay in the courtroom. Attorney
7 Hagopian, you may call your witness.

8 ATTORNEY HAGOPIAN: I would call Richard
9 Mahler.

10 ATTORNEY FALLON: While we're waiting for
11 Mr. Mahler, if the record would reflect that
12 Attorney Gahn has joined the prosecution table.

13 THE COURT: So noted.

14 THE CLERK: Please raise your right hand.

15 **RICHARD R. MAHLER**, called as a witness
16 herein, having been first duly sworn, was
17 examined and testified as follows:

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

20 THE WITNESS: Richard R. Mahler,
21 M-a-h-l-e-r.

22 **DIRECT EXAMINATION**

23 BY ATTORNEY HAGOPIAN:

24 Q. Mr. Mahler, how old are you?

25 A. Forty-four.

1 Q. Are you employed?

2 A. Yes.

3 Q. And where are you employed?

4 A. I work in retail.

5 Q. Are you married?

6 A. Yes.

7 Q. How long have you and your wife been married?

8 A. Thirteen years.

9 Q. Is it correct that you were selected to serve as
10 a juror in this case, that being State vs. Avery?

11 A. Yes.

12 Q. Was that in early February, 2007?

13 A. That's correct.

14 Q. Would you agree that this was a very high profile
15 case?

16 A. Yes, I do.

17 Q. Had you ever before served on a jury?

18 A. No, I did not.

19 Q. How did you feel about being selected to serve on
20 this jury?

21 A. I thought it would be an honor to look at
22 evidence and base a decision on the evidence.

23 Q. How did your wife feel about the fact that you
24 had been chosen to serve on the jury?

25 A. She was kind of excited because it was such a

1 high profile case and, I mean, she thought it
2 would be interesting for me to be on a jury.

3 Q. Had your wife been upset about something that had
4 been reported in the media at the time the jury
5 was selected?

6 A. Yes, ma'am.

7 Q. Do you recall what it was in the press report
8 that had upset your wife?

9 A. That I was a musician living off my wife's money.

10 Q. Now, your name didn't appear in that media report
11 did it?

12 A. No, ma'am.

13 Q. What about your wife's name, did that appear in
14 the press account?

15 A. No, it did not.

16 Q. But your wife was able to figure out who they
17 were talking about?

18 A. Yes, ma'am.

19 Q. Was your wife upset about that report to the
20 point that she did not want you to serve on the
21 jury?

22 A. No.

23 Q. When you began your jury service, were you and
24 your wife having marriage problems?

25 A. No, we were not.

1 Q. And as a juror in this case, as the trial got
2 under way, were you present in court for the
3 lawyers' opening statements?
4 A. Yes, I was.
5 Q. Were you present in court for all of the witness'
6 testimony?
7 A. Yes, I was.
8 Q. And were you also there in court for the lawyers'
9 closing arguments?
10 A. Yes, I was.
11 Q. That whole process took a number of weeks, didn't
12 it?
13 A. That's correct.
14 Q. Do you remember about how long you were here
15 listening to the case?
16 A. Five weeks, roughly.
17 Q. Now, during those five weeks when you were in
18 court, right up to the very end of trial, were
19 you permitted to go home each night?
20 A. Yes, I was.
21 Q. Were you permitted to go home on the weekends?
22 A. Yes.
23 Q. And did you, in fact, go home to your family each
24 night and on the weekends, while this trial was
25 going on?

1 A. Yes, that is correct.

2 Q. Was there a point in the trial when the jury was
3 not allowed to go home?

4 A. That was during deliberations.

5 Q. During about the time of deliberations?

6 A. Yes.

7 Q. Now, if I, when questioning you, use the word
8 sequestered, do you know what I'm talking about?

9 A. It means lock down.

10 Q. Lock down.

11 A. Can't go home, can't do nothing, no TV, sit in
12 your room and do nothing.

13 Q. Now, is it correct that you were among the 12
14 jurors who were given the case and began
15 deliberations?

16 A. Yes.

17 Q. And when that began, when the deliberations
18 began, do you recall how many nights you had
19 spent away from home?

20 A. I believe it was one night.

21 Q. Where did the jurors stay while you were
22 sequestered?

23 A. The Best Western in Chilton.

24 Q. And now, at that point, when you're sequestered,
25 five weeks, six weeks after you were selected to

1 serve on this jury, at that point were you and
2 your wife having marriage problems?

3 A. No.

4 Q. Did you feel that your wife was still generally
5 supportive of your jury service?

6 A. Yes, I do.

7 Q. I would like to direct your attention,
8 specifically, to the day that deliberations
9 began, which was March 15 of 2007; do you
10 remember that day?

11 A. Yes, I do.

12 Q. Do you recall approximately how long the jury
13 deliberated that day?

14 A. We deliberated for four hours.

15 Q. At some point, were the deliberations completed
16 for the night?

17 A. Yes, ma'am.

18 Q. Was it your expectation that deliberations would
19 begin again the next day?

20 A. That is correct.

21 Q. What was your mood as deliberations ended for the
22 night, on March 15th?

23 A. I was exhausted but, really, it was done for the
24 day.

25 Q. What was your feeling, in just a general sense,

1 as to how things had gone during deliberations
2 that day?

3 A. I was frustrated.

4 Q. And why was that?

5 A. Because of some comments in the deliberations.

6 Q. And what sort of comments, just generally?

7 A. One of the jurors made a statement before looking
8 at the evidence.

9 Q. And that made you feel frustrated?

10 A. Yes, it did.

11 Q. What did you do after deliberations were done for
12 the day?

13 A. We were escorted to the bus, and from the bus we
14 went to Seven Angels Restaurant.

15 Q. And did all of the jurors go out to eat together?

16 A. Yes, we all did.

17 Q. And you mentioned you were transported there by a
18 bus?

19 A. That's correct.

20 Q. And were you in the company of bailiffs, or
21 officers, or who was with you?

22 A. Bailiffs and state patrol officers. And I'm not
23 sure if there was county, but I know there were
24 plenty of state patrol officers around.

25 Q. So then you're at dinner at Seven Angels; was

1 there anyone present during the dinner, other
2 than the jurors?

3 A. The bailiff and, like I said, the other officers,
4 state patrolmen.

5 Q. At any point during the dinner did Sheriff Pagel
6 arrive?

7 A. Some time during dinner, yes, he did.

8 Q. And do you recall what was the occasion for him
9 to arrive at the restaurant?

10 A. Some of the jurors felt that they wanted to have
11 an alcoholic drink and I guess Sheriff Pagel
12 stated that the judge said it was okay.

13 Q. And in this restaurant, were the jurors seated in
14 some sort of separate room, away from the public?

15 A. Yes, we were all in like a side banquet room,
16 with the doors closed.

17 Q. And when Sheriff Pagel arrived, did he come into
18 that banquet room where the jurors were?

19 A. Yes, he did.

20 Q. Did he then leave after telling the jurors that
21 you could have a drink?

22 A. I don't recall.

23 Q. Could you describe the seating arrangement at the
24 restaurant?

25 A. It was in a -- tables were in kind of a U shape,

1 I believe, with a couple tables in the center,
2 that's what I remember.

3 Q. And who were you sitting next to?

4 A. I was sitting next to Juror Carl.

5 Q. And do you recall his last name?

6 A. Yes, Wardman.

7 Q. Now, Carl Wardman, he was another juror serving
8 on the case?

9 A. Yes, ma'am.

10 Q. Did you speak with Mr. Wardman at dinner that
11 night?

12 A. I didn't catch the question.

13 Q. Did you speak with Mr. Wardman at dinner that
14 night?

15 A. Yes, I did.

16 Q. And what did you say to him?

17 A. I told him that I was frustrated with
18 deliberations.

19 Q. And did Mr. Wardman have a response for you?

20 A. Yeah, if you can't handle it, why don't you just
21 leave.

22 Q. I'm sorry, I'm having a little trouble hearing
23 you. Could you speak up.

24 A. If you can't handle it, why don't you tell them
25 and just leave.

1 Q. Could you describe Mr. Wardman's tone of voice
2 when he made that comment?

3 A. Pretty much the way I stated it. You know, if
4 you can't handle it, then, you know, tell them
5 and just leave. Just kind of sarcastic tone of
6 voice.

7 Q. And how did you interpret Mr. Wardman's comment
8 to you?

9 A. Verbally threatening.

10 Q. Did you feel physically threatened by him?

11 A. No.

12 ATTORNEY FALLON: I'm sorry, I can't hear
13 the witness.

14 A. No, ma'am.

15 Q. (By Attorney Hagopian)~ When you said you felt
16 verbally threatened, what do you mean by that?

17 A. It was just his tone of voice and demeanor when
18 he said it.

19 Q. And how did your exchange with Mr. Wardman leave
20 you feeling?

21 A. I felt threatened and upset.

22 Q. You had earlier testified to even before going to
23 dinner that night to feeling somewhat frustrated
24 by the deliberations?

25 A. That's correct.

1 Q. Was Mr. Wardman at all involved in your feeling
2 of frustration from the deliberations?

3 A. Yes, he is the one who made the statement as we
4 walked into the jury room.

5 Q. What was the statement that was made?

6 ATTORNEY FALLON: Objection, relevance and
7 hearsay.

8 THE COURT: Counsel.

9 ATTORNEY HAGOPIAN: As to hearsay, we're
10 not offering it for its truth, but merely for the
11 effect on the listener. And the relevance is in
12 terms of his explanation as to why Mr. Mahler was
13 feeling the way he was.

14 THE COURT: I will allow it.

15 A. He said he's --

16 (Court reporter couldn't hear.)

17 A. He said, he's fucking guilty.

18 Q. And was that very early in the deliberations?

19 A. That was right as we got into deliberations.

20 Q. Had there been a preliminary vote taken by the
21 jury that day during deliberations?

22 A. Yes, there was.

23 Q. What was your vote?

24 A. I voted not guilty, based on I wanted to look at
25 all the evidence and make a decision based on

1 that evidence.

2 Q. And do you know what Mr. Wardman's vote was?

3 A. No, I can just guess. I have no clue what his
4 vote was.

5 Q. And when you say guessing, would it be correct to
6 say that you are relying on the comment that he
7 made --

8 A. Yes.

9 Q. -- basically arriving in the deliberation room?

10 A. Yes, ma'am.

11 Q. So, after dinner, did you then return to the
12 motel with the other jurors?

13 A. That's correct.

14 Q. And I assume you were taken back to the motel on
15 a bus?

16 A. Yes.

17 Q. All of the jurors together?

18 A. With state patrolmen --

19 Q. Mm-hmm.

20 A. -- all over the place.

21 Q. What did you do when you got back to the motel?

22 A. We were escorted to our rooms.

23 Q. Did -- Were you aware, were jurors all staying in
24 their rooms or did some other things happen?

25 A. At first, we were all pretty much in our rooms.

1 Q. Was there an area the jurors were allowed to
2 congregate?

3 A. Yes, in the evening, they had a television with
4 VCR tapes or movies that we could watch.

5 Q. Because I assume you didn't have a TV in your
6 individual room, did you?

7 A. No.

8 Q. And you didn't have a telephone in your room?

9 A. No, ma'am.

10 Q. At some point, then, after you're back from
11 dinner, back in your motel room, did you decide
12 to call home?

13 A. Yes, I did.

14 Q. And what did you -- So you didn't have a phone in
15 your room; what did you have to do to make
16 arrangements to call home?

17 A. Well, there was -- I noticed a couple other
18 jurors calling home from a phone that the bailiff
19 had, a cell phone.

20 Q. Were you aware, prior to your arrival back to --
21 at the motel that evening, that jurors were
22 allowed to call home?

23 A. No, I didn't.

24 Q. But you saw other jurors doing that?

25 A. Yes.

1 Q. And why did you decide to call home?

2 A. I decided to call home just to check in, to let
3 her know everything was okay.

4 Q. And when you refer to "check in and let her
5 know", are you referring to your wife?

6 A. Yes, ma'am.

7 Q. Did you have any information at that point that
8 your wife was trying to reach you?

9 A. No, not at all.

10 Q. Did you have any information that your wife had
11 called a bailiff, or anyone else at the motel, to
12 report a family emergency?

13 A. No.

14 Q. Were you able to speak with your wife?

15 A. Yes, I was.

16 Q. And you were doing this on the bailiff's cell
17 phone, correct?

18 A. That is correct.

19 Q. Were you in your private room or somewhere else
20 in the motel?

21 A. We were in the group TV room that we were
22 watching movies in.

23 Q. Did you tell your wife how you were feeling?

24 A. No.

25 Q. In that conversation, did your wife tell you

1 something about your stepdaughter?

2 A. Yeah, she said that there was an accident.

3 Q. How old was your stepdaughter at that time?

4 A. Seventeen.

5 Q. Now, the mention of an accident, did that come up
6 immediately in the conversation?

7 A. No.

8 Q. So you and your wife had conversed about other
9 matters before there was any mention of an
10 accident?

11 A. Just how I was doing. I told her I was doing all
12 right.

13 ATTORNEY FALLON: I'm sorry, I'm having a
14 real hard --

15 A. I told her that I was doing okay, that I was all
16 right.

17 Q. (By Attorney Hagopian)~ And it was then, after
18 some discussion, that there was mention of an
19 accident?

20 A. That's correct.

21 Q. Did your wife tell you that your stepdaughter was
22 in the hospital?

23 A. No, she did not.

24 Q. Did she tell you that your stepdaughter was
25 injured in any way?

1 A. No, she did not.

2 Q. Did your wife tell you that you needed to come
3 home?

4 A. No.

5 Q. Did you sense that your wife was upset that
6 evening?

7 A. Yes, I did.

8 Q. Did you know why?

9 A. No.

10 Q. Did you think your wife would divorce you if you
11 did not come home that night?

12 A. No, not at all.

13 Q. When you then ended the conversation with your
14 wife, did you hand the cell phone back to the
15 bailiff?

16 A. Yes, I did.

17 Q. As you handed the cell phone back to the bailiff,
18 did you tell the bailiff that you had a family
19 emergency?

20 A. Not that I recall.

21 Q. What did you do?

22 A. I went back to my room.

23 Q. And what were your thoughts at that point?

24 A. After sitting in my room for awhile, I was
25 uncertain what was happening at home.

1 Q. You were uncertain about what was going on at
2 home?

3 A. That's correct.

4 Q. Were you also feeling frustrated?

5 A. Yes, I was.

6 Q. And what was the source of that frustration?

7 A. That conversation at dinner.

8 Q. So were you still upset about your exchange at
9 dinner that night, with Mr. Wardman?

10 A. Yes, I was.

11 Q. Were you still upset about how things were going
12 in deliberations?

13 A. Yes.

14 Q. What did you do next?

15 A. I believe I talked to one of the state patrolmen,
16 outside my door.

17 Q. What did you tell the state patrol officer?

18 A. And I told him that I needed to talk to the
19 bailiff.

20 Q. And what was the officer's response?

21 A. He said he would get the bailiff to my room.

22 Q. And what happened next?

23 A. As I recall, the bailiff came in and said he
24 would get ahold of Sheriff Pagel.

25 Q. Did you provide any information to the bailiff at

1 that point?

2 A. Yes, that there was a family emergency I had to
3 deal with at home.

4 Q. And that was the extent of the conversation, as
5 you recall?

6 A. As I recall, yes.

7 Q. So the bailiff said he would get Sheriff Pagel.
8 Did Sheriff Pagel arrive, then, at some point?

9 A. Yes, he did, with the bailiff.

10 Q. And where were you when Sheriff Pagel arrived?

11 A. I was in my hotel room.

12 Q. And you had been in your motel room this entire
13 time, from after when you spoke to the state
14 patrolman, until Sheriff Pagel arrived?

15 A. Yes.

16 Q. And when Sheriff Pagel arrived, did he actually
17 come inside the motel room with you?

18 A. Yes, he did.

19 Q. Was there anyone present in that room, other than
20 you and Sheriff Pagel?

21 A. I believe the bailiff was there with him.

22 Q. And did you speak with Sheriff Pagel?

23 A. Yes, I did.

24 Q. Did Sheriff Pagel say anything to you?

25 A. Yes, I guess he was asking what was going on.

1 Q. And what did you tell Sheriff Pagel?

2 A. That there was some kind of an accident at home,
3 family emergency.

4 Q. Did you tell him anything else?

5 A. Just that I felt I needed to go home.

6 Q. Do you recall if you told Sheriff Pagel that your
7 stepdaughter's car had been totaled?

8 A. No, I don't recall saying anything like that.

9 Q. What did Sheriff Pagel do when you told him that
10 you needed to go home?

11 A. He said he would get ahold of the judge.

12 Q. Were you present when Sheriff Pagel spoke with
13 the judge?

14 A. Yes, I was.

15 Q. Do you remember where that occurred?

16 A. That was in my hotel room.

17 Q. So it's you and Sheriff Pagel in your room,
18 possibly the bailiff as well?

19 A. Right.

20 Q. And Sheriff Pagel was on the phone with the
21 judge; is that correct?

22 A. As I recall, yes.

23 Q. And is Sheriff Pagel using his own cell phone?

24 A. Yes, he was.

25 Q. Could you hear what the sheriff was saying to the

1 judge?

2 A. I remember him talking to the judge, but I don't
3 remember what he was saying.

4 Q. Now, at some point after this encounter with
5 Sheriff Pagel and the call to the judge, did you
6 yourself speak with Judge Willis?

7 A. Yes, I did.

8 Q. And whose phone were you using?

9 A. Sheriff Pagel's.

10 Q. And where were you when this conversation with
11 the judge took place?

12 A. In my hotel room.

13 Q. Was Sheriff Pagel present while you were speaking
14 with the judge?

15 A. Yes, he was.

16 Q. Do you recall where he was in relation to you,
17 the distance?

18 A. Couple feet.

19 Q. Would he have been able to hear what you were
20 saying?

21 A. Yes.

22 Q. Approximately how long did your conversation with
23 the judge last?

24 A. Two minutes.

25 Q. What, to the best of your recollection, did you

1 tell the judge?

2 A. I told him that there was a family emergency at
3 home. And I recall him asking if I needed --
4 sure I needed to go home.

5 Q. So you told the judge there was a family
6 emergency and you needed to go home?

7 A. Yes.

8 Q. Did you say anything else?

9 A. Not that I recall.

10 Q. Did the judge ask you if your stepdaughter was in
11 the hospital?

12 A. No, he did not.

13 Q. Did the judge ask you if your stepdaughter was
14 injured?

15 A. No, he did not.

16 Q. Did you tell the judge, in that conversation,
17 that your marriage was in trouble?

18 A. No, I did not.

19 Q. Did you tell the judge that you and your wife
20 were having trouble before the trial had even
21 begun?

22 A. No.

23 Q. What happened next?

24 A. I handed the phone back to Sheriff Pagel and then
25 I waited in my room and got my stuff together.

1 Q. Did the judge say anything to you at the end of
2 that conversation?

3 A. He said I was free to go.

4 Q. Had you told the judge the full story about why
5 you wanted off the jury that night?

6 A. No, I did not.

7 Q. What did you not tell the judge?

8 A. About my conversation with Mr. Wardman.

9 Q. Had your stepdaughter actually been in an
10 accident?

11 A. No, ma'am.

12 Q. What had happened to her?

13 A. Her car was having troubles. She just had car
14 troubles.

15 Q. When did you find that out?

16 A. Upon my arrival at home.

17 Q. And once you were home, what were your feelings
18 about having gotten off the jury?

19 A. I was frustrated and angry with myself.

20 Q. Did you feel like you had let yourself down?

21 A. I felt like I left myself down and all parties
22 involved.

23 Q. When did you start to feel that way?

24 A. A few hours after I got home.

25 Q. So you felt that way even before the jury had

1 come back with a verdict?

2 A. That's correct.

3 Q. Does this still bother you today?

4 ATTORNEY FALLON: Objection, relevance.

5 THE COURT: Attorney Hagopian.

6 ATTORNEY HAGOPIAN: I think it just may
7 offer some further explanation as to why he's here
8 today.

9 THE COURT: I'm going to sustain the
10 objection.

11 Q. (By Attorney Hagopian)~ Mr. Mahler, the way you
12 have spoken in your testimony today, is that your
13 typical manner of speaking?

14 A. No, ma'am.

15 Q. What is your typical manner?

16 A. I'm usually pretty happy. Pretty -- I don't feel
17 as nervous --

18 Q. Mm-hmm.

19 A. -- as I do right now.

20 Q. The way you are speaking today, is that how you
21 would speak when you are feeling upset about
22 something?

23 A. Yes, ma'am.

24 ATTORNEY HAGOPIAN: That's all I have.

25 Thank you.

1 THE COURT: Mr. Fallon.

2 ATTORNEY FALLON: Thank you.

3 **CROSS-EXAMINATION**

4 BY ATTORNEY FALLON:

5 Q. Good morning, Mr. Mahler.

6 A. Good morning.

7 Q. Would you say you have a pretty fair recollection
8 of the events of March 15th, 2007?

9 A. Yes, I do.

10 Q. Very well. What time did you begin deliberations
11 on March 15th, 2007?

12 A. It was in the afternoon, like one -- around 1:00.

13 Q. And what time did you call it a day,
14 deliberating?

15 A. It was like 4, 4:30 roughly.

16 Q. At the end of deliberations that day, what was
17 the first stop the jurors made when they left the
18 courthouse? Did they go to the hotel? Did they
19 go to the restaurant? What did they do first?

20 A. We went to the restaurant.

21 Q. And you went to Seven Angels?

22 A. That is correct.

23 Q. And there were the 12 jurors, correct?

24 A. That's correct.

25 Q. And there were bailiffs, correct?

1 A. That's correct.

2 Q. How many bailiffs?

3 A. I believe one.

4 Q. And there were some law enforcement officers
5 providing security detail, correct?

6 A. That is correct.

7 Q. All right. There were some sheriffs deputies?

8 A. As I recall.

9 Q. A state patrol officer or two?

10 A. Yeah, there were plenty of state patrol officers.

11 Q. All right. And you got to the restaurant on the
12 bus that was provided by the county, correct?

13 A. That is correct.

14 Q. Who did you sit with on the bus?

15 A. I don't recall.

16 Q. Did you have any conversations with anyone on the
17 bus, on the way to dinner?

18 A. No, sir.

19 Q. You testified that you had an unpleasant exchange
20 with Mr. Wardman at dinner. Prior to that dinner
21 conversation, you had no other conversation with
22 Mr. Wardman, correct?

23 A. That is correct.

24 Q. And thus, the only time that you had any exchange
25 with Mr. Wardman was at this brief dinner

1 exchange, correct?

2 A. That is correct.

3 Q. What did you have for dinner?

4 A. I believe it was some kind of -- like a French
5 dip type of sandwich.

6 Q. How did it come to pass that you were sitting
7 next to Mr. Wardman?

8 A. I just -- I don't know, I just sat down.

9 Q. Just coincidence that you ended up sitting next
10 to Mr. Wardman?

11 A. I don't know why, I just sat down.

12 Q. So it was a coincidence?

13 A. Pretty much so.

14 Q. All right. How long were you at the dinner --
15 excuse me -- How long were you at dinner or
16 having dinner at Seven Angels?

17 A. About an hour or so, as I recall.

18 Q. Not a long dinner; is that correct?

19 A. That is correct.

20 Q. All right. What did Mr. Wardman have?

21 A. I don't recall.

22 Q. And from your questioning by counsel, I take it
23 that you only had one exchange with Mr. Wardman,
24 correct?

25 A. That's right.

1 Q. I'm sorry?

2 A. Yes.

3 Q. All right. So you had no other small talk, as it
4 were, with Mr. Wardman, whatsoever?

5 A. No.

6 Q. And so at some point, was this before dinner,
7 during dinner, or after dinner, that you had this
8 exchange with him?

9 A. It was during dinner.

10 Q. And so out of the blue, without having any
11 discussion beforehand, you turned to him and told
12 him you were frustrated about the deliberations
13 that afternoon?

14 A. That is correct.

15 Q. All right. And he said, well, if you can't
16 handle it, then you should just tell them that
17 you want to leave, correct?

18 A. Yes.

19 Q. There was no other exchange between the two of
20 you, correct?

21 A. No, sir.

22 Q. I'm sorry?

23 A. No, sir.

24 Q. Thank you. Did you find participating in the
25 trial itself, as a juror, to be stressful?

1 A. Yes, sir. I believe we all did.

2 Q. And it was stressful, why?

3 A. Because to me it was because of certain things
4 that were said during deliberations.

5 Q. Well, I'm not getting to deliberations. I'm
6 talking about the trial itself, listening to the
7 evidence for the five weeks before deliberations,
8 was that stressful?

9 A. No, sir, I didn't feel it was.

10 Q. Okay. So it would be fair to say that the first
11 time you felt stress was during the initial four
12 hours of deliberations; is that correct?

13 A. That is correct.

14 ATTORNEY FALLON: May I have a moment,
15 please.

16 Q. (By Attorney Fallon)~ You found the deliberations
17 stressful because you attribute a cavalier
18 comment to one of the jurors, Mr. Wardman,
19 correct?

20 A. That's correct.

21 Q. All right. What other stress, other than that
22 one comment, now I'm talking during
23 deliberations, caused you stress?

24 A. There was a couple of different jurors that made
25 statements, but his stood out the most to me.

1 Q. All right. So there was the one statement that
2 he made and a statement or two attributed to
3 other jurors, seemingly suggesting too cavalier
4 approach for your liking; is that it?

5 A. To me, it just seemed they were more willing to
6 look at the evidence.

7 Q. I'm sorry, they were what?

8 A. To me it seemed that they weren't willing to sit
9 down and look at the evidence.

10 Q. So, there was a comment from Mr. Wardman and a
11 comment from how many other jurors?

12 A. Two others.

13 Q. All right. So there were three jurors that you
14 didn't think were taking this seriously enough?

15 A. That's correct.

16 Q. All right. And that made you stressful?

17 A. As far as doing my civil duty, yes.

18 Q. All right. Were you upset about that?

19 A. Yes, I was.

20 Q. Were you distraught?

21 A. I was angry.

22 Q. You were angry?

23 A. Yes, sir.

24 Q. And who did you express your anger to?

25 A. I basically held.

1 Q. All right. So you didn't respond to Mr. Wardman
2 when he made his first comment during
3 deliberations?

4 A. I did not.

5 Q. You did not respond to the other two jurors
6 either, correct?

7 A. That is correct.

8 Q. All right. So you didn't impress upon them the
9 serious nature of the deliberations, correct?

10 A. I did mention too that during the deliberations,
11 that we're here to look at the evidence. I
12 didn't direct it to the three jurors, but I said
13 to everybody, that we should look at the
14 evidence.

15 Q. All right. All right. So there were those three
16 comments that were made by three different jurors
17 during the initial deliberations stage?

18 A. Yes, sir.

19 Q. All right. There were no other comments,
20 correct?

21 A. No, sir.

22 Q. The rest of the time was actually spent looking
23 at the evidence and talking about things, as
24 jurors do, correct?

25 A. The majority of us, yes.

1 Q. All right. So that night, you had no prior
2 conversation with Mr. Wardman, whatsoever, before
3 you leaned over to him during dinner and told him
4 you were frustrated by that afternoon's events?
5 A. No, I did not.
6 Q. And you had no further conversation with him,
7 after he made what you termed to be a sarcastic
8 comment about, then you should just leave?
9 A. No, I had no other comment -- or no other
10 conversations with him.
11 Q. All right. And you had no conversation with any
12 other juror about your frustrations, correct?
13 A. No, not during --
14 Q. Dinner?
15 A. -- dinner.
16 Q. Correct?
17 A. That's correct.
18 Q. All right. On the bus ride back to the hotel,
19 who did you ride with?
20 A. I don't recall. I don't know.
21 Q. Did you have -- You didn't have any conversation
22 with anyone on the bus regarding the day's
23 events, your frustrations, I mean, correct?
24 A. No, sir. We were bound to not talk about it.
25 Q. All right. You got back to the hotel or motel;

1 what time was it?

2 A. I believe it was like 6, 6:30, something like

3 that.

4 Q. What was the first thing you did?

5 A. We were escorted to our hotel rooms.

6 Q. You were escorted to your room?

7 A. That's correct.

8 Q. Who escorted you to your room?

9 A. The sheriff -- The state patrol.

10 Q. A state patrol officer?

11 A. Yes. They walked us up the steps.

12 Q. How many bailiffs were there?

13 A. I do recall there was one.

14 Q. All right. Do you recall the bailiff's name?

15 A. No, I don't.

16 Q. He had been a bailiff with this jury for quite

17 some time, had he not?

18 A. Yes.

19 Q. All right. You do not recall his name at this

20 time?

21 A. No, sir.

22 Q. Did you have conversation with anyone else at

23 dinner, about family, about work, music?

24 A. No, not during the meal.

25 Q. Not during dinner?

1 A. No.

2 Q. On the bus ride back to the hotel?

3 A. No.

4 Q. When you got to the hotel, your first stop was

5 immediately to your room?

6 A. Yes.

7 Q. How long were you in your room?

8 A. Three, four hours, as I recall.

9 Q. Three or four hours.

10 A. Yes, sir.

11 Q. What did you do during the three or four hours?

12 A. I believe I went to sleep.

13 Q. So you had no conversation with anyone --

14 A. Not until --

15 Q. -- after returning to the motel?

16 A. Not until I found, you know, I found out there

17 was movies.

18 Q. What time was that?

19 A. That was probably around 9:30, 10:00.

20 Q. Well, if I were to tell you that court records

21 reflect that you had a conversation with Judge

22 Willis about your need to leave, about 9:00,

23 would that be incorrect?

24 A. I don't recall.

25 Q. You have no recollection of that?

1 A. I don't recall what time it was.

2 Q. All right. So, just so I'm clear, you went back
3 to your room and stayed in your room for a period
4 of time, you think you took -- you went to sleep?

5 A. As I recall, yes.

6 Q. So up to this point, you were frustrated?

7 A. Yes, I was.

8 Q. You were angry?

9 A. Yes.

10 Q. You were distraught?

11 A. I -- Yes.

12 Q. All right. And all as a result of your exchange
13 at dinner with one other juror; is that correct?

14 A. That is correct.

15 Q. That exchange at dinner lasted 10 seconds?

16 A. Yes.

17 Q. And as a result of that exchange, you felt
18 threatened; is that correct?

19 A. That is correct.

20 Q. All right. You were -- Did you feel -- Well,
21 let's talk about that. Why did you feel
22 threatened?

23 A. It was by the way he said it and his comment at
24 the beginning of deliberations.

25 Q. All right. And why did you feel threatened by

1 that, his tone of voice?

2 A. His demeanor, the way he said it.

3 Q. Did you feel it was going to seriously jeopardize
4 your ability to be a juror?

5 A. I don't believe it did.

6 Q. You don't believe that it did, correct?

7 A. I felt -- No, that I didn't feel that it would.

8 Q. I'm sorry, you are going to have to be clearer,
9 Mr. Mahler.

10 A. I didn't feel it would affect my judgment as a
11 juror, no.

12 Q. All right. So, in other words, being a juror,
13 you were going to more or less stick to your guns
14 and review the evidence and then decide, after
15 you reviewed everything, as you thought the
16 evidence merited, correct?

17 A. That is my -- That was my intention.

18 Q. That was your intention. And even though you had
19 this unpleasant exchange with Mr. Wardman, that
20 was still your intention when you went to your
21 room that night, correct?

22 A. Yes.

23 Q. All right. And it obviously wasn't that
24 threatening because you mentioned it to no one,
25 correct?

1 A. I'm not the kind that usually tells. You know, I
2 sometimes hold a lot of things in. I don't
3 express my anger.

4 Q. All right. But you didn't mention anything to
5 the bailiff, correct?

6 A. No, sir.

7 Q. And you didn't mention any of this concern or
8 threatening behavior to any of the troopers,
9 correct?

10 A. No, sir.

11 Q. And you didn't mention it to the sheriff's
12 deputies who were assisting in the security
13 detail, correct?

14 (Court reporter couldn't hear.)

15 A. No, sir.

16 Q. All right. Now, at some point you woke up and
17 you proceeded to this common room?

18 A. That's correct.

19 Q. And when you got to that room, who was present?

20 A. The bailiff and a bunch of other jurors.

21 Q. All right. And what was going on in the common
22 room when you arrived?

23 A. There were jurors watching television and I
24 noticed that other jurors were talking on the
25 cell phone with their spouses.

1 Q. All right. And the bailiff was there, correct?

2 A. That is correct.

3 Q. And what did you do?

4 A. After -- Well, when I noticed that other jurors
5 were calling their spouses, I asked if I could
6 call home.

7 Q. All right. And you asked the bailiff this,
8 correct?

9 A. That's correct.

10 Q. You asked if you could use his phone, right?

11 A. Yes, sir.

12 Q. And he agreed to allow you to call home, correct?

13 A. That's right.

14 Q. And he stood nearby as you called home, correct?

15 A. That's correct.

16 Q. All right. And you called home and spoke to your
17 wife?

18 A. Yes, sir.

19 Q. All right. And you have just told us that your
20 relations with your wife were just fine, correct?

21 A. Yes, sir.

22 Q. All right. You have a warm, loving relationship,
23 correct?

24 A. Yes, sir.

25 Q. All right. And you feel secure and safe in

1 telling her things that you may not tell other
2 individuals, correct?

3 A. Yes, sir.

4 Q. All right. And you have been married for how
5 many years, 15 years?

6 A. Thirteen.

7 Q. Thirteen years. All right. And often times you
8 have told her and expressed things to her that
9 you pretty much keep to yourself and don't tell
10 others, right?

11 A. Yeah, I try.

12 Q. And in this particular case, you were so upset
13 and so distraught, but you didn't mention
14 anything to your wife about the stress of the
15 deliberations, correct?

16 A. No, sir, because I was sworn not to say anything
17 to her about anything in deliberations.

18 Q. All right. Now, in your conversations with your
19 wife, she told you your stepdaughter had been in
20 an accident?

21 A. That's correct.

22 Q. All right. She was still upset about the report
23 that appeared in the press, during the initial
24 selection process, about you living on the
25 proceeds of a trust fund that she had, correct?

1 A. Didn't seem that's why she was upset that
2 evening.

3 Q. I'm coming to that. But at the time of the
4 deliberations, even after five or six weeks, that
5 was still a sore point with her, right?

6 A. I believe it was, yes.

7 Q. All right. Now, in the phone conversation that
8 night, March 15th, there was no discussion of
9 that press report, correct?

10 A. Not at all.

11 Q. All right. Did she tell you that your
12 stepdaughter's car was totaled?

13 A. No.

14 Q. She did not tell you that?

15 A. No, sir.

16 Q. All right. She was upset that your stepdaughter
17 was in an accident?

18 A. I didn't know why she was upset.

19 Q. But she told you that your stepdaughter was in an
20 accident?

21 A. That's correct.

22 Q. All right. And you assumed that she was upset
23 because of the accident?

24 A. That's correct.

25 Q. All right. You never asked if she was hurt,

1 right?

2 A. No, sir.

3 Q. And your wife never told you if your stepdaughter
4 was hurt, or did she?

5 A. No, she did not.

6 Q. She didn't tell you, right?

7 A. That's correct.

8 Q. All right. She also could have been upset
9 because you weren't there for family support,
10 because of the accident, correct?

11 A. I suppose that could be.

12 Q. That could be part of the --

13 A. Part of it, right.

14 Q. -- of the reason for her seeming upset to you?

15 A. I believe it could be, yes.

16 Q. All right. And how would you characterize her
17 demeanor on the phone?

18 A. She just seemed upset.

19 Q. Seemed upset. How did she seem upset to you?

20 A. Her tone of voice.

21 Q. All right. Was she crying?

22 A. I couldn't tell.

23 Q. Did she raise her voice?

24 A. No.

25 Q. Did she lower her voice too much?

1 A. I don't believe so, no.

2 Q. What was it about the tone of her voice that led
3 you to believe that she was upset?

4 A. It was the way she was talking to me, she just
5 seemed kind of like I'm talking to you now, you
6 know, kind of upset, nervous, whatever. I
7 couldn't -- It was the way she was talking.

8 Q. All right.

9 A. She wasn't talking like she usually talks to me.

10 Q. Did she tell you she wanted you to come home?

11 A. No, sir.

12 Q. She didn't tell you that?

13 A. No, sir.

14 Q. But you felt that you should go home?

15 A. I felt under the circumstances, yes.

16 Q. That you should go home?

17 A. Yes.

18 Q. Because you thought that there was a crisis at
19 home, that you should be there to help out?

20 A. I didn't know what was going on and I was worried
21 about what was happening, yes.

22 Q. How long did the conversation last between you
23 and your wife?

24 A. About five minutes.

25 Q. And that was in the common room?

1 A. Yes, sir.

2 Q. With the bailiff nearby?

3 A. That's correct.

4 Q. And he was there close enough to make sure that

5 there was no discussion regarding the status of

6 deliberations or the case, correct?

7 A. Yes, sir.

8 Q. So he could hear what you were saying?

9 A. Yes, I believe so.

10 Q. What did you say to the bailiff when you were

11 done speaking with your wife?

12 A. I just handed him the phone.

13 Q. You didn't say anything?

14 A. Not that I recall, no.

15 Q. You didn't say anything about the nature of your

16 conversation with your wife?

17 A. No, not that I --

18 Q. You didn't tell him that your wife seemed upset?

19 A. No.

20 Q. You didn't say anything that maybe you needed to

21 go home?

22 A. Not that I recall, no.

23 Q. All right. So after the conversation, you left

24 the common room and you went back to your room?

25 A. That is correct.

1 Q. Were you escorted back to your room, or did you
2 walk alone?

3 A. There were state patrolmen that escorted us or
4 were down the halls to ...

5 Q. So did they escort you, or were they just well
6 placed in the hallway to observe your movements?

7 A. They were -- I remember I was escorted to my
8 room.

9 Q. All right. And was your room nearby, or was it a
10 longer walk?

11 A. It was a longer walk.

12 Q. All right. You got to your room, the trooper
13 watched you walk into your room; is that correct?

14 A. That's correct.

15 Q. And you went into your room and you were there
16 alone?

17 A. That's right.

18 Q. All right. And you were in your room how long,
19 before you decided you needed to speak to
20 someone?

21 A. I don't recall how long I was there.

22 Q. What was your mood at that time?

23 A. I was upset, worried.

24 Q. You were worried about what was going on at home.

25 A. That's correct.

1 Q. You didn't really know what was going on at home;
2 is that what you are telling us?

3 A. That's correct.

4 Q. All right. So there was this reference to a car
5 accident, but the reason for your concern was
6 more that you had no idea what was going on; is
7 that correct?

8 A. The uncertainty, yes.

9 Q. The uncertainty of the situation made you upset?

10 A. That's correct.

11 Q. And it caused stress?

12 A. Yes, sir.

13 Q. And you were distraught?

14 A. Yes, sir.

15 Q. And primarily, as a result of the tone of voice
16 that your wife was talking to you about?

17 A. Yes, sir.

18 Q. All right. What did you talk about in that
19 conversation?

20 A. We talked about how things were going, you know,
21 how I was doing, how I was feeling.

22 Q. All right. How you were doing, how you were
23 feeling. And you told her you were doing, okay?

24 A. Yes, sir.

25 Q. So far so good, as it were; is that right?

1 A. Yes, sir.

2 Q. You didn't complain to her that you were feeling
3 down, correct?

4 A. I don't know.

5 Q. You didn't tell her you certainly weren't feeling
6 threatened, right?

7 A. I don't remember saying anything like that.

8 Q. Basically, you tried to put her at ease and tell
9 her everything was all right with you, correct?

10 A. Yes, sir, without going into details of
11 deliberations or anything.

12 Q. Right. But generally, your mood, you said you
13 talked about how each of you were feeling and you
14 told her you were fine, right?

15 A. (Witness nods.)

16 Q. Is that a yes?

17 A. Yes, sir.

18 Q. Thank you. All right. After some period of time
19 in your room, you decided that you need to speak
20 to someone. How much time would you say elapsed
21 before you, after mulling these things over, you
22 stepped into the hallway, right?

23 A. Yes. I don't remember.

24 Q. All right. And who did you speak to in the
25 hallway?

1 A. State patrol officer.

2 Q. All right. And you didn't tell him anything
3 other than what?

4 A. That I needed to talk to a bailiff.

5 Q. All right. And he said he would get the bailiff?

6 A. Yes, sir, as I recall.

7 Q. All right. So he told you to remain in your
8 room, correct?

9 A. Yes, sir.

10 Q. All right. So you went to your room -- back in
11 your room?

12 A. Yes, sir.

13 Q. All right. And he went and got the bailiff?

14 A. That's correct.

15 Q. All right. Now, if I told you that bailiff's
16 name was Oscar, would that ring a bell?

17 A. Yes, sir.

18 Q. That was the bailiff, right?

19 A. Yes, sir.

20 Q. All right. So Oscar came to your door, right?

21 A. As I recall, yes.

22 Q. All right. Did he come into your room?

23 A. I believe he did.

24 Q. All right. All right. What did you tell Oscar?

25 A. That there was a family emergency and I felt I

1 had to go home.

2 Q. Did you give him any details on the family
3 emergency?

4 A. No.

5 Q. Did you tell him your stepdaughter was in an
6 accident?

7 A. Not that I recall.

8 Q. Did you tell him your wife was upset?

9 A. Not that I remember.

10 Q. You didn't tell him it was the uncertainty of the
11 situation which led you to believe you should go
12 home?

13 A. Not that I recall, no.

14 Q. All right. So Oscar told you that he would get
15 the sheriff, right?

16 A. That's correct.

17 Q. All right. It's your testimony that you talked
18 to Sheriff Pagel first, correct?

19 A. After I talked to the bailiff --

20 Q. Right.

21 A. -- I believe, yes.

22 Q. The first person you talked to after Oscar was
23 Sheriff Pagel?

24 A. That's correct.

25 Q. You told Sheriff Pagel that your stepdaughter was

1 in an accident?

2 A. That's correct.

3 Q. You told him that the vehicle was totaled?

4 A. I don't recall that.

5 Q. You told him that your wife was very upset about
6 the accident?

7 A. I don't recall.

8 Q. You don't recall saying that?

9 A. No, I was pretty upset at the time.

10 Q. You were upset at the time?

11 A. I was upset with --

12 Q. And you were upset at the time because you
13 couldn't figure out why your wife was upset?

14 A. That's correct.

15 Q. You also told him that your wife was still upset
16 because of the media reports regarding this trust
17 fund issue, correct?

18 A. I don't recall that.

19 Q. You don't recall telling him that?

20 A. No, sir.

21 Q. Could you have told him that?

22 A. I might have.

23 Q. All right. Could you have told him that your
24 wife was upset about the accident; could you have
25 told him that?

1 A. It's probable, possible.

2 Q. It's probable, possible. All right. You told
3 him that your wife was upset by the amount of
4 time that you were away from the home because of
5 the length of this trial, right?

6 A. I don't recall.

7 Q. You don't recall. You could have told him that?

8 A. I don't recall.

9 Q. You don't recall. You would characterize your
10 demeanor in your conversation with Mr. Pagel as
11 being upset?

12 A. Yes, sir.

13 Q. Distraught?

14 A. Yes, sir.

15 Q. All right. Really concerned about what was going
16 on at home?

17 A. Yes, sir.

18 Q. All right. You certainly suggested or implied
19 that you had some marital difficulties with your
20 wife, with Mr. Pagel, correct?

21 A. I don't recall saying anything like that.

22 Q. You didn't imply or impress upon him that it was
23 vital for your marriage that you be excused and
24 go home and attend to those family issues?

25 A. I don't recall.

1 Q. You don't recall?

2 A. No, sir.

3 Q. Specifically, and exactly, what did you tell
4 Sheriff Pagel when he came to your room?

5 A. As I recall, that I told him there was a family
6 emergency that I had to attend to at home.

7 Q. That was it?

8 A. That's what I recall telling him.

9 Q. That's what you recall.

10 A. Yes, sir.

11 Q. All right. And he said he would contact the
12 judge?

13 A. Yes, sir.

14 Q. All right. He left your presence?

15 A. I believe he did.

16 Q. All right. And he contacted someone, or did
17 something, he was gone?

18 A. Yes, sir.

19 Q. For a few minutes?

20 A. Mm-hmm.

21 Q. He returned?

22 A. That's correct.

23 Q. All right. And when he returned, he had a cell
24 phone?

25 A. Yes, sir.

1 Q. And at that particular point, he dialed the cell
2 phone and you believed him to be contacting Judge
3 Willis?

4 A. That's correct.

5 Q. All right. And he and Judge Willis had a brief
6 conversation?

7 A. I believe so, yes.

8 Q. How long?

9 A. I don't recall.

10 Q. Seconds?

11 A. He just put me on the phone.

12 Q. He put you on the phone right away?

13 A. Pretty much so, yes.

14 Q. All right. So you didn't overhear any
15 conversation, at that particular point, between
16 Sheriff Pagel and Judge Willis?

17 A. I don't recall much of a conversation.

18 Q. You recall no conversation?

19 A. Much of a conversation, right.

20 Q. And your impression was it was very brief and he
21 then handed you the phone so that you could speak
22 to the judge?

23 A. Yes, sir.

24 Q. All right. And at that particular point, you
25 spoke to the judge?

1 A. That's correct.

2 Q. All right. At that particular point, when you
3 spoke to the judge, you were upset?

4 A. Yes, sir.

5 Q. You were distraught?

6 A. Yes, sir.

7 Q. You were concerned about what was going on at
8 home?

9 A. That's correct.

10 Q. In fact, you were concerned primarily because you
11 had no idea what was going on at home?

12 A. That's correct.

13 Q. All right. You told the judge that your
14 daughter, your stepdaughter, was in an accident?

15 A. That's correct.

16 Q. You told him that the vehicle had been totaled?

17 A. I don't recall.

18 Q. You told the judge that your wife was very upset
19 about the accident?

20 A. I believe that's what I told him, yes.

21 Q. All right. You also told him that your wife was
22 upset about the amount of time that you were
23 spending away from home because of the
24 requirements of this trial?

25 A. I don't recall that.

1 Q. You don't have any recollection of that?

2 A. No, sir.

3 Q. All right. You could have told the judge that?

4 A. I don't recall if I did or not.

5 Q. You told the judge that the family and friends

6 and your wife were still somewhat embarrassed by

7 those news reports about the trust fund issue,

8 right?

9 A. I don't recall saying that.

10 Q. You don't have any recollection of saying that to

11 the judge?

12 A. No, sir.

13 Q. You told the judge you were having marital

14 difficulties, correct?

15 A. I don't recall saying that to him.

16 Q. You have no recollection of that?

17 A. No, sir.

18 Q. You impressed upon the judge that it was vital

19 that you go home to preserve your marriage,

20 because you were concerned about that, correct?

21 A. I don't recall saying that.

22 Q. When you were speaking with the judge, you spoke

23 very quietly, right? That's your demeanor?

24 A. I believe I sounded upset.

25 Q. All right. And your tone of voice, you spoke

1 quietly?

2 A. I don't -- I believe I was talking, you know,
3 like I am right now.

4 Q. Slowly?

5 A. That's correct, like I was upset --

6 Q. Somewhat --

7 A. -- and nervous.

8 Q. I'm sorry, go ahead.

9 A. Well, I was talking like I am, basically, now.

10 Q. Somewhat monotone?

11 A. Correct.

12 Q. You told the judge that the trial was putting a
13 strain on your marriage, didn't you?

14 A. I don't recall that.

15 Q. You have no recollection of that?

16 A. No, sir, none at all.

17 Q. What impression were you trying to create with
18 the judge, in this conversation with him?

19 A. I was upset.

20 Q. All right. What other impression? What did you
21 want the judge to conclude, after his discussion
22 with you?

23 A. That I should be let go.

24 Q. That you should be allowed to return home,
25 correct?

1 A. Yes, sir.

2 Q. So your conversation with him was designed to
3 accomplish that objective, right?

4 A. Under the circumstances, yes.

5 Q. All right. You certainly left the judge with the
6 impression that your marriage might very well be
7 at stake because --

8 ATTORNEY HAGOPIAN: Objection, that would
9 be beyond the scope of his knowledge.

10 ATTORNEY FALLON: I will rephrase.

11 THE COURT: Go ahead.

12 Q. (By Attorney Fallon)~ It was your intent to
13 create the impression that your marriage was at
14 stake?

15 A. I don't believe so.

16 Q. Your conversation with the judge lasted less than
17 five minutes, right?

18 A. About two, three minutes, yeah.

19 Q. And Sheriff Pagel was present the entire time of
20 that conversation, correct?

21 A. Correct.

22 Q. And he was just a few feet away from you during
23 the course of that conversation, right?

24 A. Yes, sir.

25 Q. All right. At the end of the conversation, the

1 judge told you you could be excused?

2 A. That's correct.

3 Q. All right. And he told you that he would not
4 publicly disclose the reasonings, on the record,
5 correct?

6 A. As I believe, yes, that's what he said.

7 Q. All right. And you thanked him for that,
8 correct?

9 A. Yes, sir.

10 Q. You were concerned about your family privacy in
11 those issues, at the time, correct?

12 A. Yes.

13 Q. All right. Mr. Mahler, in your conversation with
14 Sheriff Pagel, before the call with Judge Willis,
15 you never mentioned anything about your concerns
16 of being verbally threatened by another juror,
17 correct?

18 A. No, sir.

19 Q. You never mentioned anything to the bailiff,
20 Oscar, that this was a concern, correct?

21 A. No, sir.

22 Q. All right. And the bailiff was the one who was
23 actually in charge of the juror's well-being,
24 correct?

25 A. Yeah, I believe so.

1 Q. That was his job, as far as you could tell?

2 A. Mm-hmm. Yes, sir.

3 Q. And you never mentioned anything about your
4 concerns with the jury or, more particularly,
5 this incident at the restaurant, correct?

6 A. No, sir.

7 Q. All right. And in your conversation with Judge
8 Willis, you did not tell him about that?

9 A. No, I was pretty much concerned about what was
10 happening at home.

11 Q. All right. And the real reason you wanted to go
12 home was what was occurring at home, or what you
13 didn't know, but certainly was concerning to you,
14 at home?

15 A. Yes, that was.

16 Q. That was the reason you wanted to go?

17 A. Yes, sir.

18 Q. So if -- In an effort to get home, you told the
19 judge that you were having marital problems,
20 didn't you?

21 ATTORNEY HAGOPIAN: Objection, asked
22 several times and answered.

23 THE COURT: Sustained.

24 Q. (By Attorney Fallon)~ Mr. Mahler, the
25 preservation of your marriage was more important

1 than your duty as a juror, correct?

2 A. I don't believe, no.

3 Q. You don't believe so?

4 A. It had nothing to do with my marriage.

5 Q. I'm sorry?

6 A. It had nothing to do with my marriage.

7 Q. But you told the judge that it did?

8 A. I don't recall --

9 ATTORNEY HAGOPIAN: Objection.

10 A. -- saying that.

11 ATTORNEY HAGOPIAN: Covering the same
12 ground.

13 THE COURT: I'm going to sustain the
14 objection.

15 Q. (By Attorney Fallon)~ All right. Did you intend
16 to deceive the judge?

17 A. I don't recall saying --

18 Q. You don't recall saying any of those things I
19 asked you about, is that correct?

20 A. About my marriage being in trouble, no. And my
21 intention wasn't to deceive the judge.

22 Q. Your intention was to get home?

23 A. Under the circumstances, yes, right.

24 Q. And those circumstances were the problems at
25 home?

1 A. The uncertainty of what the accident, or
2 whatever, what I thought was an accident.

3 ATTORNEY FALLON: Pass the witness.

4 THE COURT: Any redirect?

5 ATTORNEY HAGOPIAN: Yes, please.

6 **REDIRECT EXAMINATION**

7 BY ATTORNEY HAGOPIAN:

8 Q. Mr. Mahler, you made reference that you had
9 entered into deliberations with the plan of how
10 you wanted to proceed; is that right?

11 A. That's correct.

12 Q. And what was your thought about what you wanted
13 to do in deliberations?

14 A. My object was --

15 ATTORNEY FALLON: Objection, beyond the
16 scope of cross.

17 THE COURT: Counsel.

18 ATTORNEY HAGOPIAN: There had been
19 testimony, at some length, elicited on cross, as to
20 his reaction and things that were actually said
21 during deliberations. And that's what I am leading
22 to, following up on that.

23 ATTORNEY FALLON: The question is his state
24 of mind and what occurred that evening, not what he
25 was planning to do the next day.

1 THE COURT: As the question is phrased, I'm
2 going to sustain the objection.

3 Q. (By Attorney Hagopian)~ You testified about some
4 comments that were made by the jurors in this
5 first day of deliberations; do you recall that
6 testimony?

7 A. Yes, ma'am.

8 Q. And how did those comments leave you feeling?

9 A. I felt hopeless. I felt angry. I was angry and
10 I felt hopeless.

11 Q. And one of the jurors who made the comment, as
12 you described, quite immediately, that he is
13 guilty, that's one of the comments you are
14 referring to that left you feeling frustrated?

15 A. Yes. There were similar comments from two other
16 jurors.

17 Q. So then, at dinner, when you were seated next to
18 Mr. Wardman, and you made the comment that you
19 were feeling frustrated; in your own mind, what
20 were you referring to?

21 A. I was referring to his comment, without directly
22 pointing the finger at him.

23 Q. And it was after you made the comment, in your
24 own mind referring to his behavior during
25 deliberations, that he then responded to you,

1 correct?

2 A. That's correct.

3 Q. And your testimony was that his -- his -- his
4 comment was that you should try to get off the
5 jury?

6 A. Yes.

7 Q. And how did you take that comment?

8 A. As a verbal threat.

9 Q. And I would like you to explain what you mean by
10 a verbal threat. In your own mind, at that time,
11 what did you think he was trying to tell you?

12 ATTORNEY FALLON: Objection, asked and
13 answered.

14 THE COURT: Sustained.

15 Q. (By Attorney Hagopian)~ You have testified, that
16 when you spoke with the judge, that you were
17 feeling frustrated and you were upset. Part of
18 that frustration was your family situation?

19 A. Yes.

20 Q. Was there some other thoughts in your mind at
21 that time that were troubling you?

22 A. It was a mixture of what was said during
23 deliberations, at lunch, and then all of a sudden
24 the family emergency hit.

25 Q. And when you refer to the deliberations, what

1 specifically are you referring to?

2 A. To the comment that Carl and two other jurors had
3 made.

4 Q. And are you also, then, referring to the comment
5 that was made by Mr. Wardman at dinner?

6 A. Yes.

7 Q. So when you spoke to the judge, you did want off
8 the jury; is that right?

9 ATTORNEY FALLON: Objection, leading.

10 Q. (By Attorney Hagopian)~ When you spoke to the
11 judge, what were you hoping to accomplish?

12 A. To go home and find out what was really going on.

13 Q. Had you been instructed by the Court about what
14 you could and couldn't talk about, in terms of
15 the deliberations?

16 A. Pretty much anything about the trial, we weren't
17 allowed to talk to anybody about.

18 Q. And was it your understanding that you should not
19 be talking to other people about what was going
20 on in deliberations?

21 A. That is correct.

22 Q. Did you think it would, in any way, be improper
23 for you to talk with your wife about what
24 happened in deliberations that day?

25 A. Yes, it would have been improper.

1 Q. Would it have -- Also, in your own mind, would
2 you have thought maybe it wasn't proper to talk
3 about that with the bailiff?

4 A. I felt it was improper to talk about it with
5 anybody.

6 Q. When you spoke with your wife that evening, and
7 there was mention of an accident, did your wife
8 provide you with any details about this accident?

9 A. Not at all.

10 Q. Did you ask her specific questions about the
11 accident?

12 A. No, I didn't ask her.

13 Q. So there's mention of an accident and then what
14 happens in the conversation?

15 A. I just said, well, I got to get going, I will
16 talk to you later.

17 Q. You were questioned some about this press report
18 about a trust fund that I would like to ask if
19 you remember a day, I'm referring to March 12th
20 of 2007, that would have been a few days before
21 the case went to the jury. Do you remember being
22 brought in and questioned by the judge, each
23 juror, one by one?

24 A. Yes, ma'am.

25 Q. You specifically remember that day and you

1 remember, were you in the courtroom or somewhere
2 else?

3 A. We were in a back room.

4 Q. And do you recall at that time some reference
5 being made to that press report?

6 A. I don't recall.

7 Q. Would it refresh your recollection to take a look
8 at the transcript of that? I have here --

9 THE COURT: Just a minute. Do you
10 understand the question?

11 THE WITNESS: Yes, ma'am. Yes, sir.

12 THE COURT: What is your answer, to whether
13 or not looking at the transcript would refresh your
14 recollection?

15 THE WITNESS: Yes, it would help.

16 THE COURT: Go ahead.

17 ATTORNEY FALLON: I'm going to object as to
18 the relevance of the transcript during the jury
19 selection process as it pertains to his state of
20 mind on the night the decision to excuse him.

21 THE COURT: It's my understanding we're not
22 talking about the jury selection process here, but
23 rather a questioning of the jury that occurred a few
24 days before these events. I don't actually know the
25 substance of what's being referred to. Why don't

1 you show Mr. Fallon the transcript.

2 ATTORNEY HAGOPIAN: Certainly.

3 (Off record discussion.)

4 ATTORNEY FALLON: That's fine, Judge, I
5 will withdraw the objection.

6 THE COURT: Very well.

7 ATTORNEY HAGOPIAN: May I approach the
8 witness?

9 THE COURT: Yes, you may.

10 Q. (By Attorney Hagopian)~ Mr. Mahler, I'm showing
11 you a transcript dated March 12, 2007. I'm on
12 page 32. I'm actually going to ask you to start
13 reading at line 24. It refers to officer as
14 being the speaker, however, I believe Mr. Fallon
15 will agree that that must be a typographical
16 error and that was actually you speaking.

17 ATTORNEY HAGOPIAN: Is that correct,
18 Mr. Fallon?

19 ATTORNEY FALLON: That would be my
20 understanding of the general context of the
21 discussion, it appears to be a misnomer.

22 Q. (By Attorney Hagopian)~ I would ask you then to
23 start reading on line 24, continue on to the next
24 page and read through line 16?

25 THE COURT: And you are asking him to read

1 it to himself?

2 ATTORNEY HAGOPIAN: Yes, please.

3 A. Okay.

4 Q. (By Attorney Hagopian)~ Okay. Have you completed
5 reading that?

6 A. Yes, ma'am.

7 Q. I will take that back then. And I'm going to ask
8 you, then, in that questioning by the Court, did
9 you raise with the Court the incident where there
10 had been a press report that had caused some
11 upset for your wife?

12 A. Yes, ma'am.

13 Q. And were you asked whether that would affect you
14 now, at this point in the trial, shortly before
15 deliberations were to begin?

16 A. Yes.

17 Q. And did you feel at that point that this was
18 going to affect your ability the serve as a
19 juror?

20 A. Not at all.

21 Q. And as far as you can recall, Mr. Mahler, in
22 your -- whatever you told Sheriff Pagel when he
23 came into your motel room, you do not recall
24 mentioning your wife's upset about this press
25 report?

1 A. No, ma'am.

2 Q. And to the best of your recollection, you do not
3 recall mentioning that in your conversation with
4 the judge?

5 A. No.

6 Q. Is it fair -- If the judge, when you spoke with
7 him by phone that evening, had asked you for
8 details about the accident, would you have been
9 able to provide them?

10 A. No, ma'am.

11 Q. And when you refer to your upset about your
12 family situation, did you feel -- what was your
13 feelings in terms of what you have described as
14 the uncertainties?

15 A. I just wasn't sure what was happening at home.
16 And I was upset, like anyone would probably be,
17 with uncertainty of the situation.

18 Q. And your lack of knowledge about the accident,
19 about what was going on at home, these would be
20 matters that could be clarified with some further
21 follow up with your family?

22 A. Yes.

23 Q. But that never happened, right?

24 A. No, ma'am.

25 ATTORNEY HAGOPIAN: That's all I have.

1 Thank you.

2 THE COURT: Mr. Fallon, anything?

3 ATTORNEY FALLON: Nothing.

4 THE COURT: Very well. You are excused.

5 We'll take our morning break at this time and resume
6 at 5 minutes to 11.

7 (Recess taken.)

8 ATTORNEY FALLON: Your Honor, before we
9 proceed, I think counsel and I would like to
10 introduce Exhibit No. 1, which is the Court's
11 memorandum on the issue we just talked about.

12 THE COURT: The Clerk will mark it. It is
13 marked. Very well.

14 ATTORNEY FALLON: Very well. Thank you.

15 THE COURT: And is it stipulated that it's
16 being admitted, or you are simply marking it?

17 ATTORNEY FALLON: I believe admitted.

18 ATTORNEY HAGOPIAN: Admitted. Although
19 could I just look at the second page of that, just
20 to make sure?

21 ATTORNEY FALLON: It's got the addendum.

22 ATTORNEY HAGOPIAN: It does. Okay.

23 ATTORNEY FALLON: Yup.

24 THE COURT: Very well, Exhibit 1 is
25 admitted. Attorney Hagopian, you may call your next

1 witness.

2 ATTORNEY HAGOPIAN: We call Dean Strang.

3 **ATTORNEY DEAN A. STRANG**, called as a
4 witness herein, having been first duly sworn, was
5 examined and testified as follows:

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

8 THE WITNESS: Dean A. Strang, S-t-r-a-n-g.

9 **DIRECT EXAMINATION**

10 BY ATTORNEY HAGOPIAN:

11 Q. Is it correct, Mr. Strang, that you and Attorney
12 Jerry Bruting (sic) were trial counsel for
13 Mr. Avery in this case?

14 A. Not initially, but eventually, yes.

15 Q. And you were -- you or your law firm was retained
16 by Mr. Avery?

17 A. Initially, I and my law firm were retained, and
18 then Jerry Buting was retained after that.

19 Q. And you were the first attorney to represent
20 Mr. Avery in this case, were you?

21 A. No.

22 Q. Is it correct that his first attorneys were
23 appointed by the Public Defender's Office?

24 A. That's my understanding.

25 Q. And the defendant must be found indigent in order

1 to qualify for public defender appointment; isn't
2 that right?

3 A. At least past an initial appearance, that's my
4 understanding.

5 Q. How was Mr. Avery able to afford to retain you?

6 A. He settled the civil action he had pending under
7 42 U.S.C. 1983 and all -- or substantially all of
8 those proceeds went to retaining counsel.

9 Q. And that lawsuit, the civil action, was related
10 to his wrongful conviction; is that right?

11 A. Yes.

12 Q. When you agreed to represent Mr. Avery, did you
13 or your law firm enter into a written retainer
14 agreement with Mr. Avery?

15 A. The firm did, yes.

16 Q. Did that agreement require Mr. Avery to pay a
17 specific fee to retain your law firm?

18 A. Yes. And my recollection is that it was to be a
19 flat fee. So, yes, he had to pay a specific fee
20 to retain us and that was all we were going to
21 get.

22 Q. The record shows that you were retained in about
23 February of 2006 and the trial began a year
24 later, February of 2007. When the trial began,
25 how much of the fee had been expended for

1 Mr. Avery's representation?

2 A. I cannot be certain of that, but if forced to
3 guess, I would say all of it, and then some,
4 before trial began.

5 Q. To your knowledge at that time, did Mr. Avery
6 have additional funds to put towards his legal
7 representation?

8 A. No, nothing significant. There may have been an
9 old car somewhere, or snowmobile, but nothing
10 that was worth the trouble to try to ask him to
11 sell or give to us.

12 Q. Did the retainer agreement specify at what point
13 your representation of Mr. Avery would end?

14 A. Going by memory here, I think we agreed to
15 represent him through a first trial and
16 sentencing, if necessary, but not on a retrial or
17 any post-conviction or appeal proceedings.
18 That's memory, but that's my recollection.

19 Q. So if a mistrial had been declared under the
20 terms of the retainer agreement, would you or
21 your law firm have been obligated to represent
22 Mr. Avery at a second trial?

23 A. As I recall the agreement, no.

24 Q. I'm now going to direct your attention toward the
25 end of trial; and specifically, I'm referring to

1 March 15 of 2007, that was the day when closing
2 arguments were completed and the jury began
3 deliberations. Do you have a recollection of
4 that day?

5 A. Sure, in a general sense.

6 Q. That evening of March 15th, were you informed at
7 some point that the jury had stopped deliberating
8 for the day?

9 A. Yes.

10 Q. How did you learn that?

11 A. I think by -- you know, I'm sure by a phone call.
12 And whether that came into my cell phone or to --
13 I think I had a working telephone in the
14 apartment that I was renting, but in any event it
15 would have been a telephone call.

16 Q. And do you recall approximately what time that
17 was?

18 A. No, is the short answer to that. It was either
19 getting toward or well into maybe time for
20 dinner.

21 Q. When you received the news that the jury had
22 stopped for the day, was it your understanding
23 that the jury would resume deliberations the next
24 day?

25 A. Yes.

1 Q. After having been told that the jury was done for
2 the night, what did you do?

3 A. I know approximately, I may be compressing time
4 here because I just don't remember exactly when I
5 was told we could stand down for the evening, but
6 at least at some point after that what I remember
7 doing is collecting Mr. Buting and suggesting
8 that we go have dinner and a beer.

9 Q. Now, you had been in trial for, what, about six
10 weeks at that point?

11 A. I think at least or, you know, something right
12 around there, yeah.

13 Q. How were you feeling that evening?

14 A. Exhausted. I mean, if I'm recalling this
15 correctly, I had given my portion of the defense
16 closing argument the same day as Mr. Kratz's
17 rebuttal and the judge's instructions. And
18 that's the day we're talking about, I think,
19 right?

20 Q. You had completed your arguments, correct.

21 A. Okay. So I was having the sort of let down you
22 have after a closing argument.

23 Q. Did you have a drink with dinner that night?

24 A. I remember we went out for Mexican food. It was
25 in a strip mall somewhere not far from the

1 southeast corner of the city of Appleton, where
2 Jerry and I both were staying.

3 Couldn't possibly tell you the
4 restaurant or exactly where it was, but it was a
5 Mexican restaurant in a strip mall. And when I
6 have Mexican food I have a negra modelo beer.
7 And at no other time do I drink negra modelo
8 beer, so, yes, I had a negra modelo beer very
9 shortly after getting to the restaurant and
10 getting somebody's attention.

11 Q. Okay. And do you recall, were you feeling the
12 effects of the alcohol while you were at the
13 restaurant?

14 A. Yes, I was. I think I only had one beer. I'm
15 sure I would have been legal to drive --

16 Q. Mm-hmm.

17 A. -- but I could feel the beer.

18 Q. At some point that evening did you receive a
19 telephone call from Judge Willis?

20 A. Yes.

21 Q. Did this occur while you were still at the
22 restaurant?

23 A. Yes.

24 Q. Do you have any recollection as to the time?

25 A. In my head, it was about 8:30. That could be --

1 that could be off one way or the other, but
2 that's -- that's my recollection. And I think
3 the phone call came into my cell phone, as
4 opposed to Jerry's. That's my recollection.

5 Q. So the phone call comes on your cell phone; I
6 assume you were the one who answered it?

7 A. That's how I recall it.

8 Q. And did you speak directly with Judge Willis?

9 A. Yes.

10 Q. To your knowledge, was there anyone else on the
11 line, aside from you and Judge Willis?

12 A. I can't believe the phone call would have
13 happened without someone from the prosecution
14 either already on the line or being added
15 immediately. But, honestly, the only one I
16 remember speaking was Judge Willis. And, you
17 know, I remember I spoke a little bit. But --
18 so, no, I can't tell you for sure that someone
19 from the prosecution team was on there, but I
20 would be quite surprised if one or more of the
21 prosecutors were not.

22 Q. But at least as you are sitting here today, you
23 don't have any recollection of having heard, for
24 example, District Attorney Kratz say anything
25 during the conversation?

1 A. I really don't. It doesn't mean he wasn't on the
2 phone, I just don't remember anyone other than
3 the judge speaking and, you know, my reacting.

4 Q. So you are on the phone, Judge Willis is on the
5 phone, that much you recall?

6 A. That's what I recall.

7 Q. Was Attorney Buting on during this call at all?

8 A. I don't think so, because if -- I think it came
9 into my cell phone, and if that cell phone had a
10 speaker phone feature, I surely never figured out
11 how to use it or had any interest in using it.
12 And so, you know, I think that what was -- I know
13 Jerry was there and I remember him being there,
14 but I think that I was probably relaying tidbits
15 to him.

16 Q. What did Judge Willis tell you in that phone
17 conversation?

18 A. Well, approximately, as I recall --

19 Q. Yeah.

20 A. -- what he said is that he had been notified
21 maybe by the sheriff's department, I don't know
22 that I was given a name, but by the sheriff's
23 department, that a situation had arisen with a
24 juror. And my recollection is that it was
25 presented to me as being urgent and serious. And

1 I'm distinguishing, I mean, that it was a serious
2 situation, something important, but that it was
3 also emergent or urgent.

4 Q. I'm sorry, could you -- I didn't quite understand
5 the last.

6 A. It was not just serious, it was something urgent,
7 something that needed to be tended to
8 immediately, was the impression I got during that
9 conversation.

10 Q. In that conversation, do you recall, did the
11 judge tell you which juror was seeking to be
12 excused?

13 A. I'm sure he did. I don't recall that, but I know
14 which juror we were talking about. I can't
15 attribute it to that first conversation with
16 100 percent certainty, but he probably told me.

17 Q. And which juror are we talking about, in your
18 mind?

19 A. Mr. Mahler.

20 Q. Yes. Okay. And in that phone conversation,
21 again, this is at the restaurant, with Judge
22 Willis, was there any discussion about how to
23 handle the situation?

24 A. Yes.

25 Q. What was proposed?

1 A. I don't remember what was proposed. What I think
2 I remember is what was agreed upon, or settled,
3 which is that the judge would make his own
4 inquiry of the juror. And if the facts presented
5 to him, or suggested to him by someone in the
6 sheriff's department, were born out by the
7 judge's inquiry, that the juror would be excused,
8 would be relieved of further duty on the case.

9 Q. Your recollection is that that was something that
10 was agreed upon in the conversation?

11 A. Agreed, acquiesced to, yes. I mean, I didn't --
12 I don't recall my squawking about that or
13 objecting.

14 Q. Do you recall if you were the one who had
15 proposed that?

16 A. No, I don't, but maybe I did. I mean, I -- It's,
17 you know, I just have an impressionistic
18 recollection that the judge was sort of driving
19 the suggestion, or the resolution.

20 Q. So that in that phone conversation, did you agree
21 that the judge should speak with the juror?

22 A. Yes, or I mean, agreed or didn't object to that
23 course. My own recollection is that that was the
24 best -- that was the best that was going to
25 happen at that point.

1 Q. And when you agreed, or acquiesced, was it your
2 understanding that the judge would be speaking
3 with the juror, without either you or Mr. Buting
4 present?

5 A. Yes.

6 Q. Was it your understanding that Mr. Avery would
7 also not be present?

8 A. Yes.

9 Q. And as part of that, again, that conversation,
10 did you agree or acquiesce that the judge should
11 also remove the juror?

12 A. Yes, if -- if the facts were as they had been
13 presented to the judge, you know, were as
14 represented by the sheriff's department or
15 something very close to that, yes. And I really
16 don't mean to be splitting hairs on agreeing or
17 acquiescing. This was -- I don't remember who
18 proposed.

19 Q. Mm-hmm.

20 A. I don't remember the full discussion, but I think
21 by the end there was a consensus that this was
22 the course of action the judge would take.

23 Q. And at that time, when that decision was made,
24 did you have a recollection of who this juror
25 was, which juror was Richard Mahler?

1 A. Oh, sure.

2 Q. Okay. What did you think of him?

3 A. Focus me a little bit on that.

4 Q. Well, during the course of trial, were you paying
5 some attention to the jurors, as the trial went
6 on?

7 A. Not that much. It's one of my shortcomings, as a
8 trial lawyer, to be honest. But I was aware of
9 who he was.

10 In voir dire, I had this sense that he
11 would not be a follower necessarily, that this
12 was someone who, you know, wasn't a standard
13 government issue human being. He was -- had
14 maybe his own drummer, so to speak. I'm not
15 trying to make a joke about being a musician, but
16 he was someone who was likely to come to his own
17 views of the case, I thought, and I didn't have
18 any sense where he would end up.

19 Was he more likely a prosecution juror
20 or defense juror, that I had no sense. But I had
21 the sense that he would probably prove to be a
22 relatively strong juror.

23 Q. And that the characteristics that you had
24 ascertained from the individual voir dire, that
25 he would be able to come at his own decision,

1 would that be something you would view as
2 favorable, favorable quality in a juror?

3 A. Not necessarily. You know, this isn't something
4 I ascertained, it's something I guessed,
5 surmised, intuited, from the sort of unhelpful
6 process that is voir dire.

7 Q. That night, when the situation arose, did you
8 have a strategic reason for trying to get Richard
9 Mahler off the jury.

10 A. No. No, I mean not -- No, I didn't want this man
11 off the juror -- off the jury, on his merits. I
12 certainly did have a concern that if he was
13 distracted by a family tragedy, or something that
14 was weighing heavily on him, that he might be
15 someone who would be inclined not to deliberate
16 fully or with a, you know, an exclusive focus on
17 the case. But that wasn't a concern I had before
18 the phone call. I wasn't out to get rid of this
19 juror.

20 Q. In the conversation with Judge Willis that
21 evening, was there any discussion of the
22 Wisconsin Supreme Court's decision in ***State vs.***
23 ***Lehman?***

24 A. In the phone call while we were --

25 Q. In the phone call at the restaurant.

1 A. -- at the Mexican restaurant. Not that I recall,
2 no.

3 Q. Were you familiar with that decision as you spoke
4 with Judge Willis?

5 A. No, and that's why I think it didn't come up. I
6 remember not knowing exactly what our options
7 were at that point, if the juror got excused.

8 Q. Did you become aware, familiar with that decision
9 at some point after that conversation?

10 A. Later on, yes, later on that evening. I'm quite
11 certain there was not a second beer. I think
12 dinner was either gulped down or cut short. And
13 I went back and got on Westlaw, at some point
14 earlier than I would have preferred to.

15 Q. When you agreed to have the Court speak with the
16 juror and remove him if the information was
17 confirmed, did you consider whether Mr. Avery and
18 his attorneys had a right to be present during
19 that inquiry?

20 A. I knew we did. He had a right, personally, to be
21 present if the Court was speaking to a juror and
22 he certainly also had what I see as an
23 independent right to have counsel present during
24 such conversation with a juror.

25 Q. Did you consult with Mr. Avery about whether he

1 wanted to be present during the Court's inquiry
2 with the juror?

3 A. No, I couldn't, he was in the Calumet County
4 Jail.

5 Q. So you were also not able to consult with him
6 about whether he wanted this particular juror
7 taken off the jury?

8 A. No.

9 Q. In your mind at that time, again you are still at
10 the restaurant, in this conversation, what did
11 you think would happen if you had objected to the
12 procedure that was discussed, the Court talking
13 to the juror and excusing him? What if you had
14 objected to that and told the Court that
15 Mr. Avery and his attorneys had a right to be
16 present?

17 A. What would have happened is necessarily
18 speculative. But I -- right or wrong, I had the
19 impression that this was serious enough and
20 urgent enough that some contact between the judge
21 and the juror just was very likely to happen that
22 night, at best, or that the juror would be let go
23 on the say so of the sheriff's department.

24 I can't say the judge said that, I'm
25 just -- that was the sense I had, was that sort

1 of the best safeguard we were going to get was to
2 have the judge talk to the juror. I don't recall
3 any conversation about reconvening that night in
4 court. Maybe we had it, I just don't recall any
5 conversation like that, or even I don't recall
6 talking about doing this in the morning.

7 It was -- I felt like at the time -- I
8 mean, bluntly, my sense at the time was this was
9 not a time for temporizing or worrying too much
10 about legal niceties. That was just my sense.

11 Q. Well, when you agreed to the juror's removal, did
12 you have any information about an accident?

13 A. Yes, I think what we were told, and judge was
14 attributing this to the sheriff's department, was
15 that maybe a stepdaughter of the juror had been
16 in a car accident; that neither she nor anyone
17 else had been killed, as far as anyone knew; but
18 whether she was injured or in the hospital, or
19 whether others were injured or in the hospital,
20 seemed unknown at that point; and that in a
21 related way the juror's wife had about had it
22 with his absence, or his service on the jury; and
23 that this car accident was sort of a last straw
24 and she was threatening to walk out of the
25 marriage. That was, as I recall, what was

1 presented, secondhand, by the judge, to us.

2 Q. Mm-hmm. Did you have any information that, for
3 example, the stepdaughter was hospitalized?

4 A. No, my recollection is that we were told that was
5 unknown, that no one had died, but I don't think
6 we knew whether anyone was in the hospital or
7 not.

8 Q. And you refer to this information as having come
9 from the sheriff's department; is that correct,
10 as far as you knew?

11 A. I think that's what the judge said.

12 Q. Was there any, to your recollection, any specific
13 mention that the information came from Sheriff
14 Pagel?

15 A. I don't remember that now. Is it possible, yes,
16 but I don't remember it being attributed to any
17 particular employee of the sheriff's department.

18 Q. When you agreed that the judge could speak with
19 the juror and remove him if information was
20 confirmed, were you aware that Sheriff Pagel had
21 spoken with Mr. Mahler?

22 A. I don't think I was. I don't recall that. I
23 can't exclude it entirely.

24 Q. Would it have concerned you, had you known that
25 the sheriff was speaking with the juror?

1 A. Yes, but I think it would have concerned
2 Mr. Buting more.

3 Q. And why is that, why do say that?

4 A. He was more suspicious of Sheriff Pagel. And I
5 tried to maintain a line of communication there,
6 a cordial working relationship with the sheriff.

7 Q. And when you authorized, or agreed for the Court
8 to speak with the juror, did you expect that
9 Sheriff Pagel would be involved in that
10 communication?

11 A. I don't know that I had an expectation one way or
12 the other.

13 Q. Were you provided, again, in this conversation
14 with the judge, were you provided any information
15 as to how this situation about the accident had
16 come to the juror's attention?

17 A. Might have been, I don't remember -- I don't
18 remember being told that, I might have been. May
19 have been that the jurors all had been allowed to
20 call home. I guess I'm guessing. I don't recall
21 specifically how this came to the juror's
22 attention.

23 Q. You didn't have any specific information that the
24 wife had been calling in to report a problem?

25 A. If I did, I don't remember it now, that's

1 possible, but I don't remember it.

2 Q. So, there's a conversation with the judge, all
3 this is occurring at the restaurant, there's an
4 understanding of how the judge should handle it.
5 And what happened next in terms of your knowledge
6 of the situation?

7 A. Well, I think there was a second phone call that
8 Mr. Buting placed to Judge Willis. But I only
9 think that because I have seen a page of
10 Mr. Buting's cell phone record more recently. I
11 didn't remember --

12 Q. Okay.

13 A. -- that Jerry Buting had placed a call to the
14 judge. Without that cell phone record, my
15 recollection would be that at some point that
16 night we were told that it was fait accompli,
17 that the juror had been interviewed by the judge
18 and the judge had excused the juror. I think I
19 knew that before I went to bed that night.

20 Q. Okay. So, when you got back to your apartment,
21 your best recollection is that you knew at that
22 point that Juror Mahler was off?

23 A. I don't know if it was before I got back to the
24 apartment, but some -- some time before I went to
25 bed. And it probably was either before I got to

1 the apartment or very soon thereafter. Because,
2 as I say, I did go on Westlaw and start doing
3 some research to see if I could determine what
4 our options were then.

5 Q. And that's when you discovered the **Lehman**
6 decision?

7 A. Yes, I found **Lehman**.

8 Q. So then I turn your attention to the next day,
9 it's March 16, 2007; was there a meeting in
10 chambers that morning with Judge Willis and the
11 attorneys?

12 A. Yes.

13 Q. Was Mr. Avery present during that in chambers
14 conference?

15 A. No. No, the initial meeting with the judge and
16 the lawyers in chambers, Mr. Avery was not
17 present for that.

18 Q. And by the time of that in chambers conference,
19 had you spoken to Mr. Avery about the juror's
20 removal?

21 A. I don't think so.

22 Q. So as far as you knew, when you went into that in
23 chambers conference, your understanding would
24 have been that Mr. Avery still had no knowledge
25 of the fact that a juror had been taken off the

1 jury?

2 A. My recollection is that we had not, that
3 Mr. Buting and I had not spoken to him before
4 going to chambers the morning of March 16. So,
5 if he knew, that didn't come from us.

6 Q. Was there some discussion of the **Lehman** decision
7 in that conference?

8 A. Yes, I mean, as I recall it, more or less
9 simultaneously, the judge and I discovered that
10 we each had found **Lehman** and we had copies of it.

11 Q. And in part, relying on that decision, was there
12 some discussion of the options available now that
13 a deliberating juror had been removed?

14 A. Yup. Yes.

15 Q. And what options were discussed?

16 A. Well, I think -- I think all the lawyers and the
17 Court were in agreement that there were three
18 options. One, you could continue with 11 jurors;
19 two, you could declare a mistrial; three, you
20 could insert an alternate juror, if one had been
21 retained, into the group, to restore it to 12.
22 And that if you did that, the jurors would have
23 to be instructed to begin deliberations anew.

24 And I think there also was consensus
25 that each of the two sides had an absolute veto

1 in the sense that any -- either of the two
2 options would have allowed deliberations to go
3 forward, required the assent of both sides.

4 Could have forced a mistrial, to put it
5 succinctly, either side could have.

6 Q. And it was the understanding at that point that
7 indeed there was an alternate available?

8 A. We had retained an alternate, yes.

9 Q. And while you were still in that in chambers
10 conference, did the parties reach an agreement of
11 which of the options to take?

12 A. My recollection is, no, that at some point I or
13 Jerry, or both of us, said we have got to go talk
14 to Steven.

15 Q. But was there some at least tentative agreement
16 among the attorneys and the Court as to which
17 option would be taken?

18 A. I think that we were all leaning toward plugging
19 in the retained alternate juror and continuing
20 deliberations with 12, although deliberations
21 would have to start afresh. I think we were
22 leaning that way by the time Mr. Buting and I
23 left chambers to go down and speak with Mr. Avery
24 in the jail.

25 Q. And even in that conference, may there have been

1 some discussion of drafting the appropriate
2 instruction to give the jury, if the sub -- if
3 the alternate were put in?

4 A. I can't place the exact time at which that
5 discussion occurred, but at some point, yes, we
6 talked about an instruction and settled, I think,
7 on the wording of an instruction. I can't place
8 that at the initial meeting in chambers before
9 Mr. Buting and I spoke to Mr. Avery. Maybe,
10 maybe not.

11 Q. When the decision ultimately was made to
12 substitute in the alternate, was it your
13 understanding that **Lehman** would allow the parties
14 to consent to putting in an alternate during
15 deliberations?

16 A. As long -- excuse me -- as long as deliberations
17 started over, yes.

18 Q. And you have testified that you had found **Lehman**
19 the night before and were familiar with that by
20 the time of the in chambers conference. Had you
21 also researched whether there had been any
22 changes to the relevant statute since **Lehman** was
23 decided?

24 A. I did not.

25 Q. So, did you ultimately agree to the option of

1 substituting in the alternate with the belief
2 that that was an option permitted under Wisconsin
3 law?

4 A. Yes.

5 Q. So after this in chambers conference, then, you
6 went to meet with Mr. Avery?

7 A. Yes.

8 Q. And that took place at the jail; is that right?

9 A. Yes, it did.

10 Q. Who was present?

11 A. Jerry Buting, Steven Avery, and I.

12 Q. How long did that meeting last?

13 A. Something under 20 minutes, close to 20 minutes.

14 Q. That 20 minutes would have been from the time you
15 arrived at the jail until the time you left?

16 A. I have looked at that page from my trial notes,
17 and as I recall, the notes say 8:45 to 9:05. And
18 I have a habit about keeping time with
19 conferences with the detained or incarcerated
20 clients.

21 And I note the time when I'm walking
22 through the security door, the last locked door,
23 and then I note the time when I leave the secure
24 area of the jail or prison. I don't -- I
25 don't -- you know, I don't write down the time

1 when the client walks in the interview room, or
2 the booth, or wherever we're meeting. Because
3 that's unpredictable, how long that's going to
4 take the jail personnel to get the client there.
5 And usually what I'm doing at that point is
6 writing down the things we're going to discuss.

7 Q. So, based on your note showing that time of a 20
8 minute time frame, that would be the absolute
9 longest the conversation with Mr. Avery took?

10 A. Right. The conversation with Mr. Avery would
11 have been a little bit shorter than that. The
12 Calumet County Jail was very prompt about getting
13 Mr. Avery into the interview room that we used.
14 I think because -- I think because he was the
15 only inmate in the adjoining pod, but we never
16 had to wait long.

17 Q. And what was discussed in that meeting with
18 Mr. Avery?

19 A. The fact that we lost a juror, the night before,
20 and what the three options were at this point,
21 going forward.

22 Q. And those would have been the three options you
23 just described in your testimony?

24 A. Right. And -- And I also would have explained --
25 I did explain to Mr. Avery that, in the end,

1 which of these three options to choose was his
2 choice.

3 Q. And so as part of this discussion, did you tell
4 Mr. Avery he could have a mistrial?

5 A. I did.

6 Q. Did you give him any advice about taking a
7 mistrial?

8 A. I advised that he not take a mistrial. I steered
9 him toward introducing the alternate juror into
10 the deliberations.

11 Q. And in part of your discussion with him about
12 whether to take a mistrial, did you talk to him
13 about whether you would be representing him at a
14 second trial?

15 A. We must have then, and I remember more than one
16 such conversation with Mr. Avery. And one of
17 those must have been then, in this meeting on the
18 16th.

19 Q. And what did you tell him?

20 A. If you have a mistrial, which you have a right to
21 do, they will try you again. This isn't a case
22 where they are going to, you know, make a
23 meaningful offer for a lesser disposition. The
24 case will go to trial again and neither Jerry nor
25 I will be able to represent you, financially. We

1 just can't and won't do that, through a second
2 trial.

3 Q. At any point in that discussion of the options,
4 did you advise Mr. Avery that he should proceed
5 with 11 jurors?

6 A. No.

7 Q. Why did you not recommend that?

8 A. Because I never would.

9 Q. Why?

10 A. Twelve is better than eleven. I mean, you know,
11 look, you want to win the case, but placing, so
12 to speak, is a mistrial, in my business. And you
13 have got one more chance to get a mistrial with
14 12 jurors than you do with 11. The dynamic is
15 different.

16 Q. If substitution of a juror, during deliberations,
17 was not a legal option, would you have advised
18 Mr. Avery to proceed with 11?

19 A. I'm sorry, I zoned out a moment.

20 Q. Sure. You had talked about mistrial and you
21 recommended substituting, correct?

22 A. Yup.

23 Q. You did not recommend going with eleven?

24 A. I recommended that we not go with 11.

25 Q. If --

1 A. Strongly.

2 Q. -- substitution of a juror was not an option
3 allowed under law, would you then have advised
4 Mr. Avery to proceed with 11 jurors?

5 A. No.

6 Q. If the choices allowed by law would have been go
7 with 11 or have a mistrial, which option would
8 you have recommended?

9 A. Well, I don't know, and here's why I don't know,
10 because I would have been saying mistrial and I'm
11 not sure Mr. Buting would have. That's
12 something, had we known that there were only two
13 options, that's something that would have
14 required a real discussion, between me and
15 Mr. Buting, to reach agreement ourselves, before
16 we spoke to Steven, because we weren't going to
17 go into a client and, you know, have his two
18 lawyers be giving him directly conflicting advice
19 or bickering about what we thought he ought to
20 do, in front of him.

21 Q. So, if I understand your testimony, you
22 personally, if given the choices of 11 jurors or
23 a mistrial, would have preferred the mistrial,
24 correct?

25 A. Yes.

1 Q. But you are unsure whether Attorney Buting would
2 have preferred 11 or a mistrial?

3 A. To this day, I'm unsure of that. But, you know,
4 we had -- we had made an agreement which became
5 sort of solemn over time. We had made an
6 agreement, the day Jerry Buting agreed to get
7 into the case, that we would not play it for the
8 fumbles, that we were going to try to win this
9 trial. We wanted, you know -- we wanted not
10 guilty verdicts down the line. And Jerry had
11 secured my agreement before he agreed to come in
12 as co-counsel.

13 And that agreement, interestingly enough
14 in this trial, was one we had to come back to and
15 reaffirm at a number of different junctures.
16 This was one of those. And if the choices had
17 been two, not the three that we thought, that
18 would have been a juncture that would have
19 required a real serious conversation about, you
20 know, do we go for broke or do we take a
21 mistrial.

22 Q. But just to make sure then I understand, the
23 declining of a mistrial was with the
24 understanding that the option that was chosen,
25 substituting in the alternate, was a legally

1 permissible option?

2 A. Absolutely, yes.

3 Q. I'm going to show you a court memo that is dated
4 March 16th, 2007, and has been marked as an
5 exhibit. And I just want to ask if you are
6 familiar with that.

7 A. Yes.

8 Q. You have seen that before?

9 A. I have.

10 Q. How did you become aware of that memo?

11 A. Judge Willis told us, I think the morning of
12 March 16, that he either had or was going to
13 prepare a memo like this, just to memorialize
14 what had happened the night before.

15 Q. And so you were told about it, do you recall,
16 though, when you actually saw it?

17 A. I don't.

18 Q. Do you think it was that same day?

19 A. I don't, but I honestly, in my mind, I saw this
20 after trial, for the first time. But I could be
21 wrong about that, it could have been that day, it
22 could have been the next day. In my head, for
23 whatever reason, I think I didn't see this until
24 after trial. Perfectly possible I'm wrong about
25 that.

1 ATTORNEY HAGOPIAN: I will take that back.
2 And then I think that's all I have for now. Thank
3 you.

4 ATTORNEY ASKINS: Judge, at this point, we
5 would turn our attention to the other issue and
6 should I just go ahead and proceed with Mr. Strang,
7 or what did you want to do in terms of the Court's
8 schedule today?

9 THE COURT: Why don't you go ahead and get
10 started.

11 ATTORNEY ASKINS: Okay. Thank you.

12 **DIRECT EXAMINATION CONTD**

13 BY ATTORNEY ASKINS:

14 Q. Mr. Strang, I would like to change subjects here
15 and ask you about some other matters relating to
16 Mr. Avery. Now, prior to the trial in this case
17 there were a number of motions filed by each side
18 to resolve certain potential trial problems; is
19 that correct?

20 A. Yes.

21 Q. In fact, there was lots of pre-trial litigation,
22 lots of pre-trial motions, correct?

23 A. You know, both sides filed a number of motions
24 and briefs.

25 Q. And prior to the trial, do you recall filing with

1 the Court a request to be able to introduce
2 evidence at the trial of alternative persons who
3 may have been responsible for Mr -- for Ms
4 Halbach's death?

5 A. Yes. And at least one brief supporting that
6 motion.

7 Q. And, ultimately, the Court issued a ruling on
8 that; is that correct?

9 A. Yes.

10 Q. And do you recall that the Court ordered that you
11 could not present evidence that a third party,
12 other than Brendan Dassey participated in the
13 commission of these crimes; is that also correct?

14 A. Yes, generally. Let me tell you what I remember
15 about that, and I haven't gone back and looked.
16 But my recollection is that the judge ruled that
17 **Denny** applied. And that under **Denny** we had not
18 made a sufficient showing as to anyone, other
19 than Brendan Dassey, and the State, I think, gave
20 us Brendan Dassey. I think they conceded Brendan
21 Dassey, for **Denny** purposes. But I think beyond
22 Brendan Dassey, the Court ruled that we had not
23 made the necessary showing that would allow us to
24 argue specific third party liability.

25 Q. Now, a minute ago you used a phrase that you and

1 Mr. Buting -- and I'm not going to get it exactly
2 right -- had an agreement not to play for
3 fumbles, but for the win, correct?

4 A. Yes.

5 Q. And I'm wondering why you made that agreement;
6 what was the purpose for that sort of agreement
7 between you and Jerry, or the rationale behind
8 it?

9 A. And it's -- I realize it sounds funny because I
10 don't take any case planning to lose, you know.
11 You try to win everything that you think is going
12 to trial. But this was a matter of specific
13 discussion. And Jerry brought it up, in our
14 first meeting in my office, when he was
15 considering entering an appearance.

16 And, you know, it was, look, Dean, if
17 I'm going to get in, I'm not interested in a
18 mistrial. I'm not interested in appellate
19 issues, you know, for their own sake. I'm
20 interested in trying to win this case.

21 And while I don't remember the details
22 of that conversation, it had to do, and the
23 reason we struck that agreement, or really, you
24 know, reached an accord deeper than ordinary
25 professional obligation, was that this was Steven

1 Avery we were talking about. This was somebody
2 who had spent 18 years in a cage for a crime he
3 didn't commit.

4 And I'm an officer of the court. I work
5 in the system. I have given my professional life
6 to our system of justice and I didn't want that.
7 And I think, to his credit, the first one who
8 decided he didn't want that happening again, on
9 his watch, was Jerry Buting. And that's the gist
10 of the conversation that we had. So if we're
11 going to do this, we are going to try to win this
12 case.

13 Q. Now, the Judge's ruling on third party liability,
14 and I will either refer to it as the **Denny** ruling
15 or the ruling on third party liability; did that
16 affect your trial strategy?

17 A. Sure.

18 Q. I would like to direct your attention to the
19 opening statement. You presented the opening
20 statement on the part of the defense, correct?

21 A. Yes.

22 Q. You have tried many cases in your career?

23 A. Maybe not as many as you think, but.

24 Q. As an experienced defense attorney, however, you
25 would agree that you are an experienced defense

1 attorney?

2 A. I guess, relatively speaking, I'm getting more
3 experience by the day, but.

4 Q. As a defense attorney, do you have a specific way
5 that you approach an opening statement to a jury?
6 Is there something that you are trying to
7 accomplish?

8 A. Grab their attention, give them a coherent
9 narrative that embraces and advances the theory
10 of defense.

11 Q. And that was true in Mr. Avery's case as well?

12 A. That's what I tried to do.

13 Q. In light of the Court's ruling, then, did the
14 Court's third party liability ruling affect your
15 approach to the opening statement?

16 ATTORNEY FALLON: Objection, relevance, the
17 opening --

18 ATTORNEY ASKINS: I'm sorry, I can't hear
19 the objection.

20 ATTORNEY FALLON: Objection, relevance.

21 THE COURT: Mr. Fallon.

22 ATTORNEY FALLON: Yes, the opening
23 statement is not evidence and nor is it argument.
24 It's a statement of what is expected to occur. It's
25 an oratorical device. It is not argument. It is

1 not evidence. And, therefore, is irrelevant to the
2 specific and narrow focus of this post-conviction
3 motion.

4 THE COURT: Attorney Askins.

5 ATTORNEY ASKINS: Judge, ultimately the
6 question is going to be raised about what effect
7 the -- or what prejudice, what effect there was on
8 this case, due to the Court's third party liability
9 ruling. And I think the opening statement being
10 part of the whole defense case is certainly relevant
11 to how this case was handled differently.

12 THE COURT: Well, I largely agree with
13 Attorney Fallon on this one. I will let you ask a
14 couple questions as an introduction into the
15 evidence portion of the case and certainly the
16 closing argument, but.

17 ATTORNEY ASKINS: Very well, thank you.

18 THE COURT: Go ahead.

19 Q. (By Attorney Askins)~ Would you like me to repeat
20 the question?

21 A. No, I think I have it in my mind. Had the **Denny**
22 ruling gone our way, we would have settled on one
23 or more people as to whom we thought we had the
24 best case, that they had committed the crime.
25 And I would have presented a theory of defense in

1 my opening statement that identified that person
2 or those persons that stopped short of, and
3 explain to the jury why I was not taking on the
4 burden of persuasion in the end of proof beyond a
5 reasonable doubt.

6 But the theory of defense would have
7 been shaped around the person we thought probably
8 committed the crime. And I would have had a
9 chance in that opening statement to blunt the
10 thrust of the prosecution argument that I
11 expected, which was, if you are saying the police
12 planted evidence to frame Mr. Avery, or to make
13 it appear that Mr. Avery committed the crime, if
14 you're saying that, then you must also be saying
15 that the police killed Ms Halbach, which we
16 weren't saying.

17 But unable to point to the person we
18 think did, we were -- we were wide open on the
19 flank to that prosecution attack. And I would
20 have shaped -- tried to shape an opening
21 statement that took that opportunity for attack
22 away from the State.

23 Q. Let's turn now to the actual evidence at the
24 trial. You were able to illicit testimony that
25 Teresa Halbach was good at getting so-called

1 hustle shots; is that correct?

2 A. Yes. Can't tell you from whom, but I know that
3 came in.

4 Q. Did the trial court's third party liability
5 ruling affect your ability, in your mind, to
6 elicit other testimony relating to hustle shots?
7 And what I mean by -- I should back up. When I
8 say other testimony, testimony other than what
9 you did elicit.

10 A. That I don't -- That I don't remember, tying the
11 **Denny** ruling to hustle shots.

12 Q. All right.

13 A. Honestly, Jerry was more focused on the hustle
14 shots than was I, but I don't remember that.

15 Q. Now, another -- or one important piece of
16 evidence in the State's case was the blood inside
17 of Ms Halbach's vehicle, correct?

18 A. Yes.

19 Q. Did the trial court's ruling on third party
20 liability affect how you would respond to that
21 evidence at the trial?

22 A. It took away the ability to suggest that persons
23 other than law enforcement officers had access to
24 bloody bandages, bloody towels, blood drips that
25 came from Steven Avery. He had cut his finger

1 badly some time I think shortly before Ms Halbach
2 disappeared, or right after, somewhere in there.

3 Q. Another blood source, you have stated, how would
4 that matter?

5 A. Well, if his blood was found in her car, as the
6 people from -- or, you know, Sherri Culhane was
7 going to testify, that's a big problem for the
8 defense. How did it get there, if it wasn't
9 Steven Avery who bled in the car. The *Denny*
10 ruling left us only the police as the possible
11 source of that blood, if it wasn't directly from
12 Steven Avery.

13 The people who were on that property
14 regularly, though, would have had, presumably,
15 access to Steven's trailer or to places where he
16 disposed of bandages, things he had bled on.

17 Q. As a defense attorney, have you previously
18 defended a client on a theory that the -- that
19 client was framed in some fashion by the police?

20 A. Certainly not in the first chair, at least not
21 that I remember in the first chair. It is an
22 enormously unappealing defense, for obvious
23 reasons.

24 And I think I second chaired Jim Shellow
25 in a trial in which that was essentially the

1 argument as to an FBI agent who had elicited a
2 statement from the client. That is, I know I
3 second chaired Jim. And I remember the trial and
4 I think Mr. Shellow's argument in that was that
5 the FBI agent had set up the client in some
6 fashion. That's the only thing that even comes
7 close, that I remember as I sit here.

8 Q. And I think you stated, is that a difficult or an
9 easy argument to make to a jury?

10 A. You know, it's not an argument that most jurors,
11 most jurors, come in prepared to accept. You
12 know, there are some who just don't like or trust
13 law enforcement. But, you know, the norm, so far
14 as in my experience with jurors, is that they
15 presuppose the good faith, competence, and
16 honesty of law enforcement officers as a group.

17 Q. I'm going to refer to the State's rebuttal
18 closing argument in this case, in it and this is
19 a quote from the transcript and I'm going to ask
20 you a question following that.

21 The quote is this, Despite Mr. Buting
22 trying to sell you on the fact that we're not
23 saying the cops did it, that's exactly what they
24 are saying. That's exactly what they are arguing
25 to you and you have to be prepared to go there.

1 Closed quote.

2 In light of the trial court's *Denny*
3 ruling, did this argument from the State surprise
4 you or did you expect that argument?

5 A. Expected that from the get go. That's the
6 argument I would have been making if I were
7 Mr. Kratz. I think I tried, you know -- I
8 think -- I think, in opening statement, I told
9 the jury, we're not saying the police killed Ms
10 Halbach.

11 Q. Did the trial court's third party liability
12 ruling affect how you would handle this expected
13 argument from the State?

14 A. Yes. I think I could have taken it away, had I
15 been able to say, this probably is who killed Ms
16 Halbach and this is why they had a motive to put
17 it on Steven. And in doing so, they found a very
18 receptive audience in law enforcement, who were
19 happy to believe him guilty.

20 Q. All right. I would like to turn your attention
21 now to Bobby Dassey, one of the State's
22 witnesses; you recall his testimony at trial, in
23 general?

24 A. In general.

25 Q. And do you recall that he was one of the

1 individuals you identified in your third party
2 liability briefs as a potential alternative
3 suspect?

4 A. Yes. Yes, I think -- I think we identified all
5 of the Dassey brothers who lived with their
6 mother as, I think, as potential third party
7 perpetrators.

8 Q. And now you did the cross-examination of Bobby,
9 do you recall doing the cross-examination?

10 A. Yes.

11 Q. All right. And did the trial court's third party
12 ruling affect your cross-examination of Bobby
13 Dassey?

14 A. Yes, I think there is a very, very good
15 likelihood. I can't say this for sure, because
16 we're talking about a ruling we never got, you
17 know, but had the **Denny** ruling gone the other
18 way, I think there's a very good possibility that
19 Bobby Dassey would have been cross-examined by me
20 as someone who potentially was a murderer.

21 Q. Just drawing your attention to a couple of -- and
22 I'm not going to go into a great amount of detail
23 about this, but were there areas that you thought
24 would be fruitful to cross-examine Bobby on,
25 Bobby Dassey?

1 A. The mutual and mutually exclusive alibi that he
2 and Scott Tadych offered each other would have
3 been the one that comes to mind.

4 Q. Had you looked at Mr. Dassey's, Bobby Dassey's
5 chronology that day, his timeline for where he
6 was and when?

7 A. Well, I'm sure that I had. We had all the
8 interviews of law enforcement with Bobby Dassey.

9 Q. Would you have treated Mr. Dassey differently
10 about the so-called joke that Mr. Avery had
11 supposedly made to him?

12 A. Almost surely.

13 Q. How so?

14 A. That could have been handled as a blame shifting
15 effort by someone who himself was culpable,
16 rather than having to handle it as, oops, you
17 made a mistake, you didn't really mean to suggest
18 that Mr. Avery was serious about that.

19 Q. Now --

20 A. Could have been handled as something, you know,
21 that he never heard.

22 Q. Excuse me?

23 A. It could have been handled as something that
24 Bobby Dassey never heard and was saying to point
25 an accusatory finger at his uncle.

1 Q. Now, another individual was Scott Tadych, who was
2 the State's witness; do you recall Mr. Tadych?

3 A. Oh, yes.

4 Q. And you did the cross-examination of him as well?

5 A. I did.

6 Q. And do you recall that he was also identified as
7 a possible third party suspect?

8 A. Yes.

9 Q. Did the Court's **Denny** ruling affect your
10 cross-examination of Mr. Tadych?

11 A. Almost surely.

12 Q. Can you give some examples of how the Court's
13 ruling affected your handling of Mr. Tadych, or
14 more specifically, your cross-examination?

15 A. I expect that I would have projected to
16 Mr. Tadych, or to the jury, in my attitude toward
17 Mr. Tadych, my tone of voice, the manner of my
18 questioning, the view that he was a probable
19 murderer.

20 Q. You mentioned the mutual alibi with Mr. Bobby
21 Dassey; would that have been a source of
22 cross-examination as well?

23 A. It was anyway. I would have tried to develop
24 that at greater length, including the
25 improbability of the whole notion that these two

1 guys going hunting, you know, Dassey at Tadych's
2 place, and Tadych somewhere past Dassey's place.

3 You know, the improbability of that
4 could have been developed on cross of both of
5 them, including, you know, Bobby Dassey's claim
6 that he took a shower before going hunting, not
7 something a bow hunter likely would do.

8 Q. How about other witnesses, and I understand that
9 the ruling did not go your way; however, had the
10 ruling gone your way, would you have considered
11 calling other witnesses in Mr. Avery's defense?

12 A. Potentially, if allowed, witnesses to
13 Mr. Tadych's temper; witnesses to Mr. Tadych's
14 attempt to sell a .22 caliber long rifle, shortly
15 after this; a witness to Mr. Tadych bolting out
16 of work, ashen faced, shortly after this, when he
17 heard that one of the Dassey boys either had been
18 arrested or was being questioned by the police.

19 Q. Other than Mr. Tadych, any other types of
20 evidence or witnesses who you might have called,
21 I mean other than witnesses relating to
22 Mr. Tadych? Anybody else who you think you might
23 have called?

24 A. That -- Now, we're beyond my ability to sort of
25 reconstruct this. The ruling did not go our way

1 so we tried a different case than we would have
2 tried had the ruling gone our way. That's just
3 the nature of pre-trial rulings, significant ones
4 in any event.

5 Q. Fair enough. So now we move on to the closing
6 argument and both you and Mr. Buting made closing
7 arguments, correct?

8 ATTORNEY FALLON: Your Honor, I'm going to
9 impose an objection. I have listened now for about
10 the last 30 minutes on this line of questioning, and
11 it occurs to me that this line of questioning is
12 entirely irrelevant to the specific focus of the
13 post-conviction motion, which was, in effect, did
14 the Court err in making the ruling that you made at
15 that time, based on the argument presented by the
16 defense and the arguments presented by the State, as
17 to the existence of the evidence at the time.

18 And this last 35 minutes here of what is
19 in effect speculation as to what might have
20 occurred, could have occurred, we would have done
21 this, or we might have done that, doesn't really
22 shed any light whatsoever on whether or not the
23 Court was wrong, or committed an error in
24 deciding whether the evidence of third party
25 liability should have gone the other way. I

1 don't see its relevance.

2 THE COURT: Attorney Askins.

3 ATTORNEY ASKINS: Your Honor, it is
4 relevant because, as I mentioned earlier, ultimately
5 this question is going to be addressed in terms of
6 prejudice, and what we're establishing today is
7 prejudice. And the other response that I would
8 have, first of all, is that we're now closing in on
9 the last two questions that I have for Mr. Strang
10 and so the objection is a little late in this
11 process.

12 But this is also information that the
13 Court did not have at the time that it made the
14 **Denny** ruling. This information that we're
15 eliciting today is information that you had not
16 heard prior to today's date. And so I think it's
17 useful for you to have that, to understand what
18 is part of our motion relating to **Denny**.

19 ATTORNEY FALLON: If I may respond.

20 THE COURT: Go ahead.

21 ATTORNEY FALLON: We haven't heard any
22 evidence. What would the evidence have been, that
23 is where the essence of the prejudice argument,
24 assuming for the sake of this brief discussion that
25 prejudice must be shown under these circumstances.

1 But the real question is, what is the evidence, not
2 what counsel's strategy would have been, or how
3 counsel might have changed his opening, or how
4 counsel might have cross-examined Mr. Dassey
5 differently or Mr. Tadych differently. The question
6 is, what would the evidence have been if elicited.
7 There is no evidence.

8 THE COURT: All right. Well, this is a
9 post-conviction motion hearing rather than a trial,
10 I'm not going to anticipatorily decide that the
11 defendant doesn't have an argument to make based on
12 this line of questioning. I will let the State make
13 that argument in its written brief. Attorney
14 Askins, I'm going to permit you to continue.

15 ATTORNEY ASKINS: Thank you, your Honor.

16 Q. (By Attorney Askins)~ Turning to the closing
17 argument, as I was asking you before, did the
18 trial court's ruling affect your closing argument
19 to the jury?

20 A. Yes, I -- there's a specific instance that I can
21 recall in the -- I -- The defense split the
22 closing argument, Mr. Buting went first, I went
23 second. He said something suggesting that
24 someone else may have been the culprit, during
25 his closing argument. I don't remember the

1 details now, but I think it probably was
2 Mr. Kratz who objected and wanted to be heard.

3 And my recollection is that at some
4 point in chambers, so maybe it was at the end of
5 the day, or at some break, before I started my
6 closing argument, I think I was told, you know,
7 Strang, you better go back, you better go out and
8 clean up the mess that Buting made or, you know,
9 sort of pull back from the position he took,
10 otherwise there may be a curative instruction by
11 the Court, which as I recall is what Mr. Kratz
12 wanted.

13 Q. I had asked earlier if you have a theory of how
14 you approach an opening statement to a jury. Do
15 you also have a kind of a theory of how to
16 approach a jury in your closing argument?

17 A. Again, with a narrative that I hope reaffirms the
18 facts that I expected to elicit for the jury and
19 that reaffirms the theory of defense as
20 consistent with the evidence the jury heard, and
21 that, if possible, inspires the jury to hold firm
22 to the rules by which we try cases in this
23 country, and offers them a narrative in a theory
24 that fits better with the facts than the
25 competing narrative that the State offers.

1 Q. Did you understand the trial court's ruling to
2 prohibit you from offering a coherent theory that
3 some specific other individual did this?

4 A. I couldn't argue that anyone other than Brendan
5 did it, that was the nature of the Court's ruling
6 as I understood it.

7 And I think I went back and tried to
8 retract or smooth over whatever it is Jerry had
9 argued in his portion of the closing argument
10 that had resulted in the objection and the
11 colloquy, whether that was in the courtroom or in
12 chambers.

13 ATTORNEY ASKINS: I have no other
14 questions, your Honor.

15 THE COURT: All right. We're going to take
16 our noon break at this time. Counsel, I will leave
17 it up to you whether we resume at 1:00 or 1:15. I
18 would like to try and get the evidence in today.

19 ATTORNEY FALLON: 1:15 is fine.

20 THE COURT: 1:15.

21 ATTORNEY HAGOPIAN: That's fine.

22 THE COURT: Very well, we'll see you back
23 at 1:15.

24 (Noon recess taken.)

25 THE COURT: All right. Mr. Strang, you may

1 be seated. At this time we're back on the record.
2 Attorney Askins, I believe you completed your
3 direct, correct?

4 ATTORNEY ASKINS: That's correct, your
5 Honor.

6 THE COURT: All right. Mr. Fallon.

7 ATTORNEY FALLON: Good afternoon, counsel.

8 THE WITNESS: Good afternoon.

9 **CROSS-EXAMINATION**

10 BY ATTORNEY FALLON:

11 Q. If we could take a moment or two to get a little
12 information regarding your background, I think
13 that would be beneficial. As I understand it,
14 Mr. Strang, you have extensive practice in both
15 federal and state courts here in Wisconsin?

16 A. Sure. I mean, I won't quibble with the
17 adjective, but yes, both federal and state court.

18 Q. All right. In fact, at one time, you were the
19 federal defender, I believe, in the eastern
20 district, was it?

21 A. I was the first federal defender in Wisconsin, I
22 was initially the eastern district of Wisconsin
23 and then three or four years in we added the
24 western district of Wisconsin.

25 Q. So at some point you were the -- Well, first of

1 all, tell us what the federal defender is?

2 A. It's a public defender position, but representing
3 the indigent only in federal court on federal
4 prosecutions.

5 Q. And how long did you hold that position?

6 A. Five years, almost to the day.

7 Q. And I believe you were just telling us at some
8 point your responsibilities included the whole of
9 Wisconsin?

10 A. Both districts, yes, which encompassed the whole
11 of Wisconsin together.

12 Q. All right. And prior to that time, you had
13 experience as a criminal defense attorney,
14 correct?

15 A. Yes, about 11 and a half, 12 years of criminal
16 defense experience before I became the federal
17 defender.

18 Q. All right. And how long ago or how long has it
19 been since you stepped down from the position as
20 the federal defender?

21 A. I stepped down on August 1, 2005.

22 Q. So, in terms of experience, you have roughly 20
23 years of criminal defense practice experience?

24 A. Twenty-one.

25 Q. All right. And as I understand it, you have, at

1 least on two occasions, argued cases before the
2 United States Supreme Court?

3 A. The second time I was only the co-author of the
4 brief and at counsel table I didn't argue **Booker**,
5 but I argued a case in the U.S. Supreme Court
6 before that.

7 Q. All right. And on that -- particularly on that
8 **Booker** case, that was a pretty significant piece
9 of legislation -- of case law, was it not?

10 A. In the little world of federal --

11 Q. Sentencing.

12 A. -- criminal law and sentencing, yes, it was a
13 significant case.

14 Q. And you were successful in arguing that the
15 federal sentencing scheme was unconstitutional?

16 ATTORNEY HAGOPIAN: Objection, relevance.
17 And I think there is some relevance to the general
18 experience, but this sort of level of detail, I just
19 don't think it's relevant.

20 ATTORNEY FALLON: Well, if one of the
21 allegations here, Judge, is that counsel was
22 ineffective, we're certainly entitled to know of his
23 experience.

24 THE COURT: I hope we're not going to be
25 spending a lot more time on it, but I will allow you

1 to ask a couple questions.

2 ATTORNEY FALLON: I have about four or five
3 more questions.

4 Q. (By Attorney Fallon)~ You are or have been an
5 adjunct professor of law at Marquette University
6 Law School?

7 A. Yes.

8 Q. You similarly have been or are an adjunct
9 professor of law at the University of Wisconsin
10 Law School?

11 A. That's also true.

12 Q. And you currently have that position at the
13 University of Wisconsin, do you not?

14 A. Yes, and at Marquette, although I'm not teaching
15 a class this semester at Marquette.

16 Q. In fact, in classes that you teach, you have
17 taught classes on federal law, federal crimes?

18 A. Well, I taught a course for three years, or four
19 years, or something, at Marquette Law School
20 called Federal Crimes and Federal Criminal
21 Procedure, one course.

22 Q. And you have taught courses on evidence?

23 A. I have taught evidence once, last spring, at UW
24 and expect to do it again next spring.

25 Q. All right. And was that state rules of evidence

1 or federal?

2 A. Both, because of the diploma privilege, but a
3 focus on the federal rules of evidence.

4 Q. And you have also taught on Fourth Amendment
5 Search and Seizure Law?

6 A. I teach -- With Marcus Berghahn, I teach a
7 seminar on the Fourth, Fifth, and Sixth
8 Amendments, at -- again, at the University of
9 Wisconsin Law School.

10 Q. And the Fifth Amendment talks about both
11 interrogation law and even fair trials and double
12 jeopardy. You cover those topics?

13 A. We don't -- We actually don't cover double
14 jeopardy, but you have got the right amendment.

15 Q. All right. And you are also on faculty for the
16 National Criminal Defense College in Macon,
17 Georgia, correct?

18 A. Yes.

19 Q. And you have been on that faculty for about 10
20 years?

21 A. Yes.

22 Q. And that's a school designed to educate and teach
23 trial skills to defense attorneys from around the
24 country?

25 A. Yes. And to some extent outside the country.

1 Criminal defense lawyers only, that's correct.

2 Q. You have authored a number of law review
3 articles?

4 A. Co-authored one, authored and published two, and
5 then another one is coming out this fall, later
6 this fall.

7 Q. All right. And this one coming out this fall is
8 entitled what?

9 A. Becoming What We Pretend To Be, Casual Rhetoric
10 In American Criminal Justice. Get it while it's
11 hot.

12 Q. And you have also have been involved in the anti
13 death penalty movement, correct?

14 A. Not so actively now, but yes, very actively in
15 the mid-nineties to late-nineties.

16 Q. Lectured, debated, wrote on the issue?

17 A. Yes, to all three.

18 Q. All right. In this particular case, I believe
19 you already expressed this, but I want to be
20 clear, the ultimate goal in this case, at least
21 as you and Mr. Buting set out, was to obtain an
22 acquittal?

23 A. Yes.

24 Q. And that, in this case, would have been three not
25 guilty verdicts, correct?

1 A. As the case went to the jury, that's right.

2 Q. All right. Now, you would agree with me,
3 counsel, that a trial lawyer's decisions
4 throughout the course of handling a case like
5 this are an effort to achieve that objective, an
6 acquittal; you make decisions with that goal in
7 mind?

8 A. In this case?

9 Q. Yes.

10 A. Yes. And I'm sorry, I mean to the extent that
11 it's a case where the client is saying I'm
12 innocent, I didn't do it --

13 Q. Right.

14 A. -- and I want to go to trial, then I could speak
15 more generally and agree with you, yes.

16 Q. All right. That would be the point, your point
17 is well taken. And certainly in this particular
18 case, a not guilty verdict on a charge of
19 homicide for Teresa Halbach was definitely in
20 Mr. Avery's best interest, right?

21 A. Yes.

22 Q. All right. Now, a criminal defense attorney, in
23 representing a client and representing their
24 interest, has what often is referred to in the
25 law as a fiduciary obligation, right?

1 A. I view it that way. I don't know how often I
2 have seen fiduciary duty apply to the criminal
3 defense role, but I view it that way.

4 Q. All right. And would you express, then, to us,
5 your understanding of what that obligation is,
6 that fiduciary obligation?

7 A. Well, as I understand it, it would be to put the
8 client's interest first and to act in a way that
9 advances his legitimate interests so far as
10 possible, while obeying the ethical and other
11 societal rules that bind lawyers, and in general
12 bind all of us.

13 Q. All right. And with that in mind, with that
14 obligation in mind, you make decisions which you
15 believe are in the best interest of your client,
16 directed toward the goal of an acquittal?

17 A. Yes, some decisions are the clients to make,
18 others are committed to the lawyer, but I think
19 no matter who's the ultimate decision maker, I
20 would agree with you that I try to come to a
21 course or a decision that is in the client's
22 legitimate best interest.

23 Q. And you would agree that sometimes, whether it's
24 a decision or a recommendation to a client for
25 their decision, sometimes that's a very difficult

1 process, the decision making process?

2 A. Oh, sure.

3 Q. Or deciding on a recommendation?

4 A. Yes, I do agree with that.

5 Q. All right. And sometimes it's unpleasant?

6 A. Yes.

7 Q. Sometimes contentious?

8 A. Rarely, but yes, that has happened.

9 Q. And sometimes you may make an argument or a
10 recommendation to the Court because your client
11 thinks that's what should be done?

12 A. Now, you are speaking generally, beyond this
13 case?

14 Q. Generally, yes. I mean, you may not always agree
15 with your client, and they may want -- but if
16 it's their decision --

17 A. Yes.

18 Q. -- and if it's legal and appropriate, you have to
19 go that way?

20 A. If you can't dissuade them from a poor but
21 permissible choice, then, yes, unless it's --
22 unless it's a matter that's so clearly committed
23 to my judgment, yes, I would go that way or ask
24 to withdraw.

25 Q. All right. Now, returning again to decisions,

1 sometimes, and I'm talking generally now,
2 sometimes decisions are made jointly with you and
3 the client together?

4 A. Ideally, yes.

5 Q. Right.

6 A. And, yes, I mean I try to work toward that on
7 every decision, to the extent I can, with a
8 client.

9 Q. The goal being to forge a consensus between you
10 and your client?

11 A. An understanding, a mutual reliance, trust. And
12 it's a good way to check in to see that we're --
13 you know, we still view the case the same way.

14 Q. Right. And, however, as I think you have just
15 said, sometimes decisions are those that are
16 solely for the client?

17 A. Yes.

18 Q. All right. And sometimes there are just other
19 decisions which are best made and solely the
20 purview of the lawyer?

21 A. At least by law committed to the lawyer's
22 judgment, that's right.

23 Q. Certainly. But good practice is to at least kick
24 those things around with your client before you
25 decide on a course of action?

1 A. That's -- that's the best practice. You -- I
2 think most people, or at least I will speak for
3 myself, I fall short of that sometimes, but that
4 is certainly what I view as the best practice.

5 Q. Regardless of the situation, whether it's a joint
6 decision, the client's decision, or you as the
7 lawyer's decision, the goal is to make a decision
8 which is in the best interest of the client?

9 A. That is the goal.

10 Q. All right. As to the night of March 15th, you
11 first became aware there was a problem when you
12 received a call from Judge Willis, correct?

13 A. Yes, that's my recollection.

14 Q. And now, as recalled, the jury went out about
15 1:00 that afternoon, on March 15th?

16 A. Well, I don't know, I recall things as being a
17 little later in the day, but it was some time in
18 the afternoon.

19 Q. And they quit around 5:30?

20 A. There, again, I thought it was later, but it's
21 not like I have a specific recollection or a note
22 or anything.

23 Q. When the call came from the Court, I believe you
24 have already told us you were having dinner at a
25 Mexican restaurant and Mr. Buting was with you?

1 A. Yes, I was awaiting food. We had ordered, but
2 the food had not arrived when the call came.

3 Q. And when the call came in, you were the one doing
4 the talking for the defense team primarily, with
5 the judge, correct.

6 A. That's how I recall it, yes.

7 Q. And your best recollection is is that Mr. Buting
8 was nearby and you were relaying the comments
9 that were made to you by the Court?

10 A. Yes. And that -- and that Mr. Buting could
11 overhear my end of the conversation.

12 Q. Certainly. And you don't recall Mr. Kratz being
13 in on the conversation, but you fully expect he
14 was?

15 A. That's true.

16 Q. All right. And he said -- The reason you don't
17 remember him, probably, is that he said very
18 little during that conversation, correct?

19 A. That would explain it, I mean, that would be one
20 plausible explanation.

21 Q. All right. Now, in terms of your recollection as
22 to the information you were receiving, the Court
23 advised you that it had received some information
24 from Sheriff Pagel concerning Juror Mahler,
25 correct?

1 A. I don't remember Sheriff Pagel being identified
2 personally. That doesn't mean that Judge Willis
3 didn't say it, I just don't recall it being
4 attributed specifically to Jerry Pagel or any
5 other person by name.

6 Q. But you do recall the Court saying, I have been
7 made aware or I have been told this information.

8 A. Yes. And beyond that, I remember the Court
9 attributing it to the sheriff's department,
10 someone. I knew the source was the sheriff or
11 someone in his employ.

12 Q. In other words, the impression you were left with
13 is that it was an, for lack of a better term, an
14 official source of information?

15 A. For lack of a better term.

16 Q. All right. And the Court advised you that
17 Mr. Mahler apparently was advised that his
18 stepdaughter was in a car accident earlier that
19 evening, correct?

20 A. That was part of what I recall, right.

21 Q. And there was some information relayed to the
22 Court that the vehicle which she was driving was
23 totaled, heavily damaged?

24 A. That well could have been relayed to me. I don't
25 remember that specifically. My recollection is

1 no one was killed, extent of injuries or property
2 damage, unknown.

3 Q. Unknown?

4 A. That's my recollection.

5 Q. However, there was other information that his --
6 that the juror's wife was very upset by the
7 accident and the amount of time that he had been
8 away from the family?

9 A. As I recall it, the sense was this was the last
10 straw, with the juror's wife. This just, last
11 straw, put it over the edge.

12 Q. And part of the reason for that last straw
13 impression was, some of the media had attributed
14 to the information that he revealed during voir
15 dire that apparently a large source of his income
16 was coming from his wife's trust fund apparently?

17 A. I believe that now. I don't know whether I heard
18 that in the first phone call, or when that piece
19 of explanation came about. But I understand that
20 came to be part of the story.

21 Q. All right. So as you think about it now, it's
22 easier for you to connect those two pieces than
23 maybe it was that night?

24 A. My memory just is not fresh on this phone call.

25 Q. All right. The Court provided you with

1 information. I believe you testified on direct
2 examination that you -- you were certainly
3 impressed with the apparent urgency of the
4 situation?

5 A. And, again, that's his objective impression that
6 I remember best as opposed to --

7 Q. Specific --

8 A. -- objective events or words.

9 Q. All right. As opposed to specific details, you
10 remember being impressed that this is an urgent
11 or very important situation?

12 A. Serious and urgent.

13 Q. And as a result, you were then impressed with the
14 fact that it needed to be addressed, somehow,
15 sooner rather than later?

16 A. That's what I thought the Court was
17 communicating. I mean, that's the sense I got
18 from what Judge Willis was saying, yes.

19 Q. All right. Part of that sense of urgency came
20 from the fact that the juror's marital state was
21 certainly becoming an issue. In other words,
22 there was a sense that maybe his marriage was on
23 the rocks and that helped contribute to the
24 urgent impression you were left with?

25 A. The information the judge was relaying to me,

1 that was a piece of it, you know, that the wife
2 might walk out or something terrible might happen
3 as a matter of the juror's marriage.

4 Q. Right. All right. So with that information, did
5 you ask the Court to hold for a moment and you
6 and Mr. Buting discuss, well, what do you think
7 we should do, or was it kind of a free flow
8 evolving discussion as to what do you think we
9 should to?

10 A. I don't remember. As a matter of reconstruction,
11 because I have seen one page of Mr. Buting's cell
12 phone records, as a matter of reconstruction, I
13 surmise that I probably said, your Honor, let us
14 get back to you in a few minutes. Let us talk
15 about this and call you back soon. Because it
16 appears that, if I'm remembering right, like
17 8:59 p.m. Mr. Buting places a call on his cell
18 phone to the judge.

19 Q. All right.

20 A. And I had -- My cell phone was sort of old and
21 the battery was dying. It didn't -- It didn't
22 last very long and all I had was a car charger
23 when I was up trying Mr. Avery's case. So it
24 would make sense that we would switch to Jerry's
25 better cell phone.

1 Q. All right. So your recollection is that there
2 must have been some discussion between you and
3 Mr. Buting as to how you should proceed, or what
4 your recommendation to the Court would be as to
5 how you guys should proceed?

6 A. This is something that I would have wanted to
7 talk to Jerry about and that we would have viewed
8 as co-counsel as being a collaboratively made
9 decision, if circumstances permitted that.

10 Q. And while we're on that topic, is it fair to say
11 that the responsibility for handling this case
12 was split equally, or were you more lead counsel?

13 A. Both. The agreement was that I was lead counsel
14 and would be the tie breaker, so to speak, if we
15 needed one, but that we really would try to
16 operate as equals and share responsibilities.
17 And I think the division of labor was as close to
18 equal as you can get.

19 Q. All right. In any event, after discussion or
20 consulting with Mr. Buting to assess the defense
21 strategy here, for your part of the conversation,
22 it was ultimately agreed that the Court should
23 investigate this report further before any final
24 decision could be made as to what to do with the
25 juror, right?

1 A. Right. I mean, if you really want my subjective
2 recollection or sense of this, it was convincing
3 Judge Willis to talk to the juror before acting
4 and before removing the juror, was sort of the
5 best we were going to get. That's how I recall
6 it, rightly or wrongly.

7 Q. And both you and Mr. Buting were in agreement
8 with that plan, that we should at least verify
9 whatever this report is before we make any
10 decisions?

11 A. Yes.

12 Q. And as --

13 A. Well, we in the sense of having at least the
14 judge do that.

15 Q. Right.

16 A. Right.

17 Q. And as a result, with the agreement of Mr. Kratz
18 and Mr. Buting, you advised the Court to go ahead
19 and attempt to ascertain whether the report of
20 this juror's problem was in fact accurate?

21 A. I doubt that I advised the Court to do anything,
22 and I can only assume Mr. Kratz agreed. I don't
23 remember in the end, anyone objecting.

24 Q. That was my next question. No one objected to
25 the Court's inquiry?

1 A. Not that I recall.

2 Q. And you certainly had plenty of opportunity to do
3 so?

4 A. Well, sure, informally, we were -- I don't think
5 there was a court reporter. I don't think we
6 were on the record or being recorded. So in some
7 sense, we had no opportunity to object in the way
8 lawyers use that term. Informally, in terms of
9 expressing an opinion, no one was cutting us off.

10 Q. Right. And there was no opinion expressed during
11 the phone conversation that this would be a bad
12 idea?

13 A. I don't -- Yeah, I don't recall anyone
14 expressing, you know, affirmatively, this would
15 be a bad idea.

16 Q. Now, at the time that the decision was made that
17 the Court should inquire further, well, that
18 decision at that time, you believed, was in the
19 best interest of Mr. Avery, correct?

20 A. Yes.

21 Q. And -- And one of the reasons were that you would
22 certainly be concerned that if there -- that if
23 Mr. Mahler's mental state, you -- would somehow
24 become an issue if he were remaining on the panel
25 as well, correct?

1 A. Well, sure, that he would be a distracted juror.
2 Now, I want to make clear, that although I
3 thought, given the range of possibilities that I
4 perceived, having the judge talk to the juror was
5 in Mr. Avery's best interest, yes.

6 As I said, I also thought that I was
7 acting, in some ways, in a broader moral sense,
8 in the juror's best interest, or in the interest
9 of his family. And as I suggested on direct,
10 this just felt like a time where you -- where I
11 shouldn't stand on legal niceties. That may have
12 been a mistake, but that's how I -- that's how I
13 took it and I was, at least in part, considering
14 the juror and his family.

15 Q. And as a matter of fact, during that
16 conversation, several of the individuals did
17 express concern for his emotional state, for his
18 well-being, the juror's? I mean that -- the
19 feeling that you just expressed, you were not the
20 only one to express some concern for Mr. Mahler's
21 well-being?

22 A. I remember the judge expressing that.

23 Q. Right.

24 A. Yes. And Mr. Kratz may have, I don't remember
25 him speaking, but.

1 Q. And you would also be concerned, as a lawyer, if
2 Mr. Mahler had remained on the panel, that his
3 mental state could affect the deliberations,
4 generally, of other jurors?

5 A. I don't think I agree. I think the specific
6 concern that I had was that if he remained on the
7 jury, and whatever the events were at home were
8 weighing heavily on him, that he might be
9 inclined to rush through deliberations or not
10 hold to a sincerely held belief about the weight
11 of the evidence.

12 Q. All right. And -- But you have had enough cases
13 where you are experienced to realize that one
14 juror with a problem like that can have an affect
15 on the overall panel's deliberations, right?

16 A. I can't draw on my own experience on that one, I
17 have never had anything really very close to this
18 arise before.

19 Q. But you have never had a particular juror who was
20 distracted or any -- had any other problems such
21 that that juror's demeanor and mental state
22 affected the deliberations of the panel as a
23 whole?

24 A. Well, I have certainly seen, you know, jurors
25 come out with a hung jury or a verdict where

1 someone appeared to be in tears or in some
2 emotional distress, but I really don't think I
3 had ever lost a juror during deliberations
4 before. That's why I did not know what the
5 options were. That's why I had to get on Westlaw
6 that night.

7 Q. In any event, you did tell the Court that if the
8 Court were able to verify the preliminary report
9 that it received regarding the problems he was
10 experiencing, it would be appropriate to excuse
11 him?

12 A. Whether I said it or I told anybody that in the
13 end, I was part of that consensus, as I recall.

14 Q. And Mr. Buting was in agreement with that?

15 A. Yes, he must have been. I don't remember us, you
16 know -- I didn't overrule him, so to speak, on
17 that.

18 Q. And you would agree that the decision to excuse
19 that juror, under the circumstances as you
20 believed them, was in the best interest of
21 Mr. Avery?

22 A. Given the information I had and the range of
23 possibilities as I perceived them, yes,
24 understanding that I was also thinking about the
25 juror's interests.

1 Q. So, at some point you did become aware that the
2 Court did excuse Mr. Mahler?

3 A. I'm sure I knew that before I went to bed that
4 night. I don't think we learned that the next
5 morning in chambers.

6 Q. And one of the reasons you have that belief is
7 you, as you said, hit the books, or as we say
8 today, hit the computer and did some research?

9 A. Right. Yes, that is part of why I -- and, you
10 know, just in general, I recall knowing that the
11 night of the 15th, I guess, when this came up.

12 Q. All right. And so when you went to bed that
13 night, you and Mr. Buting -- Well, let me not
14 assume that. After you found the **Lehman** case,
15 I'm assuming that you had some discussions with
16 Mr. Buting as to what you thought that case
17 meant, on its own, and then what it meant for
18 your decision as it pertains to Mr. Avery's case?

19 A. Here's what I think happened. His apartment was
20 right below mine and I think I printed off
21 **Lehman**, decided there was nothing newer than
22 that, that was something like a 1982 case,
23 thereabout.

24 Q. Right.

25 A. Printed it off. Took it down, I think, to

1 Jerry's apartment. My recollection is that he
2 was going to call Kathy, who is his wife and law
3 partner, and bounce it off her and see if she had
4 ever bumped into this situation or could help.
5 But I think it wasn't very long before I got down
6 there and said, you know, I think I have the
7 case.

8 Q. All right. And so you and he then discussed what
9 you thought the case meant and how it might
10 affect Mr. Avery's case?

11 A. Right. It was -- As I recall, it was a Justice
12 Abrahamson opinion, so it took a while to read,
13 but, yes.

14 Q. Another time. When you went to bed that night,
15 then you were aware of the fact that, at least as
16 you believed them, there were three options
17 available to you, and more particularly, to
18 Mr. Avery? When I say you I mean you and
19 Mr. Buting.

20 A. Right. I think we knew those three options when
21 we retired.

22 Q. And as you talked about, the one option was
23 proceed with 11?

24 A. Yes.

25 Q. Another option was a mistrial?

1 A. Yes.

2 Q. And then the third option was, let's go with the
3 substitute juror?

4 A. Yes.

5 Q. All right. And as I understood your comment, you
6 have a firm personal philosophy of not advising
7 to go with 11 jurors?

8 A. Right. And that would be consistent with what I
9 learned from the people who mentored me.

10 Q. And one of the reasons for that is, that
11 regardless, if there is to be a conviction, it's
12 going to take 12 and not 11, so there's an extra
13 person there?

14 A. Yup.

15 Q. And the other option is, if there's a 12th juror,
16 then there's at least -- I'm not going to get
17 into statistics, but there's at least one more
18 opportunity that you might have a juror that's
19 not convinced and you are going to have a
20 mistrial?

21 A. Yes.

22 Q. Thus there would be no conviction for your
23 client?

24 A. That's right.

25 Q. And even though its not a conviction -- or excuse

1 me -- even though it's not an acquittal, it's not
2 a conviction, so it's still in your client's
3 interest?

4 A. He lives to fight another day.

5 Q. He lives to fight another day.

6 A. That's right. That's right.

7 Q. All right. So with the benefit of the 12th
8 juror, the substitute juror, then it would have
9 been true that by substituting that juror, you
10 kept your client's right to a 12 person jury
11 firm?

12 A. I don't want to quibble with you on firm, but I
13 -- but I will -- I will agree that, yes, in the
14 end he had 12 jurors who returned the verdicts.

15 Q. Returned the verdicts. And by having a 12th
16 juror, you then also had that -- you still had
17 that additional option that maybe a mistrial
18 would result, because there was still one more
19 person the State had to convince before a
20 conviction could be obtained, right?

21 A. Well, we had no way of knowing which way the jury
22 was split or leaning but, yes, there were 12
23 people who had to agree unanimously, one way or
24 the other at that point, not 11.

25 Q. So in this sense, the opportunity for a mistrial

1 still existed?

2 A. Sure, I mean, they hadn't returned a verdict, so
3 there's always a possibility that they will
4 deadlock, I suppose.

5 Q. Right. Now, you told us about the fee agreement
6 and the handshake with Mr. Buting about -- that
7 you would go all out for an acquittal in this
8 particular case. In terms of assessing this
9 case, you also felt fairly good about how the
10 case went in for the defense, did you not?

11 A. At trial's end?

12 Q. I'm sorry?

13 A. At trial's end?

14 Q. Yes.

15 A. Yes, I thought that it had gone in about as well
16 as it could, taken as a whole.

17 Q. Right. All right. And so when it came down to
18 discuss these three options with your client, you
19 had to make a recommendation to him as to which
20 option you thought was in his best interest,
21 right?

22 A. Yes.

23 Q. And how much time did you spend with him
24 discussing the option of proceeding with just the
25 remaining 11 jurors?

1 A. Almost none. I would have -- I would have made
2 very clear I thought that folly.

3 Q. And as I understood your testimony, that was --
4 there was clear agreement by Mr. Buting on that
5 point, with you?

6 A. Right, no disagreement, certainly.

7 Q. So you told him about the option, but you really
8 made short shrift of any discussion as to whether
9 that was in his best interest?

10 A. That's fair.

11 Q. All right. So, in effect, then, the time spent
12 with him was the discussion of should we mistry
13 this case or should we go with the substitute
14 juror. The balance of your time with him was
15 discussing those possibilities?

16 A. At least the balance of the substantive
17 discussion, I agree.

18 Q. All right. And with respect to assessing this
19 case, you recommended, I believe you said,
20 against mistrial?

21 A. Yes.

22 Q. Mr. Buting agreed with that recommendation?

23 A. Yes, I think we were speaking jointly, not at the
24 same time, but I think we agreed, yes, we'll take
25 the 13th juror, the alternate, put her in, start

1 deliberations over.

2 Q. All right. And you would agree with me, would
3 you not, that the parties, meaning yourself and
4 Mr. Buting, and the three of us, Mr. Gahn,
5 Mr. Kratz and myself, had contemplated the very
6 possibility that we would have need for a
7 substitute juror?

8 A. Yes. Who's idea that was, I don't have any
9 recollection now, but, yeah, we kept a 13th. I
10 think excused two alternates and kept one for the
11 purpose of having a spare, so to speak, if we ran
12 into trouble.

13 Q. And as a matter of fact that was the result of a
14 somewhat extensive process, was it not?

15 A. What I remember, that I could describe fairly as
16 extensive, is that I think we horse traded so
17 that it was -- it was really sort of wired who
18 the one remaining alternate would be.

19 Q. As a matter of fact, it was you, was it not, who
20 suggested that the parties exchange one
21 additional peremptory strike of the three
22 alternates, thereby leaving one alternate left?

23 A. It certainly could have been. I mean that level
24 of detail, I don't remember, but that sounds like
25 me. I mean, that --

1 Q. Yes.

2 A. That sounds right.

3 Q. All right. And as a matter of fact, you had one
4 particular juror in mind that you wanted to
5 strike because a previous motion to strike for
6 cause was denied?

7 A. Yes, that's right. That's right. I think there
8 had been a motion to strike for cause.

9 Q. All right. And as result of some familiarity
10 with one of the witnesses?

11 A. I don't remember why. I remember there was one I
12 really wanted to see go.

13 Q. All right. And the State also removed one juror
14 that was a concern to all parties as a result of
15 some activities that occurred shortly before the
16 end of the trial?

17 A. I think so, something that had to do with maybe
18 brandy Manhattans, at a fish fry.

19 Q. Something about a juror being a little too
20 talkative at a fish fry.

21 A. Yeah.

22 Q. All right. So the parties horse traded, as it
23 were, thereby we left one alternate juror on the
24 panel.

25 A. That's how I recall it.

1 Q. And then we took the additional step of agreeing
2 that that juror would be sequestered at the
3 hotel, all by herself?

4 A. Yeah, I think that's probably right. Do I recall
5 that specifically, no, but that sounds right.

6 Q. All right. Because we didn't want to run the
7 risk of her somehow being contaminated by any
8 news accounts or discussions with family,
9 correct?

10 A. I'm sure. I'm not disagreeing if you have a
11 better recollection than that.

12 Q. So when it came time to actually be faced with
13 the decision here, the parties had contemplated
14 and prepared for this eventuality?

15 A. The lawyers, at least on the defense side, it was
16 just the lawyers. We had not included Mr. Avery,
17 probably, in any of that.

18 Q. In any of that.

19 A. Probably not.

20 Q. In your view, that was -- these are the kinds of
21 questions that lawyers routinely make, based on
22 their experience?

23 A. Yes and no. This is something I should have
24 discussed with Mr. Avery, but because he was not
25 admitted to bail, or he was unable to make the

1 bail the Court had set, and I think Sergeant
2 Wiegert in particular, or Detective Wiegert, was
3 listening assiduously to his phone calls at the
4 end of each week; we just didn't share things
5 with Mr. Avery that we should have.

6 Q. But the question is, with respect to the lawyers
7 in this case agreed that -- to this option being
8 available?

9 A. Yes.

10 Q. All right. When you recommended against mistrial
11 to Mr. Avery, what other reasons did you give
12 him? You talked about the situation, the
13 agreement you had with Mr. Buting, but what other
14 reasons, what other thoughts, crossed your mind?

15 A. Well, it crossed my lips. I mean, I told Mr.
16 Avery, you know, if this case gets mistried, it's
17 not going away, you know.

18 It's a very serious case. They are
19 going to re prosecute this. You know, you are
20 going to face another jury trial and you won't
21 have us as your lawyers. We tried to say that
22 nicely and gently, but he was entitled to that
23 truth. He was not going to have us as his
24 lawyers.

25 And as a practical matter, what that

1 meant is that he would have to rely on counsel
2 appointed by the State Public Defender. That was
3 information we had -- I thought, had to share
4 with him.

5 I think I'm really pretty certain that I
6 told him, hey, the case went in, you know, about
7 as well as it could have. You know, we won some,
8 we lost some but, you know, overall, you take
9 this on the whole, it went in about as well as it
10 could have, for the defense. That I'm quite sure
11 I told him.

12 Q. And you believe that you and Mr. Buting did the
13 best you could on this case?

14 A. Oh, geez, that's a -- that's a God question, in
15 some ways. I mean --

16 Q. Well, you worked very hard on this case?

17 A. We worked very hard on the case, that's true.

18 Q. And you believe that you said that it went in as
19 well as it could, and we can't account for
20 everything in trial work, can you?

21 A. Right. I mean, about as well as we could have.
22 The calculus really was, is this case likely to
23 go in better for the defense the second time, and
24 I thought probably not.

25 Q. Right. And one of the reasons is, you thought

1 that you and Mr. Buting gave him his best chance
2 at an acquittal, based on the record you made?

3 A. There's probably some arrogance in that but, yes.

4 Q. And you knew at a retrial the prosecution would
5 have an opportunity to dissect whatever defense
6 strategy there was and attempt to deal with it on
7 a retrial?

8 A. Yes, that's a two way street but, of course, yes.

9 Q. And certain evidentiary developments that
10 occurred during the course of the trial would
11 have affected any possible retrial of this case,
12 specifically, reference the EDTA issue?

13 A. Yes. I think that was part of the calculation,
14 or should have been and rightly was part of the
15 calculation.

16 Q. As to what might likely occur on any type of
17 retrial?

18 A. Right. One could assume that there would be some
19 months between the Court declaring a mistrial and
20 then impaneling a new jury.

21 Q. And that --

22 A. With the change of counsel, there well could have
23 been a year.

24 Q. And that was my next question, could have been at
25 least nine months and probably more?

1 A. It well could have been.

2 Q. And that would have been 9 or 10 or 12 more
3 months in the local county jail for your client?

4 A. As matters stood, I mean, one would renew a bail
5 motion, but he was not able to come close -- he
6 and his family could not come close to posting
7 the bail that the Court set.

8 Q. Right. And finally, you had a pretty good
9 idea -- Well, let me rephrase that. You at least
10 had some idea who the alternate juror would be
11 when she was substituted in?

12 A. I knew her name.

13 Q. You knew the name.

14 A. Sure.

15 Q. And it wasn't someone that you moved to strike
16 either for cause or for any peremptory challenge
17 earlier on, right?

18 A. I'm not answering that one because, you know, A,
19 there will be a transcript of what I did or
20 didn't do. And, B, I have no recollection of
21 whether I moved to strike that juror at any
22 point.

23 Q. All right. But in terms of whatever impression
24 you had, you were left with the impression that
25 she was at least an acceptable or an okay juror

1 to assume the role as the 12th juror?

2 A. Specifically, what my opinion was, that she was
3 the best of the three alternates. You know, if
4 we were going to have an alternate retained,
5 during deliberations, this woman was the one to
6 pick.

7 Q. But we didn't know who the alternates were until
8 the names came out of the tumbler, right?

9 A. I think that's right, but it was after that point
10 we knew there were three.

11 Q. Three.

12 A. And my view was, of those three this is the one I
13 would pick --

14 Q. If you had to --

15 A. -- if I had to choose, right.

16 Q. Now, in your discussions with Mr. Avery,
17 regarding whether he should follow your advice or
18 not, he certainly didn't insist on proceeding
19 with 11 jurors, did he?

20 A. No.

21 Q. And he accepted your recommendation that a
22 mistrial was probably not the best choice?

23 A. Yeah, he accepted it. I really think I steered
24 this decision --

25 Q. Right.

1 A. -- to the outcome.

2 Q. But that's not the first time you have had a
3 discussion with a client and recommended
4 strongly, or softly, or to use your phrase,
5 steered a client toward a decision which you
6 believed was in their best interest?

7 A. Oh, it's not the first time at all.

8 Q. No. In fact, it's somewhat -- it's often quite
9 routine?

10 A. I do it commonly.

11 Q. All right.

12 A. I think it's the first time I ever told a client
13 to turn down a mistrial.

14 ATTORNEY FALLON: May I approach?

15 THE COURT: Yes.

16 Q. (By Attorney Fallon)~ Counsel, I'm showing you
17 what has been received as Exhibit No. 1, I
18 believe you have previously identified that?

19 A. Yes.

20 Q. The Court provided us with that memo on the 16th,
21 did it not?

22 A. I don't recall that. I'm not denying it. It's
23 dated the 16th. In my mind, I first saw this
24 after trial, which of course is impossible, if it
25 was given to me on the 16th. I would have looked

1 at it.

2 Q. Do you want to take a moment to look it over,
3 specifically page two? Read page two to
4 yourself.

5 A. The second paragraph --

6 Q. Yes.

7 A. -- is the one you are trying to invite --

8 Q. Yes.

9 A. -- me to consider? Yeah, I read it, but I don't
10 know if the judge is saying he prepared the memo
11 this morning or prepared the memo to elaborate
12 the comments on the record this morning.

13 Q. But we had a discussion in chambers at 8:30 as
14 well?

15 A. Right, probably was 8:30.

16 Q. All right. But you would agree that the Court
17 did provide you with that memorandum?

18 A. Oh, yes, absolutely.

19 Q. All right.

20 A. I don't know if when is a big deal --

21 Q. Right.

22 A. -- but.

23 Q. As you read it over now, there's nothing in there
24 that strikes you as being inconsistent with your
25 memory of those events, is there?

1 A. I didn't read the whole thing. If you want me to
2 answer that I'm going to read the whole thing
3 then.

4 Q. Sure.

5 A. You know, the only thing I really -- I recall
6 differently is, I think the first call from the
7 judge to my cell phone happened, you know, before
8 9:00 p.m. I would have -- you know, I think it
9 more like 8:30.

10 Q. Quarter to nine, something like that?

11 A. Yeah, but I mean, earlier than that. And then
12 the rest of it, you know, is consistent with my
13 recollection, to the extent I have one. And this
14 sort of prompts me to recall, but I think in the
15 first conversation there was some discussion
16 which the judge was expressing reluctance to go
17 too far into the details of the marital
18 difficulties, or not, you know, not wanting to
19 embarrass or pry unnecessarily. And, you know,
20 that I agreed that some deftness there was
21 appropriate.

22 Q. In other words, the Court was struggling to
23 balance the competing objectives that were at
24 play here?

25 A. That was my sense.

1 Q. All right. All right. Thank you. As a result
2 of, then, Mr. Avery accepting your recommendation
3 to proceed with 12, that then put into play a
4 series of events regarding just how we were going
5 to do that, in terms of integrating a brand new
6 juror, correct?

7 A. Yes.

8 Q. All right. And I believe that the parties were
9 in agreement. And I think based on some of the
10 research the parties had done, is that they would
11 have to be instructed as a group again, to start
12 over?

13 A. Right.

14 Q. And that they should be told to start over?

15 A. That much I got from **Lehman**, or that's -- you
16 know, I read **Lehman** to require that.

17 Q. And as a matter of fact, the first step we took
18 in the process was to invite the new juror in and
19 make sure that she had obeyed her responsibility
20 not to listen to any media accounts, or anything
21 of that sort; in other words, we wanted to make
22 sure that her knowledge base hadn't been tainted
23 by outside information? We had a colloquy with
24 the juror, correct?

25 A. I really don't remember that. I'm sure it's a

1 matter of record. I'm not disputing whatever the
2 transcript shows.

3 Q. And we did bring the jury back in as a whole and
4 have them reinstructed, and the jury was
5 instructed to accept the new juror and to begin
6 deliberations anew?

7 A. Yes, I remember being in the courtroom, all the
8 lawyers, Mr. Avery. I remember the jury coming
9 back in and an instruction to that effect being
10 given. I have no specific recollection of
11 details.

12 ATTORNEY FALLON: May I?

13 THE COURT: Yes.

14 Q. (By Attorney Fallon)~ I'm showing you what has
15 been marked as Exhibit 2?

16 (Witness asks for a break.)

17 THE COURT: We'll take a short break at
18 this time, resume in five minutes.

19 (Recess taken.)

20 THE COURT: Mr. Fallon, you may continue.

21 ATTORNEY FALLON: Just a few more questions
22 on this issue, counsel.

23 Q. (By Attorney Fallon)~ I provided you what has
24 been marked for identification purposes as
25 Exhibit No. 2; do you recognize it?

1 A. This must be the instruction the jurors were
2 given after the alternate joined them.

3 Q. And there was no objection from you or Mr. Buting
4 as to the content of that instruction, correct?

5 A. I don't want to be quarrelsome, I don't remember.
6 I'm going to let the record speak on that, if
7 that's acceptable.

8 Q. Very well. All right. Let's change gears a
9 little bit and ask, if I may, a few questions on
10 the third party liability question. We have
11 referred to it as the Court's **Denny** ruling, so I
12 will use that terminology, if that's acceptable?

13 A. Sure.

14 Q. The Court's ruling did not preclude you from
15 pointing a finger at Brendan Dassey, correct?

16 A. That's right.

17 Q. And in this particular case, you chose not to
18 introduce any evidence or point the finger that
19 way?

20 A. That's right.

21 Q. The Court's ruling still allowed you to suggest,
22 and you so argued, that some unknown, some other
23 person, committed this murder?

24 A. Yes. I mean, we certainly were allowed a
25 reasonable doubt argument and I think your

1 request, generally, was fair.

2 Q. And so the impact of the ruling specifically was
3 that you couldn't point a particular finger at a
4 particular suspect?

5 A. Or suspects, yes.

6 Q. Or suspects, or more than one. All right. The
7 ruling still permitted you to argue and
8 cross-examine witnesses with the idea in mind
9 that the police framed Mr. Avery?

10 A. Yes, I mean, at least in the sense of suggesting
11 the police may have planted evidence, yes. And I
12 paused because there may have been -- I think
13 there was a separate motion argument and ruling
14 on that issue, if my memory serves.

15 Q. Well, there was the blood vial issue, right?

16 A. I thought even apart from that. I may be wrong,
17 but the short answer to your question was, yes,
18 we were able to argue planting of evidence.

19 Q. And you were then able to choose, as a lawyer,
20 which bits of evidence you would actually argue
21 were planted by the police?

22 A. Yes.

23 Q. In other words, you had your choice of suggesting
24 that the blood was planted?

25 A. In the Toyota?

1 Q. Yes.

2 A. Yes.

3 Q. You had the opportunity to argue that the police
4 planted the key?

5 A. Yes.

6 Q. In fact, you also argued that the bones, the
7 fragments identified as Teresa Halbach, were
8 actually moved from some place else to the fire
9 pit behind his house, correct?

10 A. That argument was not directed toward the police.
11 That's not on the topic we're discussing. The
12 blood, yes. The key, we had -- we were able to
13 develop an evidentiary basis to make those
14 arguments.

15 Q. And you chose not to make the argument with
16 respect to the bones in the fire pit,
17 specifically?

18 A. Chose not to argue that the police moved the
19 bones?

20 Q. Yes.

21 A. I didn't argue that the police moved the bones
22 and, you know ...

23 Q. That some unknown person did?

24 A. The perpetrator, I think, was the gist of my
25 argument and the police were not the perpetrator.

1 Q. Now, you realized that the prosecution was going
2 to argue that the way the frame up theory was
3 positive, that a reasonable conclusion, in fact,
4 an almost irrefutable conclusion, was that they
5 would have had to have been involved in the
6 crime. You knew that argument was coming?

7 A. I didn't know it, I anticipated that you would
8 make what I sort of think of as a false premise
9 argument, that if we argued that the police were
10 involved in planting evidence, to believe that
11 you would have to believe that the police also
12 committed the underlying crime.

13 Q. In fact, I made that argument in the
14 suppression -- in the motion hearing two weeks
15 before trial.

16 A. I don't recall that, but I certainly anticipated
17 it and, you know, probably anticipated it
18 before -- two weeks before the trial, if you made
19 that argument then.

20 Q. Right.

21 A. It didn't take a genius to anticipate that
22 argument.

23 Q. Exactly. Now, there was quite a bit of evidence
24 in this particular case that was available for
25 you to poke holes at or question its reliability?

1 A. I don't know how to agree or disagree with that.
2 I mean, the Court's rulings circumscribed the
3 available evidence in some ways, opened it up in
4 other ways.

5 You know, there was a whole series of
6 rulings, obviously, that had an affect on both
7 the evidence the parties would have available to
8 them and the arguments they might make based on
9 that evidence, or the inferences they might ask
10 the jury to draw, so.

11 Q. That's my point, the rulings that while they may
12 close some doors, they open other doors that
13 previously weren't there, as you just said.

14 A. Right. And I'm not going to --

15 Q. My next question is, can you give us an example
16 of that?

17 A. Of what?

18 Q. Of a Court's ruling opening an avenue or opening
19 a door you hadn't previously thought of?

20 A. No, you know, a door the Court did not close, for
21 example, would have been -- I know there were
22 some doors the Court left open and I can't come
23 up --

24 ATTORNEY ASKINS: Judge, excuse me, I would
25 like to interpose an objection. I'm not sure what

1 the relevance is of this is.

2 THE COURT: Mr. Fallon.

3 ATTORNEY FALLON: The relevance is that
4 they have spent some time talking about trial
5 strategy and supposed impact of the Court's ruling
6 in this particular case. My argument is that the
7 Court's ruling, or I'm trying to get counsel to talk
8 about the fact that this ruling does, for whatever,
9 there's a cause and there's effect. There's a
10 liability and there's an availability of other
11 arguments and other approaches to the evidence. And
12 that's what I'm probing here, this relative to the
13 prejudice issue. I will rephrase the question.

14 THE COURT: Okay.

15 ATTORNEY FALLON: That's probably the best
16 way to go here.

17 Q. (By Attorney Fallon)~ All right. You indicated
18 on examination that you would have approached the
19 handling of witness, Bobby Dassey, differently;
20 is that correct?

21 A. It's reconstructive necessarily, but, yes, I
22 think I probably would have approached Bobby
23 Dassey differently if the **Denny** ruling had gone
24 our way, rather than against us.

25 Q. All right. And I think you said you would have

1 treated him more as a murderer?

2 A. As a potential murderer, I probably would have
3 projected that attitude, you know, taken that
4 position as a foundation for my cross. If that
5 makes sense to you.

6 Q. What evidence did you have that Bobby Dassey
7 killed Teresa Halbach?

8 A. He potentially is the last one to admit seeing
9 her. His only alibi is Scott Tadych. His story
10 about deer hunting is improbable, at least
11 because of the showering. His recollection of
12 time frames is different than the bus driver.

13 And I think we had a good argument that
14 she was, because of the habit and the sort of
15 likelihood that she's getting to each stop along
16 her school bus route at the same time, five days
17 a week, that she was a more reliable witness in
18 that respect.

19 He has access to Steven's trailer. He
20 has access to the guns in his own home.

21 And, you know, if you're asking for
22 direct evidence, no, I didn't have a confession.
23 We could have presented a circumstantial
24 evidence, in much the same way the State did
25 here, against Mr. Avery.

1 Q. But you would agree there was no direct evidence
2 connecting Mr. Dassey to the murder?

3 A. I don't know that I can agree or disagree, as I
4 sit here now, at that level of detail, I'm sorry.

5 Q. There's no physical evidence?

6 A. No -- No forensic evidence, no trace evidence?

7 Q. Right.

8 A. None that I'm aware of, that's right.

9 Q. No blood?

10 A. Of Bobby Dassey?

11 Q. Yup.

12 A. None that I know.

13 Q. And none of Teresa Halbach's was apparently
14 located anywhere inside the Dassey trailer,
15 correct?

16 A. Or the Avery trailer.

17 Q. Or the Avery trailer, which makes it rather
18 unusual if somebody was trying to frame him,
19 wouldn't they put evidence there?

20 A. Arguably they did leave a gun there.

21 Q. Well, they left a gun.

22 A. With masking tape, saying Steve's gun, or
23 something like it.

24 Q. Only it wasn't Steve's gun, was it?

25 A. I don't remember whose -- the masking tape is

1 what I remember, and I think I -- I think I all
2 but gave the jury the felon in possession count
3 in closing argument, if memory serves.

4 Q. But that's not my question, what you did in
5 closing argument.

6 A. No, I'm sorry.

7 Q. The question is the evidence. So you would have
8 taken a different tone of voice?

9 A. Attitude, I mean, the cross would have been
10 outlined differently and the projected attitude
11 to the witness, I think, would have been
12 different, yes.

13 Q. All right. But that's not evidence, correct?

14 A. No, that's -- No, it's part of the courtroom
15 mosaic. It's considered by juries. It's not
16 within the definition of evidence.

17 Q. And you were able to cross-examine Mr. Dassey
18 about the so-called joke, the Court's ruling did
19 not preclude you from crossing him on the joke,
20 correct?

21 A. That's correct. That's correct.

22 Q. And you would agree, as trial counsel, there are
23 several ways for lawyers to deal with issues such
24 as that. There's not just one way to
25 cross-examine a witness when something happens

1 like that.

2 A. Oh, I agree with that. I think the point is that
3 one's theory of defense drives the
4 cross-examinations, just as its drives the direct
5 examinations and the decisions about who to call,
6 if anyone, in a defense case, if you're defending
7 the case, and the theory -- your theory drives
8 all of those decisions. So I think, in a sense,
9 I'm agreeing with you.

10 Q. And so the ruling did not preclude you from
11 cross-examining them on the joke?

12 A. No, I was allowed to cross-examine him.

13 Q. What evidence did you have that Scott Tadych
14 murdered Teresa Halbach?

15 A. Just circumstances that would have allowed the
16 inference. I ticked through some of them on
17 direct examination. I'm not going to sit here
18 and pretend to recall all of it.

19 But I think his foreman, or his boss,
20 had some helpful potential testimony about his
21 violent nature, his angry nature, the day he runs
22 out of work ashen faced when one of the Dassey
23 boys is picked up by the police, or talked to by
24 the police. Mutual alibi with Bobby Dassey.
25 Changes in his story about when he sees flames,

1 how high the flames are, how big the fire is.

2 I mean, this is -- this is someone who,
3 as I recall, testified differently on a number of
4 points, than the statements he had made to
5 Calumet County sheriff's officers earlier.

6 Q. And you pointed out those inconsistencies in the
7 cross-examination of Mr. Tadych, didn't you?

8 A. Some of them, I did, yes, times, height of
9 flames.

10 Q. Height of flames, the passing of Mr. Dassey on
11 the roadway?

12 A. I didn't do much with that.

13 Q. But you cross-examined him, you had that
14 opportunity?

15 A. Oh, sure, I had the opportunity to cross-examine
16 Mr. Tadych, agreed.

17 Q. And you knew that afternoon Mr. Tadych was
18 nowhere near that property, was he?

19 A. I don't know that at all.

20 Q. He was up visiting his mother in the hospital;
21 there were numerous witnesses to that, correct?

22 A. Well, as a matter of fact, I think he said there
23 were none. And no one testified they had seen
24 him visit his mother at Bellin. But that was his
25 story, that he had been up visiting his mother at

1 Bellin hospital, as I recall it.

2 Q. And there are witnesses that could have been
3 called to substantiate that, had it been
4 necessary?

5 A. I don't know that at all.

6 Q. You and I both know that in trying a particular
7 case you pick and choose what evidence is going
8 to be delivered to the jury during the course of
9 a trial, correct?

10 A. Sure.

11 Q. And you make decisions on whether or not the
12 evidence is needed or necessary at the time
13 before it's presented to the jury for
14 consideration?

15 A. If I were you, I would have decided no such
16 evidence to corroborate Mr. Tadych was necessary
17 because he wasn't available to us as a **Denny**
18 suspect.

19 Q. And that's because there was no evidence that
20 directly connected him to that crime?

21 A. I mean, we're getting back to arguing the
22 briefing.

23 Q. What evidence did you have that he was trying to
24 frame his brother-in-law, or soon to be
25 brother-in-law?

1 A. What evidence did I have? Changing the story, I
2 guess, and putting Steven out by a bonfire at the
3 side of a garage, different times depending on
4 when you asked him.

5 Q. But he wasn't the only one to put him by a
6 bonfire, was he?

7 ATTORNEY ASKINS: Objection, your Honor, I
8 think this goes beyond the scope of our direct.

9 THE COURT: Well, cross-examination isn't
10 limited by direct.

11 ATTORNEY ASKINS: Then I guess I would have
12 to question the relevance, your Honor.

13 ATTORNEY FALLON: They are the ones saying
14 that the record is such that they have been
15 prejudiced by the Court's ruling. I'm looking for
16 what the law requires as introduction of evidence
17 upon which a court makes a ruling. And we're
18 probing for the evidentiary underpinnings of the
19 argument they are now advancing.

20 THE COURT: All right. I did rule in the
21 defense favor before on the theory that some showing
22 of prejudice should be allowed, so I'm going to
23 allow your questions to proceed as well.

24 A. I paused as I did, and I will defer to all of you
25 who have read the transcript presumably, and I

1 have not, of the trial. But I can't remember
2 another witness who put Steven Avery -- at trial,
3 who put Steven Avery at a bonfire. Maybe I'm
4 forgetting someone, but I don't remember any
5 other trial witness who did that. I think
6 Mr. Fabian talked about seeing a fire in the one
7 burn barrel to the south and east maybe of, or
8 north and east of Mr. Avery's trailer, but I --
9 again, I will defer to all of you who have read
10 the transcript.

11 Q. My point is, if you had evidence, it was
12 presented in your motion to the Court in an
13 effort to get the Court to rule in your favor and
14 permit this type of -- permit this type of
15 argument?

16 A. I think I did the best I could in that brief to
17 lay out the available evidence that I thought
18 bore on making the *Denny* showing. That I agree.

19 Q. And going back to the point I was making earlier,
20 you and I both know, as trial counsel, that there
21 is what is in the record and what is actually
22 used by the lawyers in their case. And then
23 there's a whole other set of facts and other
24 information which is available, that the lawyers,
25 for whatever reason, tactical or otherwise, chose

1 not to use or introduce in evidence?

2 A. That's generally true. That's right.

3 Q. And in this particular case, there was a
4 substantial amount of police investigation that
5 was developed?

6 A. Yeah. I'm not -- I mean, I'm not going to
7 quarrel with the adjective.

8 Q. But the point being is that there easily could
9 have been other witnesses to many events, they
10 just weren't called as witnesses, because for one
11 party or the other decided they didn't need to
12 use them.

13 A. I can agree with that, in general.

14 ATTORNEY ASKINS: Your Honor, excuse me. I
15 just want to interject because -- and this is a
16 little unusual because, of course, Mr. Fallon
17 participated at the trial, but he is prefacing many
18 of his so-called questions with, my point is. And I
19 would ask that the attorney be instructed that we're
20 going at questions now, not points that he is
21 attempting to establish with this witness, or with
22 this witness.

23 THE COURT: I understand his usage of the
24 phrase to mean the point of my question is.

25 ATTORNEY ASKINS: All right.

1 THE COURT: That's the way I'm taking it.

2 ATTORNEY ASKINS: Thank you, your Honor.

3 ATTORNEY FALLON: Going to pass the

4 witness.

5 THE COURT: Any redirect?

6 ATTORNEY HAGOPIAN: Yes, please.

7 **REDIRECT EXAMINATION**

8 BY ATTORNEY HAGOPIAN:

9 Q. Mr. Strang, I would like to direct your attention
10 back, again, to the conversation you had with
11 Judge Willis on March 15th, while you were at the
12 restaurant. When the judge explained to you the
13 problem with the juror, was it your understanding
14 that at that point the judge had not personally
15 spoken with the juror?

16 A. Yes.

17 Q. Was it your understanding that the information
18 that was being imparted to you was, at best,
19 secondhand?

20 A. Yes, someone in the sheriff's department, to
21 judge, to me.

22 Q. Did you, in fact, know that someone in the
23 sheriff's department had spoken with the juror?

24 A. I think I understood that from what the judge was
25 telling me. The information the judge got was

1 coming from the sheriff's department, so I
2 inferred that someone in the sheriff's department
3 had spoken to the juror.

4 Q. So, was it your understanding that at the time
5 this information was imparted to you, that Judge
6 Willis had had no opportunity to observe the
7 demeanor of the juror?

8 A. That was my understanding. I don't know if he
9 said this or not, but I had the sense that the
10 judge was calling me from his home.

11 Q. So the judge would have had no opportunity to
12 personally assess whether this juror was upset or
13 distraught?

14 A. At the time of the first call to me?

15 Q. Yes.

16 A. So I assumed.

17 Q. And in that conversation, did you know, did you
18 have any information that this juror, Mr. Mahler,
19 may have had some concerns about how some other
20 jurors were approaching the deliberations?

21 A. No.

22 Q. Did you have any information that perhaps
23 Mr. Mahler was having some problem with another
24 juror?

25 A. No.

1 Q. Did you have any information that Mr. Mahler had
2 felt verbally threatened by another juror?

3 A. No.

4 Q. And in this conversation and when you authorized
5 the Court to speak with and then to remove the
6 juror, it's correct that you also, personally,
7 had no opportunity to assess the demeanor of the
8 witness?

9 A. That's true.

10 Q. Excuse me, not the witness, but the juror.

11 A. The juror, Mr. Mahler, no, that's true.

12 Q. There was some indication that this juror may
13 have been upset, or a part of his emotional
14 status was due to his wife's upset about some
15 press report; do you recall that?

16 A. Do I recall hearing that in that first telephone
17 conversation?

18 Q. Yeah, in that conversation.

19 A. I can't place it there. I know I heard it at
20 some point, it well could have been in that first
21 conversation.

22 Q. You could have heard that in the conversation?

23 A. Yeah, I could have, yes.

24 Q. And that wasn't the first time you had heard
25 something about his wife being upset about a

1 press report, correct?

2 A. Gosh, off the top of my head, I don't remember an
3 earlier time, but.

4 Q. Do you remember a few days earlier, was on
5 March 12th, when the Court conducted an
6 individual voir dire of each of the jurors?

7 A. Yes. I couldn't have told you the date, but in a
8 little conference room down the hall from -- from
9 Judge Poppy's chambers in Calumet County, I
10 think.

11 Q. And Richard Mahler was among the jurors who was
12 individually questioned; do you recall that?

13 A. I think we went through all of them, I think,
14 that day.

15 Q. And do you recall in that individual voir dire
16 whether Mr. Mahler had referred to his wife's
17 upset about a press report at the time of jury
18 selection?

19 A. That -- that rings a bell. That rings a bell
20 with me, but I couldn't give you details or
21 even --

22 Q. Would it --

23 A. -- really assert to you with complete confidence
24 that he said it in that individual voir dire.

25 Q. Would it refresh your recollection to take a look

1 at the transcript of the individual voir dire?

2 A. Sure, and I'm not disputing the transcript, I
3 mean it does ring a bell, but.

4 ATTORNEY HAGOPIAN: May I approach, your
5 Honor?

6 THE COURT: Go ahead.

7 Q. (By Attorney Hagopian)~ I'm going to ask you to
8 take a look at the transcript from March 12,
9 2007. And page 32, beginning at line 24, there's
10 a reference here, actually, to officer speaking
11 and I believe the State has agreed that that must
12 be a typographical error and actually was
13 referring to Mahler. And if you would begin
14 reading there and on to the next page?

15 A. I remember the gist of this.

16 Q. Okay. So is it, then, your recollection -- Did
17 you read through line 14 on page 33?

18 A. No, I read through line 24 --

19 Q. Okay.

20 A. -- on page 33.

21 Q. Okay. So in that individual voir dire, then,
22 Mr. Mahler raised the issue of his wife's upset?

23 A. Yes.

24 Q. And that was referring back to the time of jury
25 selection?

1 A. Yes.

2 Q. And the Court asked Mr. Mahler if that was going
3 to affect his ability to continue serving on this
4 jury?

5 A. Right, and in effect he said, no, that he could
6 deal with that.

7 Q. And he could handle that. And so you -- you were
8 present for that individual voir dire on the
9 12th?

10 A. Yes, I was.

11 Q. And you would have been familiar with that when
12 you received the call from the Court on March
13 15th indicating a problem with this juror?

14 A. Yes. And I would hazard a guess that I would
15 have remembered it, three days later, unlike now.

16 Q. You have testified that you were concerned that
17 perhaps the best you could accomplish that night,
18 in that conversation with Judge Willis, was to
19 have the judge talk to the juror before excusing
20 him. Is that -- Do you recall that testimony?

21 A. Yes.

22 Q. So, was it your concern that if somehow you
23 objected to this process, objected to the Court
24 talking to the juror, that the judge might just
25 excuse Mr. Mahler without even speaking with him?

1 A. That was my concern. Now, I can't attribute that
2 to anyone other than myself. I mean, that was
3 just an impression, was that the best we were
4 going to get was having the judge speak directly
5 to the juror.

6 Q. But is it also your recollection that when --
7 that at some point you told the judge you needed
8 to confer with Mr. Buting about this and you
9 would get back to him?

10 A. It's a -- That's a reconstructed recollection, in
11 the sense I know I would have wanted to talk to
12 Mr. Buting, arrive at an agreement. We, like the
13 day before, or two days before, very recently
14 before this, Jerry Buting and I had had a set to
15 over a decision I had made without consulting
16 him. It was probably two days before. Because I
17 didn't consult him, he was home preparing his
18 part of the closing argument and I was here -- or
19 I was at the courthouse in Chilton.

20 We had had a real disagreement over that
21 for, first real conflict. So I know I would have
22 been attuned, the night of the 15th, to bringing
23 Jerry into the loop and making a collaborative
24 decision on this. And I now know there was a
25 phone call. I didn't remember that phone call

1 until you and Ms Askins showed me the page from
2 the cell phone records, but there was a cell
3 phone call from Mr. Buting's phone to the judge's
4 telephone number, I think. So, I'm
5 reconstructing what I believe must have happened.

6 Q. So your best recollection, though reconstructed
7 at this point, is that you did ask for time to
8 confer, although perhaps not a lot of time, but
9 that the judge did permit you to confer and get
10 back to him?

11 A. Right, that's my -- that's my best recollection
12 as I sit here.

13 Q. Now, there was reference to the -- what was
14 agreed to was that the Court could speak with
15 Mr. Mahler, and if the information was
16 verified -- is that a fair word to use, verified?

17 A. Right.

18 Q. That he could then dismiss the juror.

19 A. Right. And I want to -- I'm sorry not --

20 Q. Let me just ask.

21 A. Sure.

22 Q. By verified, you took that to mean that the Court
23 would be speaking with Mr. Mahler, correct?

24 A. Right.

25 Q. And that that would be occurring off the record?

1 A. Yes.

2 Q. And there wasn't any plan, as part of this
3 agreement, that the judge would report back to
4 you about what he learned from Mr. Mahler before
5 excusing him?

6 A. You know, I don't -- I don't remember. I think
7 we had given him the authority to go ahead and
8 excuse the juror if he decided that the report
9 from the sheriff's department was verified. I
10 think we had, you know, that we had agreed that
11 that's what the judge would do.

12 Q. So would it be fair to say that the verification
13 to you didn't come, really, until the next
14 morning, when --

15 A. I think I knew that night.

16 Q. You knew the juror was removed?

17 A. I think so. I really do. I think so.

18 Q. But any information that you obtained about what
19 Mr. Mahler told the judge would have come after
20 Mr. Mahler was removed from the jury, correct?

21 A. Yes, I think that's right. In other words, I
22 think when I heard it, it had happened, the Court
23 had excused Mr. Mahler. And then I think we were
24 told the details that the judge got and where the
25 judge stopped short rather than pushing the

1 juror, and the judge's impression that the juror
2 was very -- you know, was distraught, or in some
3 emotional distress.

4 Q. There -- You were asked on cross-examination
5 that, well, you know, even though you didn't take
6 a mistrial you still held out the possibility
7 that you could have had a hung jury; do you
8 remember that --

9 A. Yes.

10 Q. -- questioning? But you -- That morning, on
11 March 16th, you didn't have any doubt in your
12 mind you could have had a mistrial at that point?

13 A. Yes, I had a right to have a mistrial that
14 morning, or Steven did, Steven Avery did.

15 Q. And that was your reading of *Lehman*?

16 A. Yes. And I think had I told Steven Avery we
17 should have taken the mistrial, he would have
18 said, okay, and we would have had a mistrial.

19 Q. It was equally clear in your mind that you were
20 not going to be the attorney representing him in
21 the second trial?

22 A. I was not.

23 Q. And that was made clear to Mr. Avery as well?

24 A. Yes, not just in the fee agreement, but the
25 morning of the 16th.

1 Q. Now, had this case gone to a second trial, would
2 you have cooperated with successor counsel?

3 A. Sure.

4 Q. You would have shared your discovery that you
5 have obtained?

6 A. Well, sure.

7 Q. That next attorney could have obtained the
8 transcripts of the first trial?

9 A. Sure. Probably would have shared my trial notes.

10 Q. You testified that you had steered Mr. Avery to
11 not take the mistrial?

12 A. Yes.

13 Q. And is it correct that that steering away from a
14 mistrial was with the belief that what you were
15 steering him to, substituting the alternate, was
16 allowable under the law?

17 A. Yes.

18 ATTORNEY HAGOPIAN: That's all I have.
19 That's on the juror issue. In fact, I think that's
20 all we have for you.

21 THE COURT: Very well, Mr. Fallon.

22 ATTORNEY FALLON: Nothing from the State.

23 THE COURT: Witness is excused. Counsel,
24 you may call your next witness.

25 ATTORNEY HAGOPIAN: Call Attorney Jerry

1 Buting.

2 ATTORNEY FALLON: Judge, while we're
3 waiting for the witness, could counsel and I
4 approach?

5 THE COURT: Sure.

6 (Off record discussion.)

7 THE CLERK: Please raise your right hand.

8 **ATTORNEY JEROME BUTING**, called as a
9 witness herein, having been first duly sworn, was
10 examined and testified as follows:

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

13 THE WITNESS: Jerome Buting, B-u-t-i-n-g.

14 **DIRECT EXAMINATION**

15 BY ATTORNEY HAGOPIAN:

16 Q. Mr. Buting, is it correct that you, along with
17 Attorney Dean Strang, were trial counsel for
18 Mr. Avery in this case?

19 A. Yes.

20 Q. I would like to direct your attention to near the
21 end of trial and, specifically, the date is
22 March 15, 2007. That's the day on which closing
23 arguments were completed and the jury began
24 deliberations; do you have some recollection of
25 that day?

1 A. Yes, I do.

2 Q. And, specifically, that evening, did you and
3 Attorney Strang go out to dinner that night?

4 A. Yes, we did. I believe it was some time after 8.
5 We were told the jury had quit for the day, that
6 they were going for dinner themselves and that we
7 could sort of stand down, so to speak.

8 Q. And would you just, please, briefly describe your
9 mood at dinner that night?

10 A. Well, it was the end of a six week trial, we were
11 obviously exhausted. And it was always a release
12 when you finish the closing arguments. You're
13 still on -- you're still tense, waiting for the
14 jury verdict, as we were in this particular case,
15 but once we were told that the jury had retired
16 for the night, we were able to relax a little
17 bit, and we were able to have a couple beers
18 for -- have dinner, and retire early, probably
19 was the plan.

20 Q. And is it fair to say that you felt that your
21 work was over for the night?

22 A. Yes.

23 Q. And then at some point that evening did you or
24 Mr. Strang receive a telephone call from Judge
25 Willis?

1 A. We did.

2 Q. And that was still while you were at the
3 restaurant?

4 A. Yes.

5 Q. Do you recall whether you spoke directly to Judge
6 Willis in that conversation when the judge
7 called?

8 A. Sure. My recollection, it's been two and a half
9 years, so it's a little unclear to me, but as I
10 pieced it together, my recollection is the first
11 call probably came in to my partner, Dean
12 Strang's cell phone. I don't know whether he
13 held it up to my ear, or whether -- I think more
14 likely he just spoke to the judge himself and
15 then relayed to me what information he was
16 getting, in that first call.

17 Q. And in that first call, at least as the
18 information was relayed to you, did you learn
19 that there was a problem with a juror?

20 A. Yes, I did. My understanding was that there
21 was -- there was a serious problem with one of
22 the jurors, a crisis, an emergency sort of
23 situation, that the juror's daughter or
24 stepdaughter had been in a serious car accident.

25 I don't recall whether -- I know that

1 the impression I had was not that she was
2 seriously injured. I don't recall whether she
3 was injured at all, but I knew that it was a very
4 serious accident. Maybe the car totaled,
5 something like that, and that the juror's wife
6 was upset at him that -- at how much of the time
7 during the trial he was apparently unavailable to
8 her.

9 And the situation was sort of like, here
10 it is, you know, now I'm alone, I have to deal
11 with this crisis. And there was apparently some
12 kind of reference to their marital problems and
13 that this was sort of the last straw, and he
14 wanted off. He had felt like he had to get off.
15 The impression I got was that the juror was just
16 really sort of falling apart and asking to be
17 excused.

18 Q. Now, do you recall, this information is imparted,
19 it's relayed to you, was there any discussion at
20 that point about how to handle the situation?

21 A. I think -- I don't recall whether the first phone
22 conversation, or whether it was the second one,
23 but I believe that at some point during that
24 first call Dean said, well, let me talk -- We'll
25 talk about it and we will get back to you

1 shortly.

2 And the impression was that we had to
3 talk quickly and get back to him within a few
4 minutes, 15, 20 minutes, something like that. I
5 don't know whether in that first call the option
6 came up that the judge could make some contact
7 with the juror himself, or whether that came up
8 as a way of dealing with it in the second call.

9 Q. What is your recollection about a second call,
10 how that came about?

11 A. I believe, and actually I checked my cell phone
12 records for this because I just couldn't recall
13 exactly the sequence, and just before 9:00 I
14 apparently made a phone call. I must have called
15 a number the judge gave me, and had, I believe it
16 was a 12 minute phone call.

17 The judge must have conferenced in
18 Mr. Kratz, because I don't think I knew how to do
19 that with my phone. At least I don't recall
20 doing that. But I'm sure he must have been on,
21 somehow involved in the conversation.

22 At some point, in one of those two
23 calls, the decision was made that the judge
24 would -- My impression was that this information
25 had come to the judge from one of the bailiffs,

1 that this juror was falling apart and that there
2 was this crisis. I had no indication that there
3 was any contact between the sheriff and the juror
4 or anything like that. I don't think I knew that
5 until much later.

6 But at any rate, my recollection is that
7 the judge suggested that perhaps he could contact
8 the juror, speak to the juror directly, and at
9 least verify that the information he was getting
10 was correct, that the juror was really
11 distraught.

12 And I don't recall exactly, my
13 recollection was that that was the judge's
14 suggestion, that he came up with. I don't
15 recall, certainly, suggesting it, but I can't be
16 sure who did.

17 Q. And so part of what was ultimately decided, if I
18 understand your testimony, is that the judge
19 would speak with the juror; is that correct?

20 A. Yes.

21 Q. Was there also an agreement that the judge would
22 be permitted, or you would agree that the judge
23 should remove the juror if the information was
24 confirmed or verified?

25 A. Yes. And the agreement was that that could be

1 done right then, that night. For some reason it
2 never occurred to any of us, I guess, to
3 reconvene in court.

4 The impression I got was that this was
5 the sort of crisis that needed to be resolved
6 immediately. And at the time, that seemed to be
7 the most efficient way to deal with it.

8 Q. So that night, then, as you are at the
9 restaurant, as the information comes in, as you
10 are making a decision what to do and the decision
11 is made, was it your understanding that the judge
12 would be speaking to the juror without either you
13 or Attorney Strang present?

14 A. That's correct.

15 Q. And was it your understanding that Mr. Avery
16 would also not be present?

17 A. That's correct.

18 Q. As this situation with the juror was discussed at
19 the restaurant, did you know which juror was
20 having the difficulty?

21 A. Yes, I did.

22 Q. And were you able to place that juror, you knew
23 which --

24 A. Oh, yes.

25 Q. -- juror was being talked about?

1 A. Yes.

2 Q. Had you formed an opinion about him over the
3 course of the trial?

4 A. Yes, I thought he was a favorable juror for the
5 defense. At the beginning of the trial he was
6 sort of a wild card, I would say. He struck me
7 as somebody who kind of traveled to the beat of
8 his own drum, so to speak, which in this sort of
9 a case I thought could cut either way. But as
10 the case went on, you know, sometimes it's
11 difficult to read from jurors the kind of
12 feedback you get during the trial.

13 But I was not pleased that he was one of
14 the ones who -- or the one that this happened to.
15 There was two or three others that I would have
16 been very pleased if I had heard they were --
17 wanted to be discharged, but certainly not this
18 one.

19 Q. So that night when you were forced into making a
20 decision on how to proceed, did you have a
21 strategic reason for wanting to get Richard
22 Mahler off the jury?

23 A. No, I had no -- no such reason to get him off; I
24 would have preferred he stay.

25 Q. You have been a criminal defense lawyer for a

1 number of years; isn't that right?

2 A. Twenty-eight.

3 Q. Twenty-eight?

4 A. Yes.

5 Q. Now, before Mr. Avery's case, had you ever
6 encountered a situation like this, where a
7 question rose during deliberations about a
8 juror's ability to continue to serve?

9 A. No.

10 Q. Had you previously had the need to research the
11 legal question about the procedure to follow when
12 a juror is asking to be removed?

13 A. No. I think that if this had happened during the
14 day, when we had been standing by waiting for
15 juror questions, or things of that nature, no
16 matter what the crisis or emergency might have
17 been, I think it would have been much easier.

18 My instinct would have been, well, let's
19 convene in court. Let's talk to the juror. But
20 this happening at whatever it was 8:30, 9:00 at
21 night, it did not occur to me that we should have
22 done that. Apparently nobody thought of that.

23 Q. So it's fair to say that when the situation came
24 up, while you were at the restaurant, you were
25 not familiar, for example, with the Supreme

1 Court's decision in *State vs. Lehman*?

2 A. Oh, no, absolutely not, when we got that call, I
3 had never -- never -- well, if I had read the
4 case, it would have been 20 years ago or
5 something when it first came out, but I had never
6 had the need to apply it before.

7 Q. And you testified here that you and Mr. Strang
8 did have some opportunity, although perhaps not
9 very long, but to confer about the information
10 you received --

11 A. Yes.

12 Q. -- talk about what to do. Do you recall in that
13 time you had for conferring, was there any
14 discussion between you two about whether
15 Mr. Avery had a right to be present during the
16 Court's questioning of the juror?

17 A. No.

18 Q. When you agreed that the Court should be able to
19 speak with Juror Mahler, and remove him if the
20 information was confirmed, were you aware of case
21 law indicating that Mr. Avery had a right to be
22 present, with his attorneys, when the Court
23 questioned the deliberating juror?

24 A. You know, I don't know if I was aware of specific
25 case law on that point, but I think, again, if

1 this had happened during the day, my instincts
2 certainly would have been that -- I did know
3 that, generally, a judge is not supposed to
4 confer with a deliberating juror without the
5 attorneys present.

6 That's why any questions that there
7 might be go back and forth in writing. The judge
8 would then convene the attorneys and say the
9 juror has a question and that sort of thing. And
10 then if it's answered in anyway other than a
11 written response, the juror is presented in court
12 with the defendant present.

13 I knew all of that, but somehow this
14 circumstance, this crisis emergency that seemed
15 to be presented just did not -- it didn't seem to
16 fit that same scenario.

17 Q. When you agreed to have the Court speak with
18 Mr. Mahler, had you consulted with Mr. Avery
19 about whether he wanted to be present?

20 A. No, we did not.

21 Q. And when you agreed that the Court could remove
22 this juror, had you consulted with Mr. Avery
23 about whether he wanted to have Mr. Mahler taken
24 off the jury?

25 A. No, we did not.

1 Q. That evening, when this information was conveyed
2 to Attorney Strang and then relayed to you, was
3 there any information passed along about how the
4 problem at home had come to the juror's
5 attention?

6 A. I don't actually recall. The impression I got
7 was that his wife had called. I think the
8 information was that his wife had called and
9 somehow got through to him, which I think was
10 sort of the other reason I thought that this was
11 really a crisis, an emergency, because I didn't
12 think that the jurors would be able to have any
13 contact, that the rules would not allow them to
14 have contact with somebody from home, unless it
15 was an emergency.

16 Q. And, again, at the time when you agreed that the
17 judge could speak with and remove Juror Mahler,
18 were you aware that Sheriff Pagel had spoken with
19 Mr. Mahler?

20 A. Absolutely not.

21 Q. Would it have concerned you, had you known
22 Sheriff Pagel was involved in the communications
23 with Juror Mahler that evening?

24 A. Very much.

25 Q. Why is that?

1 A. Sheriff Pagel was in no way anybody that I would
2 consider uninterested in the case, just the
3 opposite. He was the supervisor of the primary
4 investigators in the case, at least the Calumet
5 County part of it.

6 I was -- He was not sworn as a bailiff.
7 My understanding was that the only ones who would
8 be in contact with the jurors directly would be
9 the bailiffs. And my understanding of what
10 happened that night was that the bailiff, and the
11 bailiff only, spoke to the juror and handed the
12 phone -- or spoke to the judge directly. That
13 all communication went from the juror, to the
14 bailiff, to the judge, without any go between.

15 And, certainly, had I known that Sheriff
16 Pagel had any direct contact with any of those
17 jurors, not just Mr. Mahler but anybody, I would
18 have objected and probably moved for a mistrial.

19 Q. When you agreed to have the Court speak with the
20 juror, did you expect that Sheriff Pagel would in
21 any way be involved in that communication?

22 A. Absolutely not.

23 Q. That, for example, Sheriff Pagel would be
24 standing nearby when Richard Mahler spoke with
25 the judge?

1 A. Absolutely not. You know, I later learned that,
2 that he was nearby, I thought in the parking lot
3 or something like that, which struck me as kind
4 of odd. Even that struck me as sort of odd. You
5 know, maybe the nature of this case, where we had
6 to raise a police frame-up defense, made me
7 especially suspicious of any of the investigating
8 officers. So I would have been especially
9 attuned to any objection had I known that.

10 Q. So you didn't have any information that, in fact,
11 Sheriff Pagel had spoken with Juror Mahler inside
12 Mr. Mahler's private motel room?

13 A. No, I had no such information.

14 Q. If you had known that the information was going
15 from Mr. Mahler to Sheriff Pagel, to the judge,
16 how would you have responded?

17 A. I would have objected, as I said.

18 Q. And by objecting, is there anything you would
19 have insisted upon?

20 A. Probably a mistrial at that point. I don't know
21 that any remedy short of that would have
22 satisfied me. I obviously would have spoken to
23 my co-counsel about it, but from my own personal
24 view, there would have been nothing short of a
25 mistrial at that point because we just don't know

1 what kind of communication there might have been
2 with Mr. Pagel.

3 And I know, for instance, that we made a
4 big deal in our pre-trial motions about there not
5 being even any Manitowoc County deputies involved
6 as bailiffs in the case. And then when we
7 learned that the Court had two retired
8 individuals that were bailiffs and that had done
9 this before that were not employed by the Calumet
10 County Sheriff's Department at that point, or
11 Manitowoc, it was -- that was a comforting
12 arrangement that we were agreeable to.

13 Q. So just so the record is clear here, you knew
14 that Sheriff Pagel was the sheriff in Calumet
15 County?

16 A. Absolutely, yes.

17 Q. And that several of his employees had testified
18 as witnesses for the State in this case?

19 A. Certainly.

20 Q. Then, I would like to turn your attention to the
21 next day, March 16th, and specifically the record
22 shows that there was an in chambers conference
23 that morning with Judge Willis and the attorneys;
24 do you recall that?

25 A. Yes, I do.

1 Q. Was Mr. Avery present during that in chambers
2 conference?

3 A. No.

4 Q. By the time of that in chambers conference, had
5 you spoken with Mr. Avery about the juror's
6 removal?

7 A. No, we had not.

8 Q. Did you know, by that point, that Mr. Mahler had,
9 in fact, been taken off the jury?

10 A. Yes.

11 Q. Was there some discussion in that in chambers
12 conference of what options were available, given
13 that the deliberating juror had been removed?

14 A. Yes. I believe -- My recollection is there must
15 have been a third call, a brief call, perhaps to
16 Mr. Strang's phone later that night that told us
17 that the judge did, in fact, speak with the juror
18 and had confirmed it and excused him. But
19 somehow or another we knew that clearly.

20 We then were, I believe, told let's
21 discuss what we're going to do the next day and
22 that was kind of left at that. We went back to
23 our apartments where we were living. Mr. Strang
24 did some research, found the case of **State vs.**
25 **Lehman**. I believe I read it that night. We came

1 into the chambers the next day. We thought that
2 that case applied.

3 I think the judge might have also found
4 that case as well and presented it as what we
5 thought at the time were three options, which was
6 either a mistrial -- three options when a
7 deliberating juror is removed for cause, either a
8 mistrial; a proceeding with just 11 jurors; or
9 the defendant, and only if the defendant, agreed,
10 the third option would be to substitute in one of
11 the alternates to begin deliberations anew.

12 That's what the -- at the time of that
13 case, as I understood the case, ***State vs. Lehman***,
14 the statute was silent on whether an alternate
15 juror could be brought in in the middle of
16 deliberations. And in that case the defendant
17 had objected and the Court reversed and ordered a
18 new trial.

19 In our case, I thought that was still
20 the status of the statute. I didn't do any
21 independent research. And Mr. Strang hadn't
22 discovered, apparently neither had the Court or
23 the prosecutor discovered, that the statute was
24 changed after the ***Lehman*** case.

25 The ***Lehman*** case was never reversed by

1 another court case. We knew that. We had
2 checked that. But somehow that the statute had
3 been changed and that the procedure for alternate
4 jurors had been changed, by statute, to require
5 them to be dismissed when the case goes to the
6 jury.

7 Q. So, in that conference that morning with the
8 Court and prosecutors, was there -- among those
9 three options was there some agreement reached as
10 to how the parties would like this to proceed?

11 A. In the chambers, before we spoke with Mr. Avery,
12 I don't know that we committed to anything. I
13 think we discussed the three options and
14 everybody seemed to think those were what was
15 available. And then we were, then, to go speak
16 with our client and discuss the options with him.

17 Q. Okay. So then you met with Mr. Avery at the jail
18 that morning?

19 A. Yes.

20 Q. And that would have been after the in chambers
21 conference?

22 A. Yes.

23 Q. And that was the first time that you had spoken
24 with him that day, correct?

25 A. Can I just clarify that the attorney/client

1 privilege has been waived for this portion of
2 the -- so that I can discuss the --

3 Q. Yes, my understanding is that by having made the
4 allegations that we did, that the attorney/client
5 privilege is waived to the extent of the
6 allegations made in the motion.

7 A. Sure. Yes, we did, then, have a discussion with
8 Mr. Avery.

9 Q. And do you recall approximately how long that
10 meeting lasted?

11 A. I would say 10 to 20 minutes, something like
12 that.

13 Q. Do you remember who did most of the talking, you
14 or Mr. Strang?

15 A. Probably Mr. Strang. I think he took the lead.

16 Q. And in that meeting, was that the time when
17 Mr. Avery first learned that a deliberating juror
18 had been removed?

19 A. Yes.

20 Q. Did you, in that meeting, tell Mr. Avery that he
21 could have a mistrial?

22 A. Yes, I'm sure we did.

23 Q. What advice did you give him about a mistrial?

24 A. I'm sure we talked about all three options. And
25 the one that was off the table from the

1 beginning, was to proceed with just 11 jurors.
2 That was never anything that I would have
3 advised, or Mr. Strang, and I think we told
4 Mr. Avery that.

5 So really, it came down to the two
6 remaining ones, which is a mistrial or substitute
7 in the alternate juror. And I think it was my
8 advice, ultimately, but I think we told him it
9 was his choice, but ultimately we were telling
10 him, both of us I think were telling him, that
11 probably we should proceed with the alternate
12 juror.

13 And, unfortunately, part of that
14 calculus, so to speak, involved the simple
15 financial economic reality that neither one of us
16 would be available on a retrial, if the case had
17 been mistried, and would have to start all over,
18 another six weeks, six months down the road, or
19 whatever, that realistically we were not going to
20 be able to be his attorneys.

21 And that was in the fee agreement, that
22 was something I felt bad about at the end, as I
23 walked out, I felt like it was kind of a
24 Hobbesian choice, so to speak, for Mr. Avery, a
25 difficult choice, that he either had to accept an

1 alternate juror, or he had to agree to a
2 mistrial, where he would no longer have his
3 attorneys, at the second trial, that he would be
4 left with a court -- or public defender or public
5 defender appointed counsel.

6 Q. So that was specifically something discussed with
7 Mr. Avery, in that --

8 A. It was.

9 Q. -- 10 to 20 minute meeting?

10 A. It was.

11 Q. And when you discussed with him the option of
12 substituting in the alternate, was that presented
13 as an option that was permitted by law?

14 A. Yes, we thought it was.

15 Q. By that next morning, you were familiar with the
16 **Lehman** decision you testified, correct?

17 A. Yes.

18 Q. But is it also correct, if I understand your
19 testimony, that you had not gone the step of
20 checking whether there had been any statutory
21 changes since **Lehman**?

22 A. That's correct.

23 Q. You also testified that going with 11, 11 jurors,
24 was off the table, so I take that to mean that
25 was something you expressly advised Mr. Avery

1 against; is that correct?

2 A. Yes, I'm sure we did. I don't even remember more
3 than a brief discussion. That was not really
4 even an option. I think we were pretty clear
5 that neither one of us would ever have agreed to
6 losing one addition -- you know, one -- one of --
7 one 12th of the minds required for a jury. So we
8 didn't really delve into that very much with him,
9 but it certainly was not presented to him as
10 something we would recommend.

11 Q. If the choices that actually had been allowed by
12 law would have been to proceed with 11 or to have
13 a mistrial, which of those two options would you
14 have recommended to Mr. Avery?

15 A. We would have recommended a mistrial, even with
16 the fact that we would not have been his
17 attorneys, unless somebody could have figured out
18 a way to pay us so that we could take care of our
19 responsibilities to our employees and the
20 financial requirements that we have as law firms.
21 Even given that, we would not have recommended
22 proceeding with 11 jurors.

23 Q. And based upon your experience representing
24 Mr. Avery over those many months, do you believe
25 that he would have taken your advice had you

1 recommended a mistrial?

2 A. He would have.

3 Q. On the morning of March 16, when a decision was
4 made not to take a mistrial, had you at that
5 point become aware that Sheriff Pagel had spoken
6 with Juror Mahler the night before?

7 A. No.

8 Q. Had you known that, would it have affected your
9 thinking about whether to take a mistrial?

10 A. It would have. It would have. I would have
11 immediately said this is a mistrial.

12 Q. I just want to, so the record is clear, show you
13 Exhibit 1 and ask if this is something that you
14 have seen before.

15 A. Yes, it is.

16 Q. And what I'm showing you is the Court's memo
17 dated March 16, 2007?

18 A. Correct.

19 Q. Do you recall how you became aware of the memo?

20 A. I don't clearly remember when we got this. I
21 think it was after the trial, after the verdict,
22 but I don't know for sure. My recollection was
23 that it was -- Well, it says right here that the
24 Court prepared this memo to elaborate on comments
25 I made on the record this morning, so that the

1 record concerning why the juror was excused would
2 be complete.

3 So it sounds like it was written after
4 we had had the in chambers conference, after we
5 had met with Mr. Avery, after we had gone back
6 reported what the decision was, and after we had
7 convened in court and announced the issue, and
8 colloqued Mr. Avery. And then it was -- We had
9 gone through all of that before this memo was
10 even prepared. And that would be consistent with
11 my recollection, that it was some time after all
12 of that.

13 ATTORNEY HAGOPIAN: I do not have anything
14 further.

15 THE COURT: All right. I think, Counsel,
16 we'll take our afternoon break at this time and
17 resume at quarter to four.

18 ATTORNEY HAGOPIAN: Thank you, your Honor.

19 ATTORNEY ASKINS: Thank you.

20 (Recess taken.)

21 THE COURT: Attorney Askins, are you going
22 to be taking this part of the direct examination?

23 ATTORNEY ASKINS: Yes, your Honor.

24 THE COURT: You may proceed.

25 DIRECT EXAMINATION, CONTD.

1 BY ATTORNEY ASKINS:

2 Q. Mr. Buting, I'm going to change direction here
3 and talk about some different subjects. Prior to
4 Mr. Avery's trial, there were a number of motions
5 filed by each side to outline or resolve
6 potential trial problems; is that correct?

7 A. Yes.

8 Q. And to resolve evidentiary or anticipate
9 evidentiary problems; would you agree?

10 A. Yes.

11 Q. And one of the areas in which the parties hashed
12 out this sort of thing was relating to so-called
13 **Denny** evidence; is that right?

14 A. Yes, it is.

15 Q. And do you recall that the Court ultimately
16 ordered the defense to be prohibited from
17 presenting evidence that any third party, other
18 than Mr. Brendan Dassey, participated in the
19 commission of the crimes against Ms Halbach?

20 A. That's correct.

21 Q. Now, did the Court's ruling have an affect on
22 your trial strategy?

23 A. Yes, it did, very much. The way -- the way we
24 analyzed it -- Let me just speak for myself. The
25 way I analyzed it, because of the pre-trial

1 publicity, specifically the press conference that
2 Mr. Kratz had when Brendan Dassey was arrested,
3 that presented a version of events that were so
4 horrific that we knew there was a great deal of
5 prejudice against Mr. Avery in the community, and
6 we knew that that version was simply false, we
7 knew that that version would not be presented by
8 the State at the trial because we could very
9 easily disprove it with all of the physical
10 evidence.

11 I felt that this could not be just a
12 reasonable doubt case, where you would pick apart
13 the State's case and leave all these unanswered
14 questions, that it was my feeling from early on,
15 that we really needed to win this case. We
16 really needed to be able to point the finger at
17 another suspect.

18 And that was -- We thought there were
19 several other suspects and that we -- I felt that
20 the -- that this became a sort of an O.J. Simpson
21 case where it was, you know, if O.J. Simpson
22 didn't do it, then who did, is what everybody
23 thinks. I felt that if it was the same way with
24 Steven Avery, that we would have a very hard time
25 getting a not guilty. Maybe a hung jury, but

1 certainly not a not guilty, and that's what we
2 were trying for.

3 So we really wanted to show the jury
4 that not only was he not guilty, but here's
5 another person there who could have been guilty,
6 or could be guilty, so that they could have some
7 sort of comfort level in returning a not guilty
8 verdict.

9 Q. Now, understanding that the ruling did not go the
10 defense way, might you have called other
11 witnesses, in addition to the witnesses you did
12 call?

13 A. Yes. It affected us two ways: One, in the way
14 that we would cross-examine the witnesses that
15 the State called. And also in the way that --
16 the decisions we had as to what witnesses to
17 call.

18 Q. Without going into a great amount of detail, can
19 you explain in what way cross-examination would
20 have been different?

21 A. Well, with two of the people that we believed
22 were prime suspects in the case, two of them were
23 State's witnesses, one of whom, in fact, was
24 quote, unquote, the star witness that the State
25 relied on a great deal, and that was Bobby

1 Dassey.

2 Bobby Dassey and Scott Tadych were --
3 had no alibi other than each other. We knew that
4 there was -- we believed that we could show that
5 Bobby Dassey was lying, that we had an
6 independent, disinterested witness in the school
7 bus driver, who could place Ms Halbach on the
8 Avery property an hour later than he had said.

9 But, we were not able to cross-examine
10 him, and in fact, in Mr. Kratz's closing argument
11 and perhaps the rebuttal -- must have been the
12 rebuttal, because I don't think the school bus
13 driver was mentioned in his first -- he weighed
14 the two against each other and said, you know,
15 Bobby Dassey's more credible than the school bus
16 driver.

17 Well, one reason Bobby Dassey might have
18 appeared more credible than the school bus driver
19 on the timing of all of this, is because we
20 weren't able to cross-examine Bobby Dassey as a
21 potential perpetrator. He was a witness, neutral
22 witness, unbiased. And yet, we had ways
23 of cross-exam -- or we would have used ways to
24 cross-examine that would have presented both him
25 and Mr. Tadych as potential suspects that the

1 jury should consider as perpetrators.

2 Q. Although Attorney Strang was able to
3 cross-examine Bobby Dassey, correct?

4 A. Sure. Actually, I believe he -- Mr. Strang
5 cross-examined both Tadych and Bobby Dassey. But
6 the way you cross-examine somebody when they are
7 an interested witness who is trying to save their
8 own skin, because they could be a guilty party,
9 is very different than the way you cross-examine
10 a witness when your hands are tied and you are
11 not allowed to do that.

12 So, you know, you may be able to present
13 inconsistencies in the versions -- various
14 versions of a witness, from one time to the next,
15 and I think he did that, but without showing a
16 motive for the witness to fabricate, you leave
17 the jury with, and you leave the State with the
18 ability to just argue, well, these are minor
19 inconsistencies. They don't matter. This is an
20 otherwise uninterested party.

21 Very different than you would if there
22 was, for instance, if it's a snitch in a case, an
23 informant, or somebody who is a suspect who,
24 therefore, has a motive, that a neutral witness
25 wouldn't.

1 Q. Now, you did the primary closing argument in this
2 case; do you recall your closing argument?

3 A. I do.

4 Q. Did the trial court's *Denny* ruling affect your
5 closing argument?

6 A. Very much.

7 Q. As an experienced defense attorney, what do you
8 try to accomplish in a closing argument?

9 A. Well, certainly reasonable doubt is where you
10 start. As I said, in this case, though, I wanted
11 to be able to do more. I wanted to be able to
12 give the jury not just reasons to doubt the
13 evidence the State had massed against Mr. Avery,
14 but also to consider that there were other
15 suspects, other people with opportunity, access,
16 and as much motive as Mr. Avery, which is to say
17 really none that anybody could divine. But that
18 was our argument, before the trial, about why we
19 thought we should be allowed to do that.

20 I believe at one point I was
21 interrupted, or there was an objection to my
22 cross-examination, by Mr. Kratz, when I had --
23 What I tried to do throughout the trial, in order
24 to try and get around, as best we could, the
25 *Denny* ruling, of course, the *Denny* ruling, we

1 knew there was *Kyles vs. Whitley*, U.S. Supreme
2 Court case that said that we could explore the
3 bias, investigative bias of the officers. And so
4 as a very weak substitute to being able to point
5 the finger at another suspect, we tried to show
6 that there were other suspects that the police
7 just didn't investigate.

8 We weren't able to cross-examine the
9 suspects themselves that way, but we could -- we
10 could point out to the jury that so and so didn't
11 have an alibi and wasn't asked, or claimed to
12 have an alibi and the police didn't follow up,
13 and that sort of thing. So I think I was at a
14 point in my closing where I was trying to
15 contrast Bobby Dassey's testimony with Lisa
16 Buchner, the bus driver.

17 And at one point I said, made reference
18 to Mr. Kratz's claim that Bobby Dassey was the
19 last person to see Teresa Halbach alive, and I
20 said, well, that may be true if he was the
21 killer, or something like that, and was objected
22 to.

23 And as I recall we -- I was allowed to
24 proceed to the end of the closing. We took a
25 break, and then the -- there was discussion about

1 Mr. Kratz wanted the jury to be instructed
2 about -- that I was -- I don't know, I don't
3 remember exactly how it was, the record would
4 show that. But somehow or another I was
5 basically squashed in my ability to try and paint
6 somebody else as a suspect, which I thought I
7 really couldn't do any way.

8 That, frankly, was just a slip of the
9 phrasing. I hadn't actually intended to go into
10 that in my closing, but clearly that was the
11 line, the line the State was drawing, and they
12 weren't going to let me go past it.

13 Q. Your understanding was you could not name
14 particular individuals in your closing argument
15 as alternative suspects?

16 A. The most I could do was argue that the State
17 failed to investigate other possible suspects. I
18 couldn't name any. I couldn't explain why
19 someone would lie because I believed they were a
20 suspect. I couldn't do any of that.

21 Q. Now, you were able, it seemed, to talk a little
22 bit about the so-called hustle shot; is that
23 correct, during the course of the trial?

24 A. Yes.

25 Q. And if I recall the testimony correctly, I think

1 maybe the receptionist at *Auto Trader*, or one of
2 the other individuals there, testified to what a
3 hustle shot is. Is that your recollection?

4 A. Yes.

5 Q. And you obviously were there, I'm reading the
6 transcript, I'm thinking that you were able to
7 get a little bit of information in about the
8 so-called hustle shot theory of the defense. Is
9 that -- Am I reading too much into that
10 transcript, or was there something there about
11 the hustle shot?

12 A. Well, one of the -- one of the theories that we
13 were working on was that the real killer was
14 somebody that she had done a hustle shot with, so
15 to speak, and that it seemed absurd that you
16 would call the office, leave a paper trail, you
17 know, here, come on out to Avery Road, and that
18 you would then kill that person, when you had
19 such an easy link.

20 But that I knew that hustle shots were
21 arrangements that the individual photographers
22 made on their own, rather than a referral for a
23 job from the front office. So, as I understood
24 this process, the only record of when one of the
25 photographers would hustle their own business, or

1 their own business, the only record of that and
2 who that person was would come after the fact,
3 when the photographer would then submit a bill to
4 *Auto Trader* and get paid double what they would
5 otherwise.

6 So, to me that made a lot more sense, as
7 the sort of scenario where somebody would have
8 killed her, if it was somebody in a situation
9 like that. I'm not sure when I first started
10 getting into that information, the State was --
11 knew where I was going with it, and whether, you
12 know, whether they knew that I was trying to
13 develop a possible other suspect theory without
14 really getting into who or naming anybody.

15 But that much I was able to get into,
16 and I argued that to the jury, that she had a
17 history of that, just within the last month. I
18 forget what it was, 10 or 12 cases like that
19 where she had hustled. She was good at her job,
20 obviously, and she was able to get that kind of
21 business. But I couldn't point the finger at any
22 particular individual as a suspect who did that.

23 Q. The trial court's ruling, then, did have an
24 affect on your development of the hustle shot
25 theory; is that correct?

1 A. Yes. If I could just explain how.

2 Q. Sure.

3 A. Specifically, we thought that she had -- was on
4 her way out from the Avery property, having
5 completed her job with Steven Avery, when one of
6 these other suspects flagged her down and
7 suggested that she take another picture, hey,
8 I've got another car over here, or truck, or
9 something, and that they, in fact, were the ones
10 that were the perpetrator, after that.

11 Q. And did you feel that you could have developed
12 that theory of other possible suspects had the
13 Court ruled for the defense in the *Denny* area?

14 A. Yes, I did.

15 ATTORNEY ASKINS: I have no further
16 questions for this witness.

17 THE COURT: Mr. Fallon.

18 ATTORNEY FALLON: Thank you.

19 **CROSS-EXAMINATION**

20 BY ATTORNEY FALLON:

21 Q. Mr. Buting, as I understand it, you have
22 practiced primarily criminal defense law for
23 approximately 28 years?

24 A. That's correct.

25 Q. The extent or the vast majority of your practice

1 is in criminal defense?

2 A. Almost exclusively.

3 Q. All right. And you have been in your own
4 business, your own law practice, for several
5 years now, correct?

6 A. Yes, it's 16 years.

7 Q. And prior to that time you worked at a couple of
8 different law firms; is that correct?

9 A. I worked at the Public Defender's Office,
10 Milwaukee Trial, for the first nine years of my
11 career, and then I was in a private firm for
12 about three or four years, and then I opened my
13 own practice.

14 Q. Then you opened your practice?

15 A. Right.

16 Q. And your practice is primarily state court
17 practice, or do you do some federal criminal
18 defense work as well?

19 A. I do some federal, but the great bulk is state
20 court.

21 Q. All right. You have argued cases before the
22 Wisconsin Court of Appeals?

23 A. Yes.

24 Q. And you have argued cases in front of the
25 Wisconsin Supreme Court, correct?

1 A. Yes.

2 Q. I believe you have also been admitted to the U.S.
3 Supreme Court bar?

4 A. Yes.

5 Q. Argued a case there?

6 A. I have not.

7 Q. You have not yet.

8 A. I have filed briefs and petitions, opposed
9 petitions, but not had a case actually accepted
10 in the Supreme Court.

11 Q. All right. And you have tried a significant
12 number of cases as a defense attorney, correct?

13 A. Yes.

14 Q. All right. Over a hundred?

15 A. Probably not. I was trying to think about that
16 the other night, probably somewhere in the area
17 of 50. I had a much higher volume when I was a
18 public defender.

19 Q. Public defender than private practice?

20 A. Right.

21 Q. Right. All right. I'm going to -- We'll start
22 with the juror issue, all right?

23 A. Sure.

24 Q. Okay. There's some background stuff that I just
25 want to talk about. We have kind of walked all

1 around it today, but we don't have anything on
2 the record. We'll get into more detail, but just
3 generally, at the time the call came in, as near
4 as you recollect or believed, you and Mr. Strang
5 were in the Appleton area having dinner?

6 A. Yes, I believe it was.

7 Q. And Mr. Kratz, as far as you knew, was at home?

8 A. I had no idea where he was.

9 Q. And he lives in the Appleton area, right?

10 A. I'm not sure I even knew that, but.

11 Q. All right. And since the jury had retired, you
12 knew that Judge Willis, or at least believed that
13 Judge Willis and his staff had returned here to
14 Manitowoc?

15 A. I assume so.

16 Q. All right. And that Mr. Gahn and I were
17 elsewhere, Chilton, or someplace else?

18 A. I had no idea exactly where you were.

19 Q. The point being is that when this all occurred on
20 the night of March 15th, we were all spread out
21 in different locations in the area?

22 A. That's fair to say, yes.

23 Q. Okay. Now, we have had some discussion, I think
24 from co-counsel and from yourself, that you had a
25 fee agreement to represent Mr. Avery through the

1 initial trial and sentencing; would that be fair?

2 A. Through the initial trial and in the event there
3 was a sentencing, we hoped there wasn't,
4 obviously, but, yes, I believe it went that far.

5 Q. And you obtained from him a fee for those
6 services, a flat fee agreement I believe it's
7 called?

8 A. Correct.

9 Q. All right. And the flat fee in this case that
10 was -- was split between you equally?

11 A. It wasn't exactly equal. There was -- I took a
12 lesser amount initially, with the understanding
13 that Mr. Strang's firm would be responsible for
14 any costs that exceeded the amount that they put
15 into a trust account as a reserve for costs.

16 Q. All right. And what was the amount that the fee
17 agreement was for?

18 A. I believe -- He had settled his civil rights case
19 for 400,000. By the time the -- those civil
20 rights attorneys took their share of it and the
21 costs, I think he came out with about 240,000.
22 And I took 100, Mr. Strang took -- I don't
23 remember exactly how much. I think there was 20
24 in reserve, so he was probably 120.

25 We knew even then, though, with the

1 amount of work that this -- although it initially
2 sounded like a lot, that when you break it down
3 to the amount of work we were going to have to do
4 on this case, we knew it wasn't going to be
5 enough, so there -- enough certainly to go
6 through it twice. And so that's why we put in
7 the fee agreement that this was going to be a one
8 trial only.

9 Q. One trial only deal. And so some of that money
10 had to be set aside for expenses associated with
11 the investigation and preparation for the ...

12 A. Correct.

13 Q. Not just your attorney time?

14 A. That's right.

15 Q. Right. Okay. All right. So let's back up. And
16 as I understand it, when you originally came on
17 in this particular case, the agreement was that
18 you and Mr. Strang would -- would do your
19 darnedest to obtain an acquittal in this case? I
20 think he used the phrase you weren't going to
21 just play for the fumbles, you were going to go
22 for the win.

23 A. That's right. And that was -- that was my view
24 all along, was that we were -- you know, that we
25 were going to try and win this with a not guilty

1 verdict, not just a hung jury or a mistrial,
2 because we thought that Mr. Avery was innocent
3 and that he had suffered 18 years of wrongful
4 conviction and that he deserved a resolution in
5 this one trial.

6 And that was our strategy all along.
7 That was one of the reasons why we were working
8 on the whole idea of trying to offer the jury
9 some other suspect.

10 Q. All right. And you had the feeling going in that
11 he deserved the best -- the very best defense
12 that could be mounted?

13 A. That's right.

14 Q. All right.

15 A. And I think we gave him the very best effort that
16 we could.

17 Q. All right. And you would agree that when you
18 have decisions to make as a lawyer in this
19 particular case, that some decisions are made in
20 conjunction with the client and his wishes?

21 A. That's right.

22 Q. All right. Some wishes -- some decisions are
23 made solely by the client?

24 A. That's right.

25 Q. All right. And in those situations, you do your

1 best to make a recommendation to them, and that
2 recommendation is based on what you think is in
3 his best interest?

4 A. That's right. And -- But we do try and present
5 the options fairly, and -- and, you know, present
6 to him what we think the law allows or what it
7 doesn't allow. And in the particular instance of
8 this alternate juror substitution in we, frankly,
9 got that wrong, I think. I think everybody did.

10 Q. And while we're on that point, but what it turns
11 out is, it did give you and Mr. -- you, meaning
12 you and Mr. Strang and Mr. Avery, it did give you
13 a third option that may or may not have been
14 there otherwise?

15 A. The *Lehman* case?

16 Q. Well, in terms of how we came to this decision in
17 this case, there was the third option of
18 proceeding with a substitute juror?

19 A. Right. We thought that that was still available
20 by law and that was what we recommended to him.

21 Q. All right. And you recommended it to him because
22 that third option was based on everything that
23 you knew at the time, that that was in
24 Mr. Avery's best interest to go with that option
25 rather than the other -- either one of the other

1 two?

2 A. We felt that, yes.

3 Q. All right. And that's because the -- I take it
4 from your comments on direct examination you are
5 not a fan, as it were, of proceeding with 11
6 jurors?

7 A. That's right.

8 Q. All right. And why not?

9 A. I don't think -- I don't think it's ever a good
10 idea to give up one 12th of your mind, collective
11 mind of a jury. Twelve people, that one extra
12 person can bring a perspective that the other 11
13 don't have. And I think there's a reason we have
14 got 12, we have always had 12. And I have never
15 agreed to a situation where we proceed with 11.

16 Q. And in this particular case, viewing that you had
17 three options, you did not believe that a motion
18 for mistrial, based on what you knew at the time,
19 was in the best interest, all things considered.

20 A. That was a very difficult choice because we knew
21 that he could -- could have gotten a mistrial and
22 that that would have been, frankly, a guaranteed
23 mistrial. And what made it so difficult is that,
24 you know, in most first degree homicide cases, if
25 you get to the point where you have a chance to

1 get a guaranteed mistrial, I think most of the
2 time I advise a client to do that.

3 In this case, though, we had the
4 difficult calculus that we knew that if we did
5 that he would have other counsel, and we had to
6 explain that to him. I think it would have been
7 unfair to say, okay, let's get a mistrial, and
8 say, oh, by the way, we're not going to be your
9 lawyers.

10 I didn't feel good about doing it
11 because I had a responsibility to Mr. Avery, and
12 we did our best. But we also had economic
13 realities of our own law firms, and our own
14 employees. And we had to, you know -- we
15 couldn't -- we already spent an entire year on
16 the case, probably were making \$10 an hour by
17 then. And so that made it difficult in this
18 case, and I don't know that I ever encountered
19 that dilemma before.

20 Q. And I think, as you said earlier, you thought
21 that you had done, under all circumstances, the
22 very best that you could with the presentation of
23 the case?

24 A. I did.

25 Q. All right. And it would be fair to say, looking

1 at it from your perspective, you meaning the
2 defense attorney's perspective, that the case
3 went in about as well as one could expect, all
4 things considered?

5 A. I did, with perhaps the one exception being the
6 EDTA FBI test, that was sort of sprung on us in
7 the middle of the trial, when we didn't have a
8 chance to redo our own test.

9 But otherwise, I thought that the --
10 that and the fact that the State, I think wisely,
11 decided not to call Brendan Dassey as a witness,
12 because I think the case might have gone in
13 better had that actually -- if we had just
14 brought in that elephant in the room and we had
15 just dealt with him, showed the jurors how that
16 information that they may have gotten elsewhere
17 and was hard to unring the bell that they had
18 heard, we were hoping that you would call Brendan
19 Dassey so we could expose the confessions as
20 false. And then that would have made the case go
21 in better. But absent that, I think the case
22 went in about as well as we could hope.

23 Q. And you realize, of course, you had no control
24 over what prosecution strategy would be selected
25 and implemented?

1 A. We didn't. Although we did consider calling
2 Brendan Dassey ourselves, and thought that that
3 was just too risky to do, so we did not.

4 Q. So the point being, is that all things
5 considered, evaluating, you were reasonably
6 comfortable with the status of the evidence that
7 the jury was now considering?

8 A. Sure.

9 Q. All right. And as you presented these options to
10 Mr. Avery, based on the effort that you have put
11 in and the amount of work, you believe that you
12 and Mr. Strang presented him with his best
13 opportunity at obtaining an acquittal, or perhaps
14 a mistrial if the jury came to that point?

15 A. Given the constraints that we had with the **Denny**
16 motion, and the EDTA test, yes.

17 Q. All right. And if, in fact, there had been a
18 retrial, then both sides would have the
19 opportunity to reevaluate each other's trial
20 strategies and adjust accordingly?

21 A. That's correct.

22 Q. All right. And as it pertains to Mr. Avery's
23 situation, all things considered, you thought it
24 was in his best interest for the current jury to
25 continue to deliberate on the status of the

1 evidence that they had been presented?

2 A. Given the information I had, yes.

3 Q. All right. In fact, the parties had contemplated
4 the very possibility that there would be a need,
5 or there might be a need for a substitute juror
6 by the manner in which the alternates were
7 removed from the panel, correct?

8 A. You know, I was trying to recall what sort of
9 discussions we had, and I haven't seen the whole
10 transcript myself, but I don't know whether it
11 was on the record or whether these were in
12 chambers discussions, what sort of discussions we
13 had as a group on what to do with the alternates.
14 And I don't think we ever -- I know none of us
15 ever saw the statute that says that they should
16 be dismissed once the case is submitted to the
17 jury. And I don't recall what discussions were
18 made for how that alternate juror would be
19 housed.

20 Q. All right. Let me try to jog your recollection
21 here. Is it not true that Mr. Strang, your
22 colleague, suggested that rather than removal
23 of -- rather than determining the identity of the
24 alternates by -- let me rephrase that. Once the
25 identity of the alternates was determined by lot,

1 he suggested that the parties each take one
2 peremptory challenge to remove the alternate,
3 such that there would be one left?

4 A. That's right.

5 Q. Right. And in that particular case, the defense
6 had their eyes on one particular juror who turned
7 out to be an alternate, that they did want
8 removed from the panel, correct?

9 A. That we did want removed?

10 Q. Yes.

11 A. Yes, there was one particular juror that we
12 thought had been talking about the case, should
13 have been removed in a voir dire that I think
14 that we had in chambers, and wasn't. I think
15 we're talking about the same one.

16 Q. And there was one other juror who was somehow --
17 in the middle of trial remembered some prior
18 association with a witness?

19 A. That's right.

20 Q. Right.

21 A. Yes.

22 Q. And so each of those jurors were removed in this
23 process of one peremptory for each team?

24 A. Correct. But as I recall, that discussion, I
25 actually wasn't initially party to that. I think

1 we had some conflict in chambers when I --
2 Mr. Strang had made an agreement that I wasn't
3 quite as comfortable with when we talked about
4 it.

5 But that was before the closings had
6 even begun. And that was back, I think the day
7 before the closings, when counsel was working
8 on -- with the Court on jury instructions. And I
9 think that's the way that came about.

10 Q. In any event, the lone remaining alternate was
11 agreeable to both sides?

12 A. Yes. And, actually, I thought that if -- if we
13 had to have her as a juror, that she would be an
14 all right juror for the defense. That was the
15 sense that I had.

16 Q. And the parties agreed that she would be
17 sequestered in the -- in the hotel, but in an
18 entirely different area from the rest of the
19 jurors, just in case a need did arise, correct?

20 A. You know that's the part I do not recall. I
21 don't know if I was absent for that part of the
22 discussion, but I -- for instance, I was trying
23 to consider what arrangements were made for her
24 security.

25 There was only two bailiffs that had

1 been sworn, and I don't know how exactly it was
2 agreed that that juror would be kept separate,
3 which -- who would eat dinner with her, would
4 there only be one bailiff with the other 12. I
5 just don't remember any of those kinds of
6 discussions, and so I don't know that -- that I
7 was actually part of that discussion or not. I
8 just can't recall.

9 Q. All right. In any event, when you came in the
10 next day, you were aware that the Court had
11 already excused Mr. Mahler?

12 A. I believe we learned that that night before, yes.

13 Q. Right. So you had the night to at least sleep on
14 it, as it were, and contemplate what was likely
15 to occur the next day?

16 A. Yes.

17 Q. And you did a little research, reviewed the
18 **Lehman** case?

19 A. I did none of the -- I did no independent
20 research. I know Mr. Strang did find -- did some
21 research, found **Lehman**. He Sheppardized it, as
22 they say, found that it wasn't overruled, it was
23 still good law, case law anyway. And so -- And
24 then when we came into chambers, I believe the
25 Court had also found that case, or maybe yourself

1 as well, so that was the basic extent.

2 Q. And the Court at that time, also in that early
3 morning conference in chambers, before you went
4 to talk with Mr. Avery, the Court filled us in as
5 to the -- more of the events of the night before?

6 A. I don't know what more of the events there were
7 that we were filled in, I don't recall that.

8 Q. Nothing?

9 A. I don't.

10 Q. At that particular point, then, you asked for
11 time to go consult with Mr. Avery, as to the
12 likely course of events?

13 A. Yes.

14 Q. And that particular time, you realized that
15 Mr. Avery, and only Mr. Avery, held the mistrial
16 key in his hand?

17 A. That's right.

18 Q. And whether or not the case was going to be
19 mistried, go with 11, or go with the substitute,
20 that decision was going to be his?

21 A. With our advice.

22 Q. With your advice?

23 A. Yes.

24 Q. All right.

25 A. Although I will say --

1 Q. Well, let me ask a question.

2 A. Okay. Go ahead.

3 Q. You also agree that the prosecution had really no
4 say in what any of those three options were, that
5 was entirely a defense call?

6 A. The prosecution's only say would have been to
7 present the new statute that said one of those
8 options wasn't on the table. And none of us
9 caught that, and so we presented the wrong set of
10 options to Mr. Avery.

11 Q. I understand your point of view. My question
12 was, on the options that you believe you had, and
13 the ones you presented to Mr. Avery, the
14 prosecution had no choice; it was entirely his
15 choice as to which of those three options?

16 A. The prosecution's choice could have been, excuse
17 me, Judge, the only option here is mistrial or
18 11. Other than that, I don't think the
19 prosecution could have controlled the decision,
20 but I think the prosecution could have corrected
21 it --

22 Q. And that's assuming, for the sake of argument,
23 that anyone knew of that particular change?

24 A. That's right.

25 Q. Based on the information that was presented,

1 however, that morning, the choice was

2 Mr. Avery's?

3 A. Yes.

4 Q. Okay. And when you sat down with Mr. Avery, you
5 recommended, rather quickly, against proceeding
6 with 11?

7 A. That's right.

8 Q. And the discussion then centered on, well, should
9 we mistry it or should we go with 12?

10 A. That's right.

11 Q. And, ultimately, you recommended to him that you
12 proceed with the substitute juror?

13 A. That's right.

14 Q. And at that particular time, and under the
15 circumstances as they existed, you believed that
16 that was in his best interest?

17 A. Yes.

18 Q. And he was agreeable with your recommendation?

19 A. He was. He was agreeable with virtually all of
20 our recommendations throughout the trial.

21 Q. He trusted you?

22 A. He did.

23 Q. All right. He believed that you were operating
24 in his best interests?

25 A. He did.

1 Q. And you were operating in his best interests?

2 A. We tried. We missed this particular point, but
3 we tried.

4 ATTORNEY FALLON: If I may have a moment,
5 Judge.

6 THE COURT: Go ahead.

7 ATTORNEY FALLON: Pass the witness.

8 THE COURT: Any redirect?

9 ATTORNEY HAGOPIAN: Just a very few
10 questions, please.

11 **REDIRECT EXAMINATION**

12 BY ATTORNEY HAGOPIAN:

13 Q. Now, you have testified that, in your view, the
14 alternate who was left was generally an agreeable
15 juror, from your perspective?

16 A. Yes.

17 Q. But before the situation arose on the night of
18 March 15th, you also viewed Mr. Mahler as an
19 agreeable juror, from your perspective?

20 ATTORNEY FALLON: Objection, asked and
21 answered. He already commented on what he thought
22 was Mr. Mahler's suitability.

23 THE COURT: He did. I guess I viewed the
24 question as foundational for another question. So
25 contingently, at least, I'm going to allow it.

1 Q. (By Attorney Hagopian)~ And in fact, you had
2 testified that you viewed Mr. Mahler as perhaps
3 favorable to the defense?

4 A. I did. And I think Mr. Avery preferred him. The
5 one thing that Mr. Avery was able to provide us
6 assistant with -- assistance with in the trial
7 was to try and -- that sort of -- the body
8 language that the jurors were showing, something
9 only a defendant can tell is, are you getting
10 good vibes or good feelings from particular
11 jurors.

12 They are not always accurate because
13 sometimes jurors can't be read that easily, but I
14 do recall that he was disappointed when we told
15 him, in the morning, that Mr. Mahler was gone,
16 because he thought that he was a juror that he
17 was comfortable with or was -- I don't remember,
18 specifically, if he was getting really good vibes
19 from him, but he thought that he was a favorable
20 witness -- or, I'm sorry, a favorable juror.

21 Q. You have also testified that you entered into
22 this case with Mr. Strang with the strategy that
23 you were trying for a not guilty verdict?

24 A. That's right.

25 Q. You wanted to win?

1 A. That's right.

2 Q. But would you also say, and I gleaned from your
3 testimony that there would be some instances
4 where you felt that you could no longer pursue
5 that goal, that a mistrial would be necessary?

6 A. Certainly. In fact, I think we made several
7 motions for mistrial during the process of the
8 case. Renewed them at the end, especially
9 involving the EDTA testing and that sort of
10 thing.

11 So we moved for mistrial. There were
12 some circumstances where we felt a mistrial would
13 be necessary, but it wasn't a goal sometimes you
14 shoot for as, you know, playing for the fumble,
15 or whatever it might be, to try and -- Sometimes
16 in a case, if you get a mistrial, there's a
17 potential for negotiations, better negotiations
18 than you had the first time. I never thought
19 that that was realistic in this case, so that
20 wasn't a strategy we were shooting for.

21 Q. Was it your thought that in the instances where
22 the goal of a not guilty verdict would have to
23 yield to the necessity for a mistrial, would be
24 when there was some error that you thought was so
25 grave that it really impacted the case --

1 A. Yes.

2 Q. -- severely?

3 A. And that would be true in the instance of any
4 contact between a juror and Mr. -- and Sheriff
5 Pagel, as I gave an example. I would have, even
6 though I wanted to win, and even though I thought
7 the case had come in well, had I known that, I
8 would have viewed that as so serious. Again, I
9 was hypervigilant, suspicious, conspiratorial,
10 whatever, about police involvement in this case,
11 because of what we -- the way we thought it
12 developed.

13 And if there had been any inkling that
14 Sheriff Pagel was having direct contact with
15 deliberating jurors, everything we -- I said
16 about wanting to win this case would have gone
17 out the door and I would have recommended a
18 mistrial. That's one example.

19 Q. You have also referred to your understanding of
20 the law about substituting in an alternate as a
21 mistaken view, correct?

22 A. I believe so now that I have looked at the
23 statute that was analyzed in *Lehman*, which was
24 silent on the issue, and then shortly thereafter,
25 the statute that was enacted which specifically

1 says that jurors -- alternates shall be
2 dismissed, I forget the exact phraseology, but
3 when the case is submitted to the jury.

4 I don't think if I had seen that
5 statute, and if I had known of it, I would have
6 suggested to Mr. Avery that he had that third
7 option.

8 Q. So that would have been another example of an
9 instance where your desire for a not guilty
10 verdict would have had to yield to the need for a
11 mistrial?

12 A. It would because, as I said, the 11 jury -- 11
13 juror option was never something I would
14 consider. And then he would have been left with
15 just mistrial or 11 jurors, and I would have
16 recommended mistrial.

17 ATTORNEY HAGOPIAN: That completes our
18 questioning.

19 THE COURT: Anything else, Mr. Fallon?

20 ATTORNEY FALLON: Tempting, but no.

21 THE COURT: All right. You are excused.

22 THE WITNESS: Thank you. Am I no longer
23 sequestered?

24 ATTORNEY HAGOPIAN: Yes, that would be my
25 view.

1 THE COURT: Yes, and free to leave as well?

2 ATTORNEY HAGOPIAN: Yes, free to leave.

3 Your Honor, may I request about a 10 minute recess.

4 THE COURT: Yes.

5 ATTORNEY HAGOPIAN: Thank you.

6 (Recess taken.)

7 THE COURT: Attorney Hagopian, are there
8 any further witnesses for the defense?

9 ATTORNEY HAGOPIAN: No, there are not.

10 THE COURT: Are there any witnesses for the
11 State?

12 ATTORNEY FALLON: Your Honor, the State has
13 decided not to pursue rebuttal witnesses on this
14 matter. However, we would ask the Court to engage
15 in a colloquy with Mr. Avery regarding his decision
16 not to testify in this post-conviction matter.

17 THE COURT: All right. Well, that's new
18 ground for me. I'm not sure what his rights are in
19 a post-conviction hearing. But Mr. Avery, assuming
20 that your rights are similar to what they are in a
21 criminal hearing, do you understand that --

22 Frankly, I'm hesitant to say that you
23 have a constitutional right to testify at this
24 hearing, because I don't know if you do. Do the
25 attorneys have any authority for such a right

1 existing?

2 ATTORNEY FALLON: Your Honor, I think there
3 is one by implication, similar to the trial right,
4 because this does involve evidentiary testimony. It
5 involves decision making that affected the outcome
6 in the case, and it is his case. And I think he
7 would have the right to testify or not to testify,
8 similar to a trial.

9 Secondly, and also by implication, there
10 is a creature in the common law known as
11 ineffective assistance of appellate counsel. And
12 I want to make sure -- we have just had that
13 experience -- they have conferred with him. And
14 I think prudence suggests that we go over the
15 matter with him. Because it is, in fact, his
16 case and his decisions, again, based on the
17 recommendations of counsel. And I would like the
18 record to reflect that they have been adequately
19 considered.

20 THE COURT: Very well. I'm certainly
21 willing to engage in a colloquy that I believe I can
22 word such as to cover the situation where there is
23 or is not a constitutional right.

24 Mr. Avery, let me ask you, first, it's
25 my understanding that you have just had some time

1 during the recent break to confer with your
2 attorneys about whether or not you would be
3 testifying at today's post-conviction motion
4 hearing; is that correct?

5 THE DEFENDANT: Yes, it is.

6 THE COURT: Do you feel that you have had
7 adequate opportunity to confer with your attorneys
8 about your decision whether or not to testify?

9 THE DEFENDANT: Yes, I did.

10 THE COURT: Do you understand that you may,
11 at least, have a constitutional right to testify at
12 this hearing, even if you didn't agree with your
13 attorneys, should they have advised you not to
14 testify?

15 THE DEFENDANT: Yes.

16 THE COURT: And let me ask you this, is it
17 your decision, even independent of any advice you
18 may have received from your attorneys, not to
19 testify at today's hearing?

20 THE DEFENDANT: Yes.

21 THE COURT: And do you make that decision
22 with the understanding that if you disagreed with
23 them and wanted to testify you may well have a right
24 to do so?

25 THE DEFENDANT: Yes, I do.

1 THE COURT: Do you feel you have had
2 adequate time to make your decision in this case?

3 THE DEFENDANT: Yes.

4 THE COURT: And do you have any questions
5 you wish to ask at this time of either me or your
6 attorneys about your right to testify at this
7 hearing?

8 THE DEFENDANT: No, I have no questions.

9 THE COURT: Very well, the Court will -- is
10 satisfied that, as I indicated, whether or not you
11 have a constitutional right to testify at this
12 hearing, that you have independently made the
13 determination, along with in consultation with your
14 attorneys, not to testify.

15 Otherwise, at this point, Counsel, my
16 intention would be to set a briefing schedule.
17 And I will ask the defense, first, how much time
18 you need to submit a brief in support of your
19 post-conviction motion?

20 ATTORNEY HAGOPIAN: Our preference, your
21 Honor, would be to write the brief, at least, and
22 have it in final form, once we have the transcript
23 from today's hearing.

24 THE COURT: That's a fair question. I
25 actually had a note to myself, which I neglected to

1 read, asking when we might have a transcript.

2 Diane, what do you think?

3 COURT REPORTER: I would say two weeks.

4 THE COURT: Okay. That puts us to -- let's
5 see -- October 12th.

6 ATTORNEY HAGOPIAN: Then I would ask that
7 we would have two weeks, then, upon receipt of the
8 transcript, to submit our brief.

9 THE COURT: All right. Let's say, assuming
10 that the transcript is to you by October 12th, we'll
11 set it at October 26th, with the understanding that
12 if for some reason the transcript is delayed, you
13 have the right to request an extension of that date.
14 Mr. Fallon, how much time for the State to respond?

15 ATTORNEY FALLON: I guess I was under the
16 impression, based on previous discussions, that
17 there was going to be a simultaneous briefing, so
18 that the Court would have adequate time to decide
19 the case and meet the December 1st deadline.
20 Counsel is now suggesting they want additional
21 briefing and reply brief --

22 THE COURT: Well, I'm perfectly willing
23 to -- What if we had both of you submit briefs by
24 the 26th and then replies by the -- how about the
25 4th of November, to give me -- that's about 10 days

1 to give me an opportunity to get it, because I think
2 I'm going to issue a written decision in this case
3 and I don't know that it's going to be short.

4 ATTORNEY HAGOPIAN: I have no objection to
5 the simultaneous briefing, but I would ask the Court
6 if we could have, and then the State as well, but we
7 really feel we would need two weeks to file a
8 response brief. And the reason, your Honor, is that
9 we have basically had our argument out here,
10 available to the State, for some time. And, they
11 understandably, have not submitted anything in
12 writing as to their position.

13 THE COURT: All right. So October 26th for
14 initial briefs and November 9 for replies?

15 ATTORNEY HAGOPIAN: That would be very
16 good.

17 THE COURT: Does that work for the State?

18 ATTORNEY FALLON: It's not very good for my
19 schedule, but I will just have to make it work.

20 THE COURT: All right. Is there anything
21 further either party believes needs addressing
22 today?

23 ATTORNEY FALLON: What day is November 9th,
24 if I could ask?

25 THE COURT: These are both Mondays. If

1 anybody has a different day request, now is the time
2 to make it.

3 ATTORNEY FALLON: Could I have until Friday
4 of that week?

5 THE COURT: All right. Why don't I do --
6 Let's do both of these then. Let's make it -- Just
7 to avoid the need for any adjournments, I'm going to
8 give you Friday, the 30th, for your initial briefs.
9 And I sure hope I'm looking at a 2009 calendar here,
10 this isn't my bench -- but, yes. I'm sorry, just a
11 second. Okay. The 30th -- Friday, the 30th, for
12 initial briefs, and Friday November 13th for
13 replies.

14 ATTORNEY FALLON: Thank you.

15 THE COURT: And if I have to request one of
16 the parties to ask for another extension from the
17 Court of Appeals, I will let you know.

18 ATTORNEY HAGOPIAN: Certainly.

19 THE COURT: Anything else?

20 ATTORNEY HAGOPIAN: No.

21 THE COURT: Very well, we're adjourned for
22 today.

23 ATTORNEY FALLON: Thank you.

24 (Proceedings concluded.)

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1 STATE OF WISCONSIN)
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2 COUNTY OF MANITOWOC)

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

Dated this 9th day of October, 2009.

Diane Tesheneck, RPR
Official Court Reporter