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STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY
BRANCH 3

STATE OF WISCONSIN,

PLAINTIFF,

MOTION HEARING
DAY 3

vs.

Case No. 06 CF 88

BRENDAN R. DASSEY,

DEFENDANT.

DATE: JANUARY 20, 2010

BEFORE: HON. JEROME L. FOX
Circuit Court Judge

APPEARANCES:

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

THOMAS FALLON
Special Prosecutor
On behalf of the State of Wisconsin.

STEVEN DRIZIN
Attorney at Law
On behalf of the defendant.

ROBERT J. DVORAK
Attorney at Law
On behalf of the defendant.

LAURA H. NIRIDER
Attorney at Law
On behalf of the defendant.

JOSHUA A. TEPFER
Attorney at Law
On behalf of the defendant.

191

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THOMAS F. GERAGHTY
Attorney at Law
On behalf of the defendant.

ALEX HESS
Law Student
On behalf of the defendant.

Adar Crosley
Law Student
On behalf of the defendant.

Brendan R. Dassey
Defendant
Appeared in person.

* * * * *

TRANSCRIPT OF PROCEEDINGS

Reported by Jennifer K. Hau, RPR
Official Court Reporter

I N D E X

1
2
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12
13
14
15
16
17
18
19
20
21
22
23
24
25

WITNESSES

PAGE

RICHARD A. LEO

Cont'd Cross-Examination by ATTORNEY FALLON 9- 75
Redirect Examination by ATTORNEY DRIZIN 75- 91

MARK FREMGEN

Direct Examination by ATTORNEY DRIZIN 92-205
Cross-Examination by ATTORNEY KRATZ 208-248
Redirect Examination by ATTORNEY DRIZIN 249-270

EXHIBITS

Marked

Moved

Admitted

| | | | |
|---------|--|-----|-----|
| 17-39 | | 7 | 8 |
| 72 | | 206 | 207 |
| 73 | | 206 | 207 |
| 74 | | 207 | 207 |
| 77 | | 206 | 207 |
| 78 | | 206 | 207 |
| 79 | | 206 | 207 |
| 101-204 | | 7 | 8 |
| 215 | | 206 | 207 |
| 216 | | 206 | 207 |
| 217 | | 206 | 207 |
| 218 | | 205 | 207 |
| 219 | | 205 | 207 |

| | <u>EXHIBITS</u> | MARKED | MOVED | ADMITTED |
|----|-----------------|--------|-----------|----------|
| 1 | | | | |
| 2 | 225 | | 206 | 207 |
| 3 | 229 | | 205 | 207 |
| 4 | 238 | | 158 & 159 | 159 |
| 5 | 239-305 | | 7 | 8 |
| 6 | 340 | | 205 | 207 |
| 7 | 366 | 13 | | |
| 8 | 367 | | 143 & 144 | 144 |
| 9 | | | | |
| 10 | | | | |
| 11 | | | | |
| 12 | | | | |
| 13 | | | | |
| 14 | | | | |
| 15 | | | | |
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1 THE COURT: Morning counsel, ladies and
2 gentlemen. This is State of Wisconsin vs. Brendan
3 Dassey. Manitowoc County Case No. 06 CF 88, Court
4 of Appeal No. 07 XX 1073. Appearances this morning.
5 Starting with prosecution.

6 ATTORNEY KRATZ: State by Ken Kratz and
7 Tom Fallon as special prosecutors.

8 ATTORNEY DRIZIN: For Mr. Dassey, Your
9 Honor, Steve Drizin; Joshua Tepfer; a law
10 student, Adar Crosley; Mr. Robert Dvorak, an
11 attorney from Milwaukee; Mr. Thomas Geraghty, an
12 attorney from Chicago; and Laura Nirider, an
13 attorney from Chicago.

14 THE COURT: All right.

15 ATTORNEY DRIZIN: And, I'm sorry, Mr.
16 Alex Hess, a law student, hiding behind the TV
17 screen.

18 THE COURT: Anyone else?

19 ATTORNEY DRIZIN: Uh, not yet.

20 THE COURT: Okay. Mr. Fallon.

21 ATTORNEY DRIZIN: Brendan --

22 THE COURT: Oh, I'm sorry.

23 ATTORNEY DRIZIN: Brendan is also
24 present in court, Your Honor.

25 THE COURT: Court'll acknowledge the

1 personal presence of the -- the defendant.

2 Mr. Fallon.

3 ATTORNEY FALLON: Yes. I'd like to
4 continue the cross of Dr. Leo.

5 THE COURT: Re-calling Dr. Leo?

6 ATTORNEY DRIZIN: Judge, before we call
7 Dr. Leo, there's a few housekeeping matters left
8 over from yesterday, if it's okay, I'd like to
9 deal with. It should take a minute. I hope.

10 Okay. Yesterday, you -- we discussed
11 that there were some problems with Exhibit 315,
12 which is why we needed the court reporter to take
13 them down.

14 THE COURT: Right.

15 ATTORNEY DRIZIN: Um, last night we
16 fixed those problems and renumbered the exhibits
17 so that the record will be clearer when this case
18 goes up on appeal.

19 And what I'd like to do, with counsels'
20 permission, is to just substitute pages 8, 9, 10,
21 11, and 12 of Exhibit 315, um, which reflect the
22 correct numbering sequence, um, of the videos.

23 ATTORNEY FALLON: Counsel, is that all
24 that's been changed? It's just the numbering
25 sequence?

1 ATTORNEY DRIZIN: It's just the
2 numbering. Not a single word of the clips has
3 been changed.

4 ATTORNEY FALLON: That's fine.

5 THE COURT: All right. Anything further?

6 ATTORNEY DRIZIN: Yes. Um, the -- there
7 was a -- there was a question about Exhibit No.
8 87, I believe, which was a summary of media
9 reports.

10 THE COURT: Correct.

11 ATTORNEY DRIZIN: Um, my recollection is
12 Your Honor accepted that for the limited purpose
13 of establishing that these facts were in the
14 public domain?

15 THE COURT: Correct.

16 ATTORNEY DRIZIN: Okay. I neglected to
17 move into evidence all of the media reports, um,
18 which would be Exhibits 101 to 204, 239 to 305,
19 and 17 to 39. These are the media reports we
20 sent to Dr. Leo, and that he reviewed in
21 connection with his opinion.

22 Um, I would ask that they be moved in
23 for the same purpose as the summary exhibit.

24 THE COURT: Let me just go over that with
25 you again; 101 to 204, 209 to 305?

1 ATTORNEY DRIZIN: 101 to 204, 239 to
2 305.
3 THE COURT: And was there one after that as
4 well?
5 ATTORNEY DRIZIN: Yes, 17 to 39, Your
6 Honor.
7 THE COURT: Mr. Fallon, these are reports
8 that Dr. Leo apparently reviewed in preparing what
9 he prepared here. Do you have any objection to
10 them?
11 ATTORNEY FALLON: No. For the purpose
12 that we've discussed, that they were in the
13 public domain, no.
14 THE COURT: All right. They're
15 received.
16 ATTORNEY DRIZIN: Thank you. No
17 further --
18 THE COURT: Anything further?
19 ATTORNEY DRIZIN: Nope.
20 THE COURT: Mr. Fallon.
21 ATTORNEY FALLON: Thank you.
22 THE COURT: Dr. Leo. I'll remind you,
23 Dr. Leo, that you're still under oath.
24 THE WITNESS: Okay.
25 THE COURT: You may wish to take the

1 overcoat off.

2 THE WITNESS: Not used to this.

3 CONTINUED CROSS-EXAMINATION

4 BY ATTORNEY FALLON:

5 Q Whenever you're ready, Doctor.

6 A Are you going to be referring to witness -- uh,
7 Exhibit 316? I just want to get this off if we're
8 done with that.

9 Q No. Three-sixteen I will not be using this
10 morning.

11 A Okay. I'm ready.

12 Q All right. Good morning, Doctor.

13 A Good morning.

14 Q When we left the record yesterday I'd asked you
15 to -- to examine the March 1 statement again; is
16 that correct?

17 A Yes.

18 Q And you did have that opportunity last night?

19 A Not to read the whole thing over. I thought what you
20 asked me to do was try to figure out the times. The
21 times when it started and it ended.

22 Q That was -- but the specific question that
23 brought us to that point was is it not a fact
24 that Mr. Dassey, in effect, confessed within the
25 first 90 minutes of that interview on March 1?

had pretty much confessed with first 90% of the interview

ologize, then. I just didn't remember on
: instructions.

men, let's move on to another piece of
d discuss that as it may or may not
this case.

believe, um, earlier we mentioned in

7 the examination that you co-authored an article
8 that was published online and will be published
9 in writing later this year entitled,
10 *Police-Induced Confessions: Risk Factors and*
11 *Recommendations?*

12 A Correct.

13 Q And you were one of the authors with Saul Kassin,
14 Steven Drizin, Thomas Grisso, Gisli Gudjonsson,
15 and Allison Redlich?

16 A Correct.

17 Q All right. In that article where you talk about
18 dispositional risk factors, we've already talked
19 about age. But there's also a discussion in
20 there about cognitive disabilities, mental
21 impairments, and the like; correct?

22 A Yes.

23 Q All right. And that particular part of the
24 article, in large part, was based on research
25 done by Dr. Gudjonsson and a colleague, John

1 Sigurdsson?

2 A Yes.

3 Q And in that particular resets -- uh, research
4 that's reflected in your most recent publication,
5 there is a question -- or I shouldn't say a
6 question -- you conclude in that article that
7 there is a correlation between mental retardation
8 and its relationship to false confessions;
9 correct?

10 A Yes.

11 Q Um, in that article, as well, um, Dr. Gudjonsson
12 talks about other dispositional problems such as
13 personality disorders; correct?

14 A I believe so, yes.

15 Q And the presence or absence of anti-social
16 traits; correct?

17 A I believe so.

18 Q And um, Gudjonsson's research is based on a
19 sample of individuals in Iceland who claim to
20 have falsely confessed; correct?

21 A That's not all it's based on. I think his research
22 is based on a lot things, including American
23 research.

24 Um, that paper, which was co-authored
25 with Gudjonsson and five others, or four others,

1 obviously is a summary of the entire field. So
2 it may reference some studies like that, but it's
3 based on much more than that.

4 Q So your assessment of the body of research out
5 there is that mental retardation, and these --
6 that type of cognitive disability, there is a
7 correlation to false confession?

8 A Yes.

9 Q Okay. Additionally, in that part of the research
10 article, Dr. Gudjonsson is referenced again, as
11 noted, that in these situations where you have
12 false confessions, there are other specific
13 mental disorders or mental illnesses that have a
14 propensity of showing up; correct?

15 A I'm not sure he says it quite like that, but, yes,
16 the underlying idea that there -- that people who
17 have mental illnesses are also, um, at risk for false
18 confession.

19 Q All right. I -- I believe the phrase, if this is
20 better, there is currently little research
21 available to show how different disorders, paren,
22 example, anxiety, depression, schizophrenia,
23 closed paren, potentially impair the suspect's
24 capacity to waive legal rights and navigate --
25 their way --

1 COURT REPORTER: Can you slow down,
2 please?

3 ATTORNEY FALLON: I'm sorry. Um,
4 ...impair the suspect's capacity to waive legal
5 rights and navigate his or her way to a police
6 interview.

7 A Okay.

8 Q (By Attorney Fallon) Right? Um, however, there
9 is a reference here that an important type of
10 psychopathology in relation to false confessions
11 is attention deficit hyperactivity disorder?

12 A Okay.

13 Q Right? Which consists of three primary symptoms;
14 inattention, hyperactivity, and impulsivity;
15 correct?

16 A Okay. If you're reading from the article, yeah.

17 Q I'm reading from the article. Well, would you
18 like a copy of the article?

19 A Yeah, that'd be great. Thanks.

20 Q Sure.

21 ATTORNEY DRIZIN: Counsel, when you're
22 referring to the article, do you mind citing a
23 page number?

24 (Exhibit No. 366 marked for identification.)

25 ATTORNEY FALLON: Sure. I'll try,

1 Counsel, although the pages are not numbered on
2 the publication copy that I have, but I'll --

3 ATTORNEY DRIZIN: Okay.

4 ATTORNEY FALLON: -- reference those
5 sections. May I approach the witness, Your
6 Honor?

7 THE COURT: You may.

8 Q (By Attorney Fallon) Doctor, I show you what has
9 been marked for identification purposes as
10 Exhibit 366?

11 A Okay.

12 Q Doctor, if I could reference your attention to
13 about, oh, roughly halfway through the article,
14 um, there's a section that begins, I believe,
15 "Dispositional risk factors" and then two full
16 pages after that -- and these are both side
17 copied -- is the reference I was making to, um,
18 an important type of psychopathology?

19 A Okay. So there's a section called, "Personality and
20 Psychopathology." That's the section --

21 Q Yes.

22 A -- heading? Okay.

23 Q And the next page.

24 A Okay.

25 Q About two-thirds of the way down in the left-hand

1 column?

2 A Okay. Thank you.

3 Q All right?

4 A Yes. Thank you.

5 Q See where I am?

6 A I do.

7 Q Okay. Now, in this particular case it is
8 conceded that Mr. Dassey has some cognitive
9 deficits; correct?

10 A Yes.

11 Q Okay. He does, um -- he struggled more with
12 verbal abilities as well as memory ability;
13 correct?

14 A I believe I read that in Dr. Gordon's report but I'm
15 not a hundred percent sure.

16 Q He shruggles (phonetic) -- struggles with
17 short-term memory kinds of tasks? In other
18 words, the working memory?

19 A Okay.

20 Q Right?

21 A I -- I'm -- I don't know. If that's in Dr. Gordon's
22 report, yes.

23 Q All right. You didn't review the testimony from
24 the suppression hearing? Is it --

25 A I don't recall reviewing the testimony from the

1 suppression hearing, no.

2 Q But it's correct, is it not, that Mr. Dassey --

3 he's not mentally incompetent; correct?

4 A Yes.

5 Q He's not mentally retarded?

6 A Correct.

7 Q He does not suffer Attention Deficit

8 Hyperactivity Disorder?

9 A To my knowledge, no.

10 Q All right. And he doesn't suffer from ADD,

11 Attention Deficit Disorder; right?

12 A To my knowledge.

13 Q Well, have -- did you make any efforts to look

14 into that?

15 A No.

16 Q And he's certainly not -- doesn't seem to possess

17 any anti-social traits; correct?

18 A I don't know if he does.

19 Q All right. Well, as a psychologist, are you

20 familiar with a diagnosis called Conduct

21 Disorder?

22 A I've heard of it before.

23 Q All right. But you're not familiar with it?

24 A Correct.

25 Q Okay. But it's fair to say, based on everything

1 you've reviewed in this case, that Mr. Dassey was
2 not a problem child at school; right?

3 A I have -- I haven't read anything that would indicate
4 that to my knowledge.

5 Q Actually, he was a -- a student who typically
6 followed the rules as reported by the school;
7 right?

8 A I don't recall reviewing any document that indicated
9 that.

10 Q He -- he -- he doesn't tend to get into trouble?

11 A Again, I have no knowledge of whether that's true or
12 not.

13 Q All right. And just so that I'm clear, the --
14 the research that's marked in -- as Exhibit 366,
15 that's not an independent research study itself,
16 is it? It's a -- it's a collection or an
17 assessment of the current state of the research?

18 A Correct. It's a synthesis of the field.

19 Q All right. So the references in there to, um,
20 length of interrogation, age, young age, and, um,
21 lack of cognitive abilities is primarily based on
22 research which was conducted before that article
23 was published then?

24 A Correct.

25 Q All right. In fact, a large part of that is

1 based on research that you, yourself, authored
2 with Mr. Drizin?

3 A I wouldn't say a large part because there's probably
4 200 cites or more in this article and that's just one
5 article. But it is referenced there.

6 Q Well, the research you did with Mr. Drizin was,
7 at -- at the time, a -- an empirical study of 125
8 people who were dem -- proven to have
9 demonstrably -- or demonstrably proven to have
10 falsely confessed; correct?

11 A Correct.

12 Q All right. And that was the largest study at the
13 time?

14 A Of aggregated cases of false confession, correct.

15 Q And it still remains so?

16 A Correct.

17 Q All right. Okay. Now, you're not familiar with
18 the statements Mr. Dassey gave to the police in
19 November, 2005?

20 A I am, yes. I reviewed them last night.

21 Q You did?

22 A Yes.

23 Q All right.

24 A And I had reviewed them earlier. I just didn't
25 recall. They were in the materials that I had

1 mentioned that I had reviewed.

2 Q And so it was an omission in your affidavit that

3 you didn't refer to them?

4 A Correct.

5 Q All right.

6 A Actually, an omission of my testimony yesterday.

7 Q Now, um, in those November interviews,

8 Mr. Dassey -- was he or was he not in custody?

9 A Uh, he wasn't in custody for the first one, and I

10 don't believe he was in custody for the second one

11 either. Yeah.

12 Q And they were both relatively short in duration

13 interviews; right?

14 A Correct. Although one of them I couldn't figure out

15 the exact time, uh, on, but, yeah, they were

16 relatively short.

17 Q In fact, the second one was 25 minutes?

18 A Correct.

19 Q First one was -- would you quibble with about 53

20 minutes?

21 A I think that's what you said yesterday, yeah. No, I

22 wouldn't quibble.

23 Q And in those interviews he was in the back of a

24 squad car; correct?

25 A Yes.

1 Q And the back of a police car is a rather confined
2 and narrow setting; correct?

3 A Yes.

4 Q In fact, there were three officers who were
5 intermittently throwing questions at him; right?

6 A I believe so.

7 Q And in that particular, um, area, we'll take the
8 November 6 one, Mr. Dassey was steadfast in
9 denials regarding having knowledge of anything
10 that his uncle may or may not have done?

11 A Correct.

12 Q In fact, he was even, um, found to be
13 inconsistent with whether or not there was even a
14 bonfire on the night in question, October 31,
15 2005; correct?

16 A Um, I don't dispute that. I just don't recall that
17 specifically.

18 Q Well, didn't he originally tell the officers he
19 thought the fire was either Tuesday or Wednesday
20 night? The 1st or 2nd of November?

21 A I -- I don't recall specifically.

22 Q In that partic -- in those -- in both of those
23 interviews the officers were far more
24 confrontational with Mr. Dassey than they were on
25 any subsequent interviews; correct?

1 A I wouldn't agree with that, no.

2 Q You haven't listened to the tapes?

3 A Uh, well, I think I did listen to the tap
4 last night. I mean, I watched all the vi
5 was provided for the other interrogations
6 didn't strike me as more confrontational
7 subsequent ones.

8 Q All right. Now, with respect to the February 27
9 interview at the high school, Mr. Dassey was not
10 in custody at that time; correct?

11 A Um, I don't recall.

12 Q Well, he -- he certainly wasn't handcuffed?

13 A Yeah. But that's not the measure of custody.

14 Q Well, its -- physical restraining is one?

15 A Right. But another measure would be whether somebody
16 perceives they're free to go.

17 Q Right.

18 A Or is free to go. And I just don't recall. Um, and,
19 of course, that would be a legal determination
20 anyway.

21 Q It would, would it not?

22 A Correct.

23 Q All right. And in that particular case, um,
24 Mr. Dassey was interviewed at the school in -- in
25 a room there; correct?

*I should
have
played
the
tapes
from
now*

1 A Correct.

2 Q All right. He was not confronted with any
3 evidence in that interview at the high school,
4 was he?

5 A I'd have to go through and look at it. I don't
6 recall, specifically, if he was confronted with
7 evidence in that particular interrogation.

8 COURT REPORTER: Please slow down.

9 THE WITNESS: Sure.

10 Q (By Attorney Fallon) Well, there was no false
11 evidence ploys; correct?

12 A On the 27th? I'd have to go through --

13 Q At the -- at the high school.

14 A Correct. The first one, yeah.

15 Q Now -- well, I'll come back to that. Similarly,
16 with respect to the second statement at the Two
17 Rivers Police Department, which we discussed
18 yesterday, um -- well, I'll ask you. Would you
19 agree that that interview at the police
20 department was about 41 minutes long?

21 A Yes.

22 Q All right. And in preparation for that interview
23 Mr. Dassey rode to the police station with the
24 police officers, Mr. Fassbender and Mr. Wiegert?

25 A Correct. They went to get him. Right.

1 Q Well, that he rode with them; correct?

2 A Yeah. Yeah.

3 Q In fact, his mother rode with him in the car?

4 A I -- I don't recall.

5 Q That would be an important fact for you, wouldn't

6 it?

7 A No.

8 Q All right. I'll bite. Why not?

9 A That his mother rode with him to the --

10 Q Yes.

11 A -- interrogation? Um, because she wasn't part of the

12 interrogation. She wasn't present during the

13 interrogation. And that occurred prior to the

14 interrogation and the use of the interrogation

15 techniques. And that was one of several

16 interrogations, obviously.

17 Q But isn't, Doctor, one of the premises of your

18 research is that the intent of an interrogation

19 is to isolate a suspect from everyone else?

20 A Yes.

21 Q And in this particular case Mr. Dassey knew that

22 his mother was nearby; correct?

23 A Uh, when he was driven there, yes.

24 Q All right. In fact, she was outside waiting;

25 correct? During the interview?

1 A Right. And that's isolation.

2 Q All right. And, um, she was offered the
3 opportunity to sit in the interview; right?

4 A I -- I don't recall.

5 Q You don't recall?

6 A No.

7 Q All right. In the statement at the Two Rivers
8 Police Department, the second statement on
9 February 22 --

10 A Okay.

11 Q -- Mr. Dassey wasn't confronted with any
12 evidence; correct?

13 A During that interrogation?

14 Q Right.

15 A I'd have to look at the interrogation.

16 Q You don't recall?

17 A Of the top of my head, no.

18 Q Were there any false evidence ploys?

19 A Again, I don't recall in that particular
20 interrogation off the top of my head.

21 Q Now, I'm going to come back to this superior
22 knowledge thing in a -- in a few minutes. So I
23 haven't forgotten that.

24 But I guess what I'd like to do at this
25 particular point is engage you in a discussion

1 regarding coercion, if I may.

2 You would concede, Doctor, that there's
3 a difference between, in your view, what the
4 courts define as legal coercion, and what you
5 define, as a psychologist, as psychological
6 coercion?

7 A I think they're pretty close but there may be
8 differences. There may be times when courts will
9 look at inducements and say they don't rise to the
10 level of promise or a threat, um, or may interpret
11 the totality of interrogation as not overbearing
12 somebody's will. But the definitions are very close.

13 Q So the decision as to whether certain conduct is
14 actually coercive is initially for the court to
15 determine and subsequently for a jury?

16 A Well, yes, in a legal setting it's for a court.
17 Obviously in our research that's separate. It's --
18 it's -- does -- has nothing to do with courts.

19 Um, and then in states that permit that,
20 yes, it's secondly a jury issue.

21 Q All right. Would you agree that the concept of
22 coercion is sometimes expressed along a
23 continuum?

24 A Yes.

25 Q In fact, a -- a lot of the research you've done

1 on the history of coercion in this country, you
2 talk about what was formerly known in the 20's,
3 30's, and 40's as the third-degree interrogation?
4 A Correct. Yeah.
5 Q And oftentimes that involved physical force or
6 violence; correct?
7 A Correct.
8 Q So you would agree with me that on the -- the
9 extreme end of a continuum of coercion you would
10 have physical violence or bodily harm; right?
11 A Correct.
12 Q A -- a -- a threat of death, for instance, would
13 probably --
14 A Right.
15 Q -- be pretty highly coercive?
16 A Correct.
17 Q Can you think of any circumstance where such a
18 threat of death would not be highly coercive?
19 A Um, unless the person really wanted to die, no.
20 Q Right. Right. So the only possible one that
21 might trump that is if a -- a loved one of
22 somebody's life was threatened rather than your
23 own? That might be the ultimate level of threat
24 coercion; right?
25 A Correct.

1 Q Okay. And there's no doubt in your mind about
2 that?

3 A Well, I mean, I want to give it a little bit more
4 thought. But, no, I would think as a parent that
5 threatening the death of a child's probably the worse
6 thing you could be threatened with.

7 Q Okay. Now -- now, you would agree that coercion
8 can come from many places?

9 A Sure.

10 Q Many sources?

11 A Sure.

12 Q And coercion doesn't always have to come from,
13 um, a person who is conducting a questioning, or
14 an interview, or an interrogation?

15 A Right. There could be other sources of coercion,
16 correct.

17 Q Right. And, in fact, um, a -- a family could be
18 a source of coercion for somebody in making a
19 decision to provide information or not provide
20 information; correct?

21 ATTORNEY DRIZIN: Judge, I'm going to
22 object. This is beyond the scope of -- of the
23 direct. We're not here to talk about what may
24 have happened outside of the interrogation room.
25 Dr. Leo's talking about what happened during the

*Didn't
get
answered*

1 interrogation process.

2 THE COURT: Coercion was raised during the
3 direct, Counsel. And it's Wisconsin, and
4 cross-examination is wide open. So your objection
5 is overruled.

6 Q (By Attorney Fallon) So you would agree that one
7 could be, um, coerced into telling a lie as well
8 as one could be coerced into telling the truth?

9 A Correct.

10 Q Okay. One could be coerced into keeping a
11 secret?

12 A Correct.

13 Q Or not keeping a secret?

14 A Correct.

15 Q Okay. In this case, Mr. Dassey received lots of
16 information from his family that he shouldn't
17 testify against his uncle; right?

18 A Uh, I'm not disputing that, but I wasn't aware of
19 that.

20 Q All right. You didn't review any of the
21 materials associated with that?

22 A Not to my knowledge.

23 Q Okay. Were you aware of the fact that he had
24 advice from the family not to take a plea
25 agreement?

1 A No.

2 Q In fact, did Mr. Avery begin calling family
3 members within a couple of days after

4 Mr. Dassey's reportedly -- reportedly confessed
5 on March 1?

6 A No.

7 Q That Brendan received information from the
8 family, or advice from the family, that she -- he
9 should take it back and tell them that he lied?

10 ATTORNEY DRIZIN: Judge, I'm going to
11 object. He said he hasn't seen or heard any of
12 the -- the phone calls he's talking to. I mean,
13 is -- is -- is the witness testifying or is
14 Mr. Fallon testifying here?

15 THE COURT: Mr. Fallon's asking questions.
16 He can do that. If the witness has no knowledge,
17 the witness says that.

18 ATTORNEY DRIZIN: Okay.

19 THE COURT: Overruled.

20 Q (By Attorney Fallon) If those things happened,
21 they would be -- they could be coercive, could
22 they?

23 A It's certainly possible they could be coercive. I'd
24 want to know more about the circumstances under which
25 they occurred.

1 Q Well, you would -- you would probably more likely
2 agree and find them coercive if that advice was
3 accompanied by a direct threat; right?

4 A Uh, if they were accompanied by threats, one might
5 find them coercive. But it's a very different
6 context, obviously, than being threatened by a police
7 officer.

8 Q Well, Mr. Dassey received a threat in this case,
9 did he not?

10 A You're talking about outside the interrogations?

11 Q Outside the interrogation.

12 A I don't recall.

13 Q You reviewed the transcripts in this case; right?

14 A I did, yes.

15 Q All right. Um, would you turn to Exhibit 206,
16 sir?

17 A Can you tell me which binder that's in?

18 Q Sure. I'm going to guess it's in four. I
19 believe 206 is the transcript of the statement
20 taken at the high school.

21 A Okay.

22 ATTORNEY DRIZIN: Do you have a page
23 number, Tom?

24 ATTORNEY FALLON: Yes. I -- I want to
25 double-check my number before I tell you. I

1 believe the number I'm looking for is -- yes,
2 466.

3 ATTORNEY DRIZIN: Page 466?

4 ATTORNEY FALLON: Right.

5 Q (By Attorney Fallon) There's a question from,
6 um, Investigator Wiegert:

7 Question: "What did he tell you?"

8 "Brendan: That I should keep my mouth
9 shut" comma "they were hers."

10 "Wiegert: Did he threaten you?"

11 "Brendan: Sort of."

12 "Fassbender: What did he say?"

13 "Wiegert: Tell me."

14 "Pause."

15 "Stab me, too."

16 "Wiegert: Or else he would stab you
17 too?"

18 "Brendan: Yeah."

19 "Go back to the clothes," he said.

20 "Those were whose clothes?"

21 "Teresa Halbach."

22 THE WITNESS: Okay.

23 Q (By Attorney Fallon) All right? So that could
24 be taken as a -- a threat on the young man's
25 life; correct?

1 A Uh, yeah. Yes.

2 Q And especially if, um -- if Mr. Dassey had
3 actually witnessed his uncle killing Teresa
4 Halbach, and then was told that he should keep
5 his mouth shut, that could certainly be perceived
6 as coercive on his part?

7 A It could be. Um, but I -- if he was in custody,
8 obviously it couldn't be acted on.

9 Q Oh. All right. Well, then, um, let me direct
10 your attention, sir, to page 478 of the very same
11 exhibit.

12 A Okay.

13 Q The bottom of the page.

14 "Fassbender: During the last several
15 months were you afraid that Steven was going to
16 get out?"

17 "Brendan: Not really."

18 "Fassbender: No. If, uh -- now that
19 you've made this statement, are you afraid --
20 that he would get out -- for your own safety?"

21 "Brendan: I don't think he's going to
22 get out."

23 "Fassbender: I know. But if he did,
24 would -- because of what he said to you, would
25 you be afraid?"

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"Brendan: Yeah."

Q (By Attorney Fallon) All right?

A Okay.

Q All right. Now -- excuse me. As a social psychologist, whose task it is to assess possible impact of coercion, it would be important for you to know whether there were other forces exacting coercion on Mr. Dassey?

A You're talking about during the interrogation?

Q Not necessarily during the interrogation, but overall in assessing the reliability of the information or the reliability of what's being discussed in the interrogation, you would want to know about the other external factors?

A To the extent it bears on what's going on in the interrogation, yes.

Q So your point is you don't really particularly care what other external coercive first -- forces are at play, you're only concerned with what the police do?

A Well, if the other coercive forces were to bear on why the statements were given or their reliability during the interrogation, yes. But if they don't bear on the interrogation, and they're really outside the scope of what I'm asked to evaluate...

1 Q So you don't think if somebody receives a direct
2 threat on their life, after possibly witnessing
3 such a violent act being carried out, that that
4 wouldn't have any effect on their decision to
5 tell the police something in response to their
6 questioning?

7 A It -- it could in the abstract. It doesn't appear
8 here, though, what you read, that he was afraid of
9 Mr. Avery getting out. So it's not clear to me from
10 what you read in this case that that had any impact.

11 Q Well, you did read other information in this
12 reports that most of the family members were
13 afraid of Steven Avery; right?

14 A Yes. Yes.

15 Q All right. So doesn't that give some credence to
16 the fact that it's very possible he wasn't that
17 threatened?

18 A It surely does, yes, but --

19 Q All right.

20 A -- if he's not going to get out, if they don't think
21 he's going to get out because he's locked up, then
22 that would undermine the fear of eventual
23 retaliation.

24 Q Well, Doctor, you would understand -- you would
25 agree with me that even those who are in prison

1 have means of reaching out to those in the
2 outside and doing them harm; right?

3 A Yeah, but it's not the same thing. It's --

4 Q If --

5 A -- difficult. It's remote. It's hard. It's not the
6 same thing.

7 Q So it's your assessment here that -- that the --
8 any potential coercive effect from Mr. Avery, and
9 the rest of the family, on Mr. Dassey had nothing
10 to do with his decision to tell the police what
11 he told them on February 27 or March 1?

12 A It didn't appear to me and --

13 Q All right.

14 A -- based on the materials I reviewed.

15 Q All right. I'm going to digress for one moment
16 and ask three points that I omitted to ask you
17 about in the introductory discussion we had
18 yesterday. So if I may -- and they're not
19 related.

20 Um, what would you say the average
21 amount of time is that you spend on a case -- a
22 case when you consult? I mean, is it like ten
23 hours? Twenty hours?

24 A Yeah, probably five or ten hours.

25 Q Five to ten hours on average?

1 A In many cases, we -- even less than that.

2 Q Even less than that.

3 A Yeah.

4 Q Therein case like this where you'd have a lot of
5 hours?

6 A Correct.

7 Q Okay. Um, and you said studied -- you -- you --
8 you testified -- I think you said -- you
9 testified once in Wisconsin at the Criminal
10 Justice Study Commission?

11 A Correct.

12 Q Was that the -- the commission -- the -- the
13 former Avery Commission-type thing? Were you
14 involved in legislative reform?

15 A It was, I believe, the former Avery Commission that
16 was formerly named that. And, um, and I just
17 presented testimony during a day there. So I wasn't
18 really directly involved in legislative reform.

19 Um, the -- what grew out of that might
20 have had some legislative impact. I didn't
21 really follow it very closely.

22 Q All right. Um, and just so that we're clear, I
23 know we had a lot of discussion about this
24 yesterday, but you would agree that the, um,
25 interrogation techniques employed by Fassbender

1 and Wiegert aren't really following the Reid
2 model of interrogation?

3 A I'm sorry. Are not following?

4 Q Are not. I mean, there's a couple of tactics,
5 yes --

6 A Yeah.

7 Q -- but it's not -- but they didn't follow the
8 Reid technique; right?

9 A Well, I would say they didn't do a mechanical
10 application of the Reid technique. So to explain,
11 the Reid technique says, um, there are nine steps.
12 And here's what you do in step one. And here's what
13 you do in step two. And here's what you do in step
14 three.

15 And almost nobody does a formulaic
16 following of that. There are elements of the
17 Reid technique present here.

18 Q Elements. But there are elements of other
19 interrogation techniques as well?

20 A Well, I'm -- I'm not sure I would say that. There --
21 there are, um, techniques that are, um, not part of
22 the formulaic nine steps of the Reid method, but
23 there's nothing that's part of a separate method
24 that's not the Reid method.

25 I mean, the Reid method's really an

1 umbrella of a lot of different techniques
2 emphasizing specific steps to deliver the
3 techniques.

4 Q Okay. All right. Doctor, I want to talk about
5 inducements right now.

6 In your testimony yesterday, I believe
7 you referred to one set of inducements as low-end
8 inducements; correct?

9 A Correct.

10 Q All right. Now a low-end inducement may be
11 something that appeals to one's religious
12 character or -- or one's sense of morality?

13 A Correct.

14 Q In other words, to do the right thing and tell
15 the truth --

16 A Correct.

17 Q -- type of thing. So -- or an appeal to one's
18 conscience if one may not be religiously
19 motivated?

20 A Correct.

21 Q All right. Now, um, these low-end inducements,
22 of which there are in this case; right?

23 A Correct.

24 Q All right. These low-end inducements, um, are
25 certainly permissible in your view; correct?

1 A Yes.

2 Q They're -- they've been found legal by the
3 courts; right?

4 A Correct.

5 Q All right. And -- and, in reality, they're
6 non-coercive?

7 A Correct.

8 Q All right. Now, I think you also testified that
9 there's some systemic, or I think you might have
10 used the ray -- the word "mid-range" inducements
11 which --

12 A Correct.

13 Q -- are present in this case? In fact, there were
14 several clips played by Counsel?

15 A Correct.

16 Q I think in Exhibit 315, um, I have, like, clips
17 four through ten, but I'm not sure with the
18 revised exhibit here if I've got that right.

19 A Did you want me to refer to that or not?

20 Q Yeah. Well, if you could, that would be great.

21 A Okay. So what notebook is 315 in?

22 Q Five.

23 ATTORNEY TEPFER: There's a new version
24 on the side.

25 THE WITNESS: There's a new version?

1 Okay. Okay. I think I have both parts of
2 Exhibit 315 and notebook five.

3 Q (By Attorney Fallon) Okay. Um, just so that
4 we're clear, can you identify for me just -- uh,
5 I don't know if there's been a change as a result
6 of the exhibit, but, um, my notes reflect
7 systemic inducements or mid-range inducements.
8 Um, looking at page four maybe?

9 ATTORNEY DRIZIN: Which interrogation
10 are you talking about?

11 ATTORNEY FALLON: I'm looking at --
12 well, if the pages are all in sequence, um, I
13 believe that would be the Two Rivers -- nope,
14 Manitowoc, 3/1/06, page four.

15 THE WITNESS: Okay. Beginning with --
16 Q (By Attorney Fallon) Wait, I -- I think I have
17 overshot the mark. Let me back up. I'm sorry.
18 Go back to page one. And I have clips four
19 through ten, which would be pages one and two.
20 Could you review those silently to yourself?

21 A Okay. Yeah. Yeah. Just give me a moment, please.

22 Q Sure. I -- I may have mis-noted, but I just want
23 to know what -- make sure I have my facts correct
24 here before I ask any questions.

25 A Okay.

1 Q All right. Um, in Exhibit 315, then, on pages
2 one and two, clips four through ten, are those
3 examples of systemic or mid-range inducements?

4 A I would say that they are. Um, I mean, we might want
5 to go through them individually. But to the extent
6 that they, um, were to communicate leniency or
7 impliedly threaten harm, they might shade into the,
8 what we call, "high-end inducements." But, yeah.

9 Q All right. Now, as I understand it, systemic, or
10 mid-range inducements, by themselves, are
11 certainly permissible interrogation techniques;
12 correct?

13 A I think it depends. You know, courts, um, oftentimes
14 will find them to be permissible because they're
15 considered vague enough that they don't really
16 communicate leniency or cross a line --

17 Q So -- sorry.

18 A -- in threatening harm. So I think as they shade
19 into what we call "high-end inducements," then, no.
20 But, um -- but traditional systemic inducements, or
21 mid-range as we're calling them, I think are usually,
22 but not always, found to be permissible by courts.

23 Q And that's because they're generally non-coercive
24 in and of themselves?

25 A Correct. As interpreted by courts.

1 Q Right. And in this particular case, as you said,
2 there's some -- some vagueness associated with
3 these -- with the comments in those clips; right?

4 A Correct.

5 Q In fact, if you were to say that they might shade
6 into, um, the high-end inducements, that would be
7 based on an implicit understanding of what they
8 are trying to connote to the -- to the person?

9 A Um, if I follow your question, yes. But, um -- yeah.

10 Q Okay.

11 A I -- I -- I don't know if you say, "try to connote"
12 but, yes, I -- I think I understand. I think I agree
13 with what you're saying.

14 Q In other words, these aren't clearly direct or
15 express syn -- systemic inducements? These are
16 somewhat vague or implicit?

17 A They're implicit -- they're implicit suggestions
18 about benefit. Correct.

19 Q That -- that he might have some perceived benefit
20 if he comes clean?

21 A Um, right. If he conforms to what they're -- if --
22 if he gives them an account they're asking for,
23 correct.

24 Q Or an account that they believe is the truth?

25 A Correct.

1 Q Okay.

2 A Yeah.

3 Q Now, you also talk about high-end inducements,
4 which are -- are the inducements that you believe
5 are coercive; correct?

6 A Correct.

7 Q All right. Now, are -- some high-end
8 inducements, um, can be legally permissible;
9 right?

10 A Well, you mean insofar as a court will find them to
11 be legally permissible?

12 Q At a suppression hearing, for instance.

13 A Yeah, that's correct. That some courts will find
14 sometimes these high-end inducements to be
15 permissible.

16 Q In fact, in your research, as now a law professor
17 and a social psychologist, you are aware that
18 courts imply a totality of the circumstances test
19 in assessing whether or not to suppress a
20 particular statement; right?

21 A Correct.

22 Q And in -- in balancing the equation, as it is,
23 between the tactics of the police and the
24 personality factors of a given person, they look
25 at a variety of -- of techniques employed by the

1 police; right?

2 A Correct.

3 Q Right. And so you may have one or two high-end
4 inducements, and yet the statement would be
5 determined to be legally admissible?

6 A It's certainly possible, yeah.

7 Q Certainly. And the problem is, is the more
8 high-end inducements you have, the more
9 cumulative the effects are, the less likely that
10 the court may be persuaded that it's legally
11 permissible or not?

12 A I would think so, yes.

13 Q All right. Now, in this particular case, and as
14 I understand your testimony and from your
15 affidavit, which I believe is Exhibit 3, it's
16 your contention that the high-end inducements in
17 these cases consist of both implicit promises
18 and/or implicit threats?

19 A Correct.

20 Q Right?

21 A Yes.

22 Q Okay. Now -- and the implicit promise is that he
23 would be offered lenient or favorable treatment;
24 is that right?

25 A Correct.

1 Q And the -- excuse me -- and the implicit threat
2 would be the converse. That if he didn't provide
3 information that the officers believed was true
4 and accurate, that it would go really bad for
5 him?

6 A Yeah, but --

7 Q Right?

8 A -- in -- in Exhibit 3, where I identified some of
9 these inducements, and we talked about them
10 yesterday, it would be more than just going bad for
11 him because they're talking about him potentially
12 facing charges.

13 Q Charges?

14 A Yeah. And they're going back to the district
15 attorney, and things going easier for him down the
16 road, implicit -- implying that it'll go worse for
17 him down the road. And they reference trial, and
18 going to bat for him. So it's -- it -- I think I'm
19 agreeing with what you're saying. I'm just being a
20 little bit more specific --

21 Q Okay.

22 A -- as I was yesterday.

23 Q So that would be an example, then, of one of
24 these systemic inducements, um, bleeding over, as
25 it were, into a high-end inducement, in -- in

1 your parlance?

2 A Cor -- correct. Correct. And one might call it a

3 high-end inducement. A couple of these at least.

4 Q And, um -- but, in one sense, the officers were

5 being perfectly candid and accurate because he

6 very well could be charged with an offense;

7 right? That was always a possibility?

8 A Yeah. They -- they -- it's correct. They -- they --

9 Q (Unintelligible.)

10 A -- may be truthful in their threats. I'm sorry.

11 Q All right. So that was an accurate statement?

12 They weren't misleading him?

13 A Um, well, I was looking at several statements. I --

14 I do think that there's some misleading here, um,

15 potentially, with the going to bat for you, uh, and

16 helping him out, um, but it is possible that what

17 they are saying to him, the implied promises, the

18 implied threats are truthful.

19 Um, that's independent of a coercion

20 analysis. But it's --

21 Q But it --

22 A -- possible that they are not misleading him. I -- I

23 thought they were, um, but it's --

24 Q But it --

25 A -- certainly possible they weren't.

1 Q But in your experience, um, in the 15 years, or
2 20, now, since your thesis, and having watched
3 all this, it's not uncommon for an officer, a
4 police officer, to go to the prosecutor and say,
5 hey, look, cut the guy some slack here. He
6 helped us out. That's not uncommon, is it?

7 A You mean trying to get a deal for -- for -- for a
8 suspect in --

9 Q No --

10 A -- a case?

11 Q -- just call -- just call the prosecutor and say,
12 hey, if you're going to charge the guy, you can
13 go a little lighter on him. I don't care. He
14 really helped us out. That does happen in the
15 criminal justice system.

16 A Yeah, I'm sure it does happen. Yeah. I just don't
17 know how common it is. Yeah.

18 Q Okay. Now, just so that I'm clear, your take on
19 this is that these are clearly implicit or
20 implied? There's nothing really flat out express
21 and direct here?

22 A Um, yeah. But that, too, could be on a continuum. I
23 think some of these are a little bit more direct.
24 Particularly the one about him facing charges and
25 particularly when they reference the district

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attorney, or the trial, or the judge.

But, yeah, for the most part
are -- these would be implied promises

threats. They're not direct or express in --
in -- in the way I described yesterday. If --

Q All right.

A -- you do this, then this will follow. If you don't,
then that will follow.

Q Okay. So if there's an implicit promise of
leniency, for instance, as you see it, that had
an effect, for instance, on Mr. Dassey's decision
to inculcate himself, that would have to have
been understood by Mr. Dassey as either a promise
or a threat; correct? You -- right?

A I -- I think --

Q There's -- there's two sides --

THE COURT: Here.

ATTORNEY FALLON: I'm sorry.

THE COURT: Let him answer. Go ahead.

Q (By Attorney Fallon) Go ahead, answer.

A Okay. So, trying to be responsive to your question,
I don't think it's a yes/no question, so let me just
succinctly elaborate, and then you can tell me if
this is responsive.

The analysis of coercion, whether

*These are
implied
promises
& threats*

1 there's coercion, is really an objective
2 analysis. Are these techniques coercive?

3 But I think what you're asking about is
4 a legal determination of voluntariness. I'm not
5 here -- well, I should say when I testify in
6 suppression hearings, I don't testify whether I
7 think a confession is voluntary or involuntary.

8 I think that's what you're asking about.
9 Do I think something is voluntary or involuntary?
10 Whether or not these techniques were understood
11 to be communicating leniency, they're still
12 coercive, in my opinion, even if he didn't
13 understand them to be communicating leniency.

14 But voluntariness, whether or not his
15 statements ultimately were voluntary is a
16 separate issue than coer -- it's a related issue,
17 but it's not for me to opine about.

18 Q Well, that's not quite what I had in mind,
19 although you did touch on it. Excuse me.

20 My point is, in assessing whether a
21 particular technique is coercive, there's two
22 parts to it, is there not? What is -- what the
23 question is, and then the person on the other end
24 of the question, did they take it as coercive?
25 Or did they take it, in this case, as a threat or

1 a promise?

2 A In -- in the first definition that I gave of
3 coercion, whether the techniques are inherently
4 coercive, no. In the second definition I gave of
5 coercion, yes.

6 Q All right. And in this particular case you have
7 no way of knowing what impact these implied
8 promises, for instance, that they would, quote,
9 go to bat for him, had on Mr. Dassey?

10 A Correct.

11 Q All right. You had no way of knowing whether or
12 not their discussions with him about that if he
13 didn't tell the truth, as they understood it, he
14 could be charged with a crime; right?

15 A There may be ways of knowing, but I -- I don't
16 recall, from the -- my review of the materials, a
17 discussion of that.

18 So, for example, as I mentioned
19 yesterday, sometimes suspects will verbalize the
20 reasons why they say things in the interrogation.
21 And sometimes there may be interviews by other
22 people, like clinical psychologists, where they
23 will describe why they confessed.

24 So there -- there are ways of knowing.
25 Um, I just don't recall from the materials I

1 reviewed if -- if that was in there.

2 Q Let me return to the February 27 statement again
3 in Exhibit 206. Is it still -- do you still have
4 that up there?

5 A Uh, no. I'm looking at Exhibit 215. You want
6 Exhibit 206?

7 Q Yeah. Would you go back to that? I'm going --

8 A May I ask --

9 Q -- to ask you a couple questions?

10 A -- which notebook is 206? And I'm sorry.

11 Q Um, four? Yep. Four.

12 A Okay. Two-o-six. Yes.

13 Q Okay. I'll give you a -- a page in a minute.
14 But I just want to ask you a couple of general
15 questions before we get to the --

16 A Okay.

17 Q -- the point. All right? Now, would you agree
18 with me that probably the best way to try and
19 figure out if somebody understood an implicit
20 promise is to ask them if they understood it or
21 if they were made a promise?

22 A I would agree that that would be the best way. There
23 is a problem, though, if the same people who make the
24 promises or threats are the ones asking, because the
25 person may lie, uh, or downplay it for reasons having

1 to do with the -- the encounter.

2 Q So you put no stock in asking the person
3 directly?

4 A Well, I wouldn't say that, but I've seen many
5 interrogations, many interrogations of false
6 confessions that are horrible interrogations, and the
7 interrogators say, we didn't threaten you. We didn't
8 promise you anything, did we? And the person says,
9 no. And the interrogation's replete with threats and
10 promises.

11 So there may be an incentive, when
12 somebody is threatened and promised by a police
13 interrogator, um, to downplay it. They want to
14 get out of the interrogation, put an end to it,
15 don't want to, um, engage in, um, conflict, you
16 know, challenge the authority of the
17 interrogator.

18 So that's not the best setting to gauge
19 whether or not somebody was threatened or
20 promised. But, yes, asking them whether they
21 understood something as a threat or a promise,
22 um, would be a good way of gauging, generally,
23 outside the context of interrogation, whether or
24 not they understood something's a threat or a
25 promise.

1 Q All right. Now, in your answer there, you gave
2 us an examples of -- of -- were you drawing upon
3 examples of demonstrably false confessions?

4 A Yes. I've seen that in demonstrably false
5 confessions. I believe I've also seen it in what we
6 called highly probable false confession cases. Um,
7 I've seen it in other cases as well, um, where I
8 don't know if it was a false confession.

9 Q In this particular case, on February 27 at the
10 high school, Mr. Dassey was asked by the police
11 if they made any promises to him; correct?

12 A Um, you have to refresh my recollection.

13 Q Exhibit 206, page 476.

14 A Four seventy-six. Okay. Thank you.

15 Q The officers ask him if they've made him any
16 promises; correct?

17 A Correct.

18 "Wiegert: Brendan, did we promise you
19 anything prior to writing this statement?"

20 "Answer: Yes."

21 "What did we promise you?"

22 "Answer: That I could leave whenever I
23 wanted."

24 Q (By Attorney Fallon) Or -- excuse me.

25 "That I could leave whenever" comma

1 "whenever I wanted" comma "and I didn't have to
2 answer any questions."

3 "Wiegert: Right. Did we threaten you
4 at all?"

5 "Answer: No."

6 Q (By Attorney Fallon) And then there's a -- the
7 tape turns over and they move on. Correct?

8 A Yes.

9 Q All right. Now, according to your answer, you
10 put no weight in that whatsoever?

11 A Um, well, I might put some weight on it. But the
12 question is -- what is the question about? Putting
13 weight on to -- to what end?

14 Is it whether or not threats or promises
15 were made?

16 Is it whether or not threats or promises
17 were understood?

18 Is it whether or not the statements that
19 he give were voluntary?

20 So I -- I might put weight on it, but
21 I'm not sure to what end.

22 Q Well, we -- that's very good. We have three
23 questions there, don't we? All right.

24 Let's take this one. Is it evidence of
25 the fact that Mr. Dassey understood the implicit

1 promises that the police were making?

2 A Um, to that point, um, it may be, um, unless he is
3 telling them what they want to hear because they want
4 to hear it. So since we don't really know
5 completely --

6 Q Well, you just told us there were inducements,
7 and systemic inducements, and low-end inducements
8 prior to that. Doesn't that statement reveal
9 that he didn't understand them as implicit
10 inducements or statements?

11 A Um, it depends on whether he's telling the truth or
12 not.

13 Q And you don't know that?

14 A Correct.

15 Q And it's entirely possible that that's evidence
16 that he doesn't understand implicit inducements?

17 A It's possible, sure.

18 Q All right. Similarly, it's entirely possible
19 that these threats that you've described are
20 similarly vague such that he did not understand
21 them as a threat?

22 A It's certainly possible. I'm not sure how likely it
23 is. But certainly possible.

24 Q And -- and you, yourself -- you don't know if he
25 answered that question truthfully or not when

1 they asked him if -- "Have you been threatened?"

2 A Correct.

3 Q So the bottom line is, although you've talked
4 about these high-end, low-end, and systemic
5 inducements, you have no idea whatsoever whether
6 Mr. Dassey understood them as implicit
7 inducements?

8 A Um, well, that may be the bottom line for you. I --
9 I wouldn't use "bottom line" to characterize it.
10 But, yeah, it is true that, um -- that I don't recall
11 from the materials that I read, um, and I wouldn't
12 know, if he answers questions like this to comply,
13 whether or not he understood those -- those
14 inducements as promises and threats or whether or not
15 that he's falsely -- yeah. I -- I wouldn't know.

16 Um, I mean, he does say at the end, like
17 we talked about yesterday, that they were messing
18 with his head, um, and we -- he did think he was
19 going home at the end of that interrogation.

20 So we talked about on direct where,
21 after he had confessed to participating in this
22 rape and murder, um, so that would be some
23 evidence that he understood what they were
24 saying, uh, and what he was agreeing to, in a
25 way, as leaving him not culpable.

1 Q Also reflective of the fact that he didn't
2 understand any threats or promises or inducements
3 that were made in that March 1 interview;
4 correct?

5 A I think you have to elaborate a little bit more what
6 you mean by that. The logic of him understanding
7 that he wasn't committing -- that he wasn't
8 confessing, that he'd be able to go home, is that he
9 wasn't confessing to a crime because it was suggested
10 that they would go to bat for him, they would help
11 him, and that he would be getting lenient treatment
12 or immunity, base -- if he gave them the answers they
13 were looking for.

14 So how you interpret that as the
15 opposite, I guess I need more explanation for
16 your question.

17 Q Well, um, we may come back to the end of the
18 March 1 interview, but I don't want to lose my
19 train of thought.

20 The point being is that you don't know
21 whether or not any of these implied threats or
22 promises were understood by Mr. Dassey as either
23 a promise to do something or a threat if he
24 didn't?

25 A I guess I don't know absolutely, yes, but I think

1 what I just described, uh, is, um -- is -- is -- is
2 good evidence that he likely understood the
3 inducements his promises or suggestions of leniency
4 are immune to.

5 Q But that's, again, just a matter of your opinion?

6 A Yeah. It's a matter of interpretation. I don't know
7 with any absolute certainty. Correct.

8 Q All right. All right. Let's talk about
9 contamination. You have subscribed to the theory
10 that, um, much of the rich detail in Mr. Dassey's
11 March 1 statement comes from the police
12 themselves?

13 A Yes.

14 Q All right. But you also opine that it could come
15 from other sources?

16 A Correct.

17 Q And those other sources could be his family?

18 A Correct.

19 Q Could be the media?

20 A Correct.

21 Q Could be his familiarity with the crime scene,
22 having grown up and lived there his whole life?

23 A Correct.

24 Q But you can't tell us where the information
25 really came from that he provided to the police?

1 A Right. So you mean when he repeats something back,
2 whether it's absolutely the case that it came from
3 media, or the police suggestion, or preexisting
4 knowledge, correct.

5 Q All right. As a matter of fact, you don't know
6 whether Mr. Dassey watched any news casts or
7 telecasts of the events of his uncle's arrest,
8 leading up to his own, in that three-month
9 period?

10 A Correct.

11 Q You don't know whether he read any newspapers;
12 right?

13 A Correct.

14 Q So all the exhibits that Counsel just read into
15 the record before I began my examination, all
16 those media exhibits, you don't know if
17 Mr. Dassey looked at one single solitary piece of
18 that, do you?

19 A Correct.

20 Q Okay. And even -- no. I'm going to save that
21 one.

22 And in your preparation to render the
23 opinions you've expressed here in court today,
24 you didn't think to ask Mr. Dassey; right?

25 A Well, I didn't interview Mr. Dassey, no. That's not

1 what I usually do.

2 Q Because that's the -- the clinical psychologist's

3 job? Or is that your job?

4 A Interviewing? No. If they -- if there's a recording

5 of the interrogation, I don't interview sus --

6 suspects.

7 Q And as far as you know from the review of the

8 materials, um, Dr. White never questioned on this

9 matter; right?

10 A To my knowledge, Dr. White did not interview

11 Mr. Dassey.

12 Q And Dr. Gordon did interview; right?

13 A Correct.

14 Q But he didn't look at these media accounts to see

15 if they had any effect on Mr. Dassey; right?

16 A I don't recall that being discussed in his report.

17 Q Okay. There's -- there's something you said

18 yesterday -- and this is on this superior

19 knowledge --

20 A Okay.

21 Q -- so, um, I'm going to make sure I got it right;

22 okay? I believe you used the phrase yesterday

23 that superior knowledge was a false evidence

24 ploy. Is it?

25 A Um, well, it can be. Uh, the --

1 Q Well, it's not "can be." Well, all right. Go
2 on. I'm sorry. Go ahead. Finish your -- now --
3 I'll be more specific. But tell me what you mean
4 more -- it could be?

5 A Well, these evidence ploys can either be true or
6 false; right? They -- whether it's pretending to
7 have -- whether it's stating, I have "x" piece of
8 evidence. Whether it's saying, we know all the
9 facts. Where they're saying, we know more than you;
10 right? There are instances in which those
11 representations are true and there are instances in
12 which they're false.

13 Q All right. And in this particular case they --
14 there were both?

15 A Well, I think I need you to be more specific when you
16 say, "both."

17 Q Well -- all right. Give me an example of where
18 the officers claim to have superior knowledge and
19 you -- and you characterize that as a false
20 evidence ploy?

21 A You're talking abstractly; right? An abstract
22 example?

23 Q No. On this case.

24 A Well -- okay. Well, we -- I think we went through
25 that yesterday, but it -- I don't have a photographic

1 memory. So me saying, you know, okay, this
2 transcript, this page. That's not -- I can't do
3 that.

4 Q All right. Well, let me --

5 A I'd have to --

6 Q -- see. Maybe --

7 A -- look through --

8 Q -- I can --

9 A Although we did that on --

10 COURT REPORTER: Wait a minute. One at
11 a time, please.

12 THE WITNESS: I thought we did that on
13 direct testimony yesterday.

14 ATTORNEY FALLON: If I may just have a
15 moment. See if I can find it. I can't find the
16 specific point, but...

17 Q (By Attorney Fallon) I guess we'll do it this
18 way then. Give me an abstract example of
19 superior knowledge claim being a false evidence
20 ploy.

21 A Um, well, I guess if an interrogator were to tell a
22 suspect, we know everything that happened in this
23 case, we've done the investigation, we're just here
24 for you to tell us what we already know. For
25 example, we know this, we know that, we know the

1 other, um, we know more than you think we know.
2 And they could be telling the truth or
3 they could be lying. The effect should be the
4 same if the suspect believes them. Um, it just
5 may be truthful or not truthful, um, and, of
6 course, both are permissible in terms of training
7 and law.

8 Q Both are permissible?

9 A Correct.

10 Q All right. So it's not inherently coercive to
11 use a false -- to -- to use superior knowledge?

12 A Correct.

13 Q Okay. All right. Yesterday, you were telling
14 us, in the post-narrative part of the interview
15 on March 1, that Mr. Dassey was able to, um,
16 resist certain suggested behaviors; right?

17 A I think -- yes. But I think resistance wasn't the
18 right word in many of -- in -- in many instances of
19 that.

20 Q Well, he failed to adopt the officers'
21 suggestions regarding certain details of possible
22 involvement by him?

23 A Correct.

24 Q All right. He resisted when the officers tried
25 to talk to him about what he saw of Teresa

1 Halbach. He resisted that she had been tied up
2 in the fire? He --
3 A I believe that --
4 Q -- resisted --
5 A I believe that's correct. He didn't agree. Yes. Or
6 he didn't adopt it. He didn't repeat it back.
7 Q Or that the garage door was closed at a
8 particularly critical time during the events on
9 the afternoon of October 31?
10 A Again, I -- I -- I'd have to look specifically. I
11 know much -- much of this is mentioned in one of the
12 reports.
13 Q All right. He -- he refused to adopt the --
14 the -- the premise that he saw Steven Avery
15 having sex with Teresa Halbach; right?
16 A I believe that's true.
17 Q He resisted, when the officers pressed him, as to
18 whether or not he actually participated in
19 shooting Teresa Halbach; correct?
20 A He said he didn't. Yes.
21 Q In fact, he tolds them he never even touched the
22 gun; correct?
23 A I believe that's true.
24 Q And the officers said, well, you did touch the
25 gun, didn't you? He refused to adopt that

1 suggestion?

2 A He said, no. That's right.

3 Q Um, that he kept the hair that he cut off of
4 Teresa Halbach's head. He -- he denied that;
5 correct?

6 A I believe that's right. Yes.

7 Q That he saw Teresa Halbach's underwear. Or that
8 he knew where her underwear or panties were;
9 correct?

10 A Believe that's right.

11 Q Or that during the course of the, um, assault on
12 Ms. Halbach, that the -- the wires in the garage
13 rafters were somehow used during the event;
14 correct?

15 A I don't recall specifically. But if that's in the
16 record, yes.

17 Q Well, he denied punching Teresa Halbach; right?

18 A I believe so. Yes.

19 Q And when the officers specifically tested him
20 about whether or not Ms. Halbach had a tattoo or
21 not, they said, well, you -- you saw the tattoo,
22 didn't you? And he denied that; right?

23 A I believe that's correct. Yes.

24 Q And she -- that's 'cause she didn't have a
25 tattoo? Or do you not know that?

1 A Well, I -- I don't -- I -- I bel -- I -- yeah. I
2 don't know.

3 Q Okay. Because you didn't read the case file?

4 A Well, I didn't read all the case file and I don't
5 have a photographic memory. It's possible that that
6 fact was in the -- in the materials I had read.

7 Q And he also resisted the suggestion that he
8 placed Teresa Halbach's cell phone and camera in
9 the burn barrel?

10 A I believe he said he didn't. Correct.

11 Q That he resisted a suggestion that he was shown
12 the -- the victim's jeep license plates; right?

13 A Um, I don't recall specifically. Um --

14 Q Okay. I want to go back to, um, the events of
15 February 27 again. Two days before the March 1.
16 In that in -- uh, interview with Mr. Dassey, he
17 came out of it on his own that he saw body parts
18 in the fire. That was not at the prompting of
19 the police; correct?

20 A I'd have to go back and look at that. Are you
21 talking about the one at the high school or at the
22 police department?

23 Q High school.

24 A Yeah. I'd have to go back and look at it.

25 Q (Unintelligible.)

1 A We have to -- yeah, we'd have to -- you -- if could
2 direct me to a particular place in that...

3 Q Well --

4 A -- and I have to find the transcript to --

5 Q -- I'll see if I can. Exhibit 206, page 455,
6 456.

7 A Okay. So Exhibit 206 and notebook four. And you're
8 saying page 455.

9 Q Now, admittedly, the transcript is difficult. So
10 I'm going to ask you: Did you review the tapes
11 last night? The audio tape of this?

12 A For this one? No. No.

13 Q You didn't?

14 A I had pri -- pre -- previously, but not --

15 Q Previously --

16 A -- not last night.

17 Q -- though --

18 A Yes.

19 Q -- right? They ask him, um, so after you throw
20 the seat on, what happens? When do you see the
21 body parts? Right?

22 A Okay. You're on page 4-, um --

23 Q Five --

24 A -- -55?

25 Q Right.

1 A Um, okay. So --

2 Q I think I have --

3 A It's in the middle of the page?

4 THE COURT: Here. One at a time.

5 ATTORNEY FALLON: I'm sorry.

6 Q (By Attorney Fallon) Uh, I gotta back up. I'm

7 sorry. Back up, um -- back up to page 451.

8 ATTORNEY DRIZIN: You might want to go

9 back to 447, too, while you're backing up.

10 ATTORNEY FALLON: That may be, Counsel.

11 Q (By Attorney Fallon) You're examining 447, 448,

12 449?

13 A I -- yeah. I was just looking at 451, but I will

14 start with 447. And -- and if you'd like me to read

15 it before your question, I can do that.

16 Q Well, let me give you a starting point here. You

17 could probably start at the bottom where they're

18 asking if he saw something in the fire.

19 A You're talking about the bottom of 447?

20 Q Right.

21 A Did you want me to read 451 or 455?

22 Q Four fifty-one to 455 and picked up --

23 A Oh, I'm sorry. Okay.

24 Q All right. Now, I have a question. Or two. Is

25 he giving up the information about the parts in

1 the fire or did the police suggest that to him in
2 your view?

3 A It looks like they're suggesting some things to him
4 and he's elaborating.

5 Q And he's elaborating. And he's going on about
6 that; correct?

7 A Well, I don't know what --

8 Q Well, they keep questioning --

9 A -- going on, yeah.

10 COURT REPORTER: One at a time, please.

11 ATTORNEY FALLON: Sorry.

12 THE WITNESS: Because the answers seem
13 to be terse. Um, so when you say, "going on,"
14 I'm not sure I agree with that. But he -- he
15 does answer their questions.

16 Q (By Attorney Fallon) And he does describe
17 various body parts in the fire?

18 A Correct. And they suggest them as well.

19 Q All right. Now, in this investigation -- as I
20 understand it, you read the trial transcript;
21 right?

22 A I read some of the trial transcript. And in my
23 affidavit it lists trial transcript. I don't recall
24 if I read all of the trial transcript.

25 Q Did you read the testimony of the cousin Kayla?

1 A I don't believe so.

2 Q Did you read the testimony of the school teacher
3 Susan Brandt?

4 A I don't believe so.

5 Q So you're unaware of the fact that as early as
6 December and January he had been making
7 statements to them about seeing something in the
8 fire? Body parts in the fire?

9 A No, I -- I don't recall if --

10 Q All right. Let me ask you this -- these
11 questions, Doctor, and then we're almost done.

12 In this particular case, even if
13 Mr. Dassey was exposed to media contamination
14 regarding the details of the crime, it is still
15 possible for him to provide an accurate and
16 reliable confession?

17 A Is it still possible?

18 Q Sure.

19 A It is still possible. The problem with contamination
20 is we don't know the source of the information, and
21 so we don't know if it's independently volunteered by
22 somebody who has crime scene knowledge because they
23 were present at the crime scene or whether they're
24 repeating back what was, um -- what was provided in
25 the media or by other sources of contamination.

1 Of course, it's not for me to decide the
2 ultimate issue. But that's the problem with
3 contamination. So, yes, it's possible.

4 Q It's certainly possible. And it's possible for
5 someone, who's had certain information suggested
6 to him, to, nonetheless, give a true and accurate
7 confession?

8 A It's possible. Sure.

9 Q And, similarly, it's possible for an individual
10 who, of below average intelligence, to provide an
11 accurate and reliable to -- confession to the
12 police?

13 A Yes, it's possible.

14 Q And it's possible for a spec -- suspect to
15 provide reliable and accurate information to the
16 police even when the police claimed to already
17 have all the answers?

18 A Correct.

19 Q It's possible for -- for a suspect to provide an
20 accurate and reliable confession even if the
21 police use coercive questioning techniques?

22 A Correct.

23 Q And it's -- even if those coercive techniques
24 involve high-end incentives, as you like to say,
25 it's still possible for the person to give an

1 accurate and true confession?

2 A Correct.

3 Q And the reason all those things are possible is

4 because, even if an individual, such as

5 Mr. Dassey, if, in fact, he was there, it

6 wouldn't matter that he has multiple data sources

7 because he could still provide an accurate and

8 true confession?

9 A If he was there, it's -- he could provide an accurate

10 and true confession. Again, the problem with

11 contamination is that we just don't know.

12 Q And as you sit here today, you don't know?

13 A Correct. It's -- I'm not offering any opinion about

14 whether I think this is a true or a false confession.

15 Q Right. That's what I was getting to right now.

16 In this particular case you have no idea what

17 effect the superior knowledge ploy had on

18 Mr. Dassey when they accused Mr., uh -- when they

19 accused him of helping Mr. Avery start the fire;

20 right?

21 A Um, correct. If you take -- if you just want to

22 isolate the effect of that one technique.

23 Q All right.

24 A Okay.

25 Q Or if and when they accused him of lying, or

1 appealing to a sense of morality to tell the
2 truth, you have no idea if that caused him to
3 actually give up the information he did?

4 A Correct.

5 Q Or the fact that they were minimizing his
6 involvement and blaming it all on Steve Avery,
7 you don't know if that had any effect on him and
8 his decision to provide the information he did on
9 March 1?

10 A That specific technique, no. I, mean, I assume that
11 the interrogation, cumulatively, had the effect.

12 Q But that's an assumption?

13 A Correct.

14 Q All right.

15 A I mean, he obviously was moved to say things that --
16 at the ends of these interrogations -- that he didn't
17 say at the beginning. So we presume the techniques
18 had an effect.

19 Q And in this particular case it's still physically
20 possible that the defendant was, in fact, an
21 accessory in this homicide based on the
22 statements he provided?

23 A Well, correct. I'm not here to say that this -- this
24 is not possible.

25 Q And it's certainly -- it's certainly not a

1 case -- as we've already discussed, it's not one
2 of these four cases where one can say this is the
3 demonstrably false confession?

4 A Correct. Even though -- even if it were, it wouldn't
5 be -- I -- my -- first of all, my testimony would not
6 be to say it was one of those.

7 Q So the bottom line is, as you sit here today, you
8 can't tell us whether this is a true or a false
9 confession?

10 A Well, it's true that I can't say that. But I
11 wouldn't say it's the bottom line, because that's not
12 the purpose of an expert like me at a trial or a
13 suppression hearing had someone like me been called
14 in this case.

15 Q And -- and the question is, it's still a matter
16 of your opinion, and your judgment, and your
17 interpretation of the facts as to whether this
18 could have been a false confession?

19 A I'm not sure I understand the question. Can you --

20 Q Yes. It's just a matter -- it's just your
21 opinion as to whether or not this could have been
22 a false confession?

23 A Well, of course it's my opinion based on my
24 expertise, and my research, and knowledge of -- of --
25 of a field that, um -- everything I say would be

1 based on my opinion, based on my expertise, and
2 knowledge of course.

3 ATTORNEY FALLON: That's all I have.

4 THE COURT: All right. Let's --

5 ATTORNEY DRIZIN: Can we take a little
6 break, Judge?

7 THE COURT: Yeah. Fifteen minutes.

8 (Recess had at 10:05 a.m.)

9 (Reconvened at 10:25 a.m.)

10 THE COURT: All right.

11 ATTORNEY DRIZIN: Okay. Thank you,
12 Judge.

13 **REDIRECT EXAMINATION**

14 BY ATTORNEY DRIZIN:

15 Q Dr. Leo, I just want to revisit some of the
16 points that -- that you discussed with
17 Mr. Fallon.

18 Um, at the end of Mr. Fallon's, uh,
19 questioning, he asked you a series about whether
20 or not you could opine as to whether this was a
21 true confession or not.

22 A Sure.

23 Q Do you remember that?

24 A Yes.

25 Q Isn't the problem with contamination that nobody

1 can make an opinion about whether it's true or
2 not?

3 ATTORNEY FALLON: Objection. Leading.

4 THE COURT: Sustained.

5 ATTORNEY DRIZIN: Okay.

6 Q (By Attorney Drizin) What does -- how do -- how
7 do you relate the problem of contamination to
8 your ability as to whether or not to opine about
9 their reliability of the confession?

10 A Well, I thought I answered that on the, um,
11 cross-examination. That when a confession is
12 contaminated, you can't know whether it's reliable or
13 not.

14 Q And if you were to testify at trial, that would
15 be something that you would testify to, to the
16 jury?

17 A Correct. I -- I have testified before about the
18 problems -- what contamination is and the problems of
19 contamination.

20 Q Okay.

21 A Including that.

22 Q Now, Mr. Fallon asked you a number of questions
23 about our study and other studies in the field;
24 correct?

25 A Correct.

1 Q And one of things he focused on was whether or
2 not age is a risk factor for unreliable
3 confessions?

4 A Correct.

5 Q Um, and he cited our study in particular;
6 correct?

7 A Yes.

8 Q But there are other studies that have shown
9 repeatedly that age is a ricks (sic) factor;
10 correct?

11 A Yes.

12 Q What other studies are you aware of?

13 A Well, there was a study that I did with Dr. Ofshe in
14 1998.

15 Um, and then there's a whole body of
16 literature on, um, devel -- developmental
17 psychology, and the psychology of, um,
18 adolescents and juveniles.

19 Um, there also case studies about
20 juveniles and false confessions.

21 There's a -- there -- the literature on,
22 um, youth and age as a risk factor is like the
23 broader literature in this area. You know, it --
24 there's some experimental work. There's some,
25 um, observational work. There's some case study

1 work. So it's a much bigger literature.

2 And, of course, the paper that he cited
3 that, um -- the Kassin, et al, paper, where you
4 and I are an author -- co-authors -- but there
5 are four others, is a synthesis of that
6 literature. It's not just based on one
7 particular study.

8 Q Would it be fair to say that the age as a risk
9 factor is one of the most robust findings in the
10 literature?

11 A Yes.

12 Q Okay. And that age as a risk factor for false
13 confessions has also come to be recognized by
14 several in the law enforcement community;
15 correct?

16 A Yes. It's mentioned in some of the manuals, yes.

17 Q And it's even mentioned in Mr. Buckley's book,
18 *Criminal Interrogations and Confessions*; correct?

19 A Yes.

20 ATTORNEY FALLON: Objection. This is a
21 cross-examination of his own witness. Leading.

22 THE COURT: Well, I'm not sure it's a
23 cross-examination, but it's -- every question is
24 leading. You objected to one. I sus --
25 sustained the objection. Let's just ask this in

1 more --

2 ATTORNEY DRIZIN: Okay.

3 THE COURT: -- question and answer form.

4 (Exhibit No. 367 marked for identification.)

5 Q (By Attorney Drizin) Um, I'd -- I'd like to show
6 you, um, what I'll -- marked as Exhibit 367 for
7 identification purposes only. Do you recognize
8 this document?

9 A Yes.

10 Q And -- this book? What is this book?

11 A This is the current edition of the *Invalid All*
12 *Training Manual* put out by Reid and Associates that I
13 referred to yesterday and has since been referred to
14 as well.

15 Q And is it -- so this is the manual you talked
16 about when we talked about the leading training
17 manual in the field?

18 A Correct.

19 Q Okay. Could you turn to page 429, please, at the
20 bottom?

21 A Okay.

22 Q I think there's a discussion about fictitious
23 evidence and its use with young people.

24 ATTORNEY FALLON: I'm going to object as
25 to beyond the scope. There's no discussion or

1 evidence in the record at this point that there
2 was, quote, fictitious, closed quote, evidence
3 introduced.

4 THE COURT: I don't know -- we started
5 talking here about age as a factor. I -- I'm
6 presuming that somehow this is going to be tied up.
7 Is it, Counsel?

8 ATTORNEY DRIZIN: It is, Your Honor.

9 THE COURT: All right. Your objection's
10 overruled.

11 THE WITNESS: Okay. I've read -- I --
12 the -- the portion of this manual that you refer
13 to.

14 Q (By Attorney Drizin) And by fictitious evidence,
15 Mr. Buckley means the use of false evidence
16 ploys; correct?

17 A Yes.

18 Q And what does Mr. Buckley advise other
19 interrogators about using those ploys with young
20 people?

21 A Uh, it says that it should be avoided when
22 interrogating a youthful suspect.

23 Q And what else does it say?

24 A A youthful suspect with low social maturity or a
25 suspect with diminished mental capacity. Um, do you

1 want me to continue?

2 Q Please.

3 A Um, the suspects may not have the fortitude or

4 confidence to challenge such evidence, and, depending

5 on the nature of the crime, may become confused as to

6 their own possible involvement if police tell them

7 evidence clearly indicates they committed the crime.

8 Q And, Dr. Leo, are you aware of whether, in

9 subsequent writings, Mr. Buckley has cautioned

10 interrogators about the risk of false confessions

11 with young people?

12 A I believe he has on his website.

13 Q Okay. Um, now, one other factor that was

14 discussed with you was length of the

15 interrogation. Do you recall that?

16 A Yes.

17 Q Okay. You've done observational studies --

18 A Correct.

19 Q -- correct? What is the average length of most

20 interrogations based on your research?

21 A Based on my field research, an hour or less. Maybe a

22 half hour to an hour.

23 Q Okay. And has that research been replicated in

24 other studies?

25 A Yes. Um, other field studies have replicated it.

1 Also, um, there've been surveys asking police which,
2 uh -- you know, how long is their average
3 interrogation, which is consistent with that finding.

4 Q And in our study, um, the average interrogation
5 of the proven false confessions, the average
6 length, was 16.3 hours; correct?

7 A Correct. For the cases where we could get that data,
8 yes.

9 Q Okay. And, um, there were many -- were there
10 interrogations in -- among the proven false
11 confessions where the length of the
12 interrogations were lower than 16 points?

13 A Yes. Yes. Much lower.

14 Q And in your experience have there been false
15 confessions in interrogations that are four hours
16 or less?

17 A Yes.

18 Q Does Mr. Buckley make any advisements about the
19 length of interrogations when he trains his
20 officers?

21 A Well, in the manual that you just showed me, yes,
22 there is an advisement that interrogation should not
23 go on longer than four hours, and usually should be
24 shorter than that.

25 And so that advisement, although he --

1 it -- it's qualified by saying there are
2 sometimes exceptional circumstances, certainly
3 suggests that four hours is a dividing line
4 that -- that interrogators should be very
5 cognizant of. And that most interrogations
6 should not take anywhere near that long.

7 Q Now, the 16.3-hour number, the length number, was
8 that the length of actual interrogations or was
9 that the length of time a suspect was in custody?

10 A My recollection of the article it was a -- it was
11 custody and interrogation.

12 Q Okay. Um, another finding that Mr. Fallon
13 questioned you on has to do with mental
14 retardation and false confessions.

15 A Okay.

16 Q Do you recall that?

17 A Yes.

18 Q Um, to your knowledge has the United States
19 Supreme Court ever made a connection between
20 mental retardation and the risk of falsely
21 confessing?

22 ATTORNEY FALLON: Objection. That's a
23 question of law. It's also a question of
24 argument. And it's also irrelevant. The
25 course -- the Court is the source of the law, not

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Mr. --

ATTORNEY DRIZIN: The Court relies on the very same studies that Dr. Leo relies on.

THE COURT: Well, I'm going to overrule the objection. Uh, this -- this goes, again, to admissibility. I don't know how much weight this answer's going to get, but you can answer the question.

THE WITNESS: I -- I believe the Court has. I just can't recall off the top of my head whether it's in the *Atkins* case or in a different case. Yes.

Q (By Attorney Drizin) Okay. And that would have been *Atkins v. Virginia*?

A Correct.

Q Okay. And in addition to our study, are there other studies that have made the connection between mental retardation and false confessions?

A Yes. There are many of them, actually.

Q Okay. And have those studies -- um, can you describe some of those studies?

A Well, again, there's various types of studies. There's studies that are case studies of false con -- people who falsely confessed who are mentally retarded or have low level IQs.

1 There's the aggregated case studies like
2 the one you and I did.

3 Um, there's specific studies of people
4 who are mentally retarded.

5 Um, more psychologically-focused studies
6 as opposed to focused on just the legal system
7 portion of it or aggregated case studies.

8 So there's a variety of studies of
9 mentally retarded individuals and their, um --
10 their tendency toward compliance and false
11 compliance in these false confession cases.

12 Q Okay. Now, Dr. Leo, um, Mr. Fallon asked you if
13 you were aware of Mr. Dassey's personality
14 factors. Do you recall that?

15 A Yes.

16 Q Um, and he also asked you if you were aware that
17 Mr. Dassey follows rules in school. Do you
18 recall that?

19 A Yeah, I recall the question. I don't recall that he
20 asked it that specific way, but, yes.

21 Q Okay. Assuming that Mr. Dassey follows rules --
22 is a rule follower -- how might that play into
23 the question of whether or not he would be
24 vulnerable to police interrogation tactics?

25 A Well, somebody who follows rules -- I mean, to a

1 psychologist, that immediately sounds like
2 compliance. Somebody who's likely to obey. And as I
3 believe I mentioned yesterday in my testimony when we
4 were talking about indi -- individual factors, risk
5 factors for false confessions, I mentioned both
6 suggestibility and compliance.

7 So somebody who is, by nature, a rule
8 follower, obedient, is probably highly compliant,
9 and that would be something that we see in many
10 of the people who falsely confess, and that's
11 something that clinical psychologists test for,
12 and that's been studied in the false confession
13 cases.

14 Q Now, I believe it was the 2/27 interview that
15 Mr. Fallon asked this question of you. He asked
16 whether the fact that Brendan said he had not
17 been threatened was relevant to your opinion.

18 A Correct.

19 Q Okay. In your experience, is it common for
20 police officers to ask suspects whether or not
21 they were threatened?

22 A Yes.

23 Q Is it common for them to ask whether or not any
24 promises were made?

25 A Yes.

1 Q Is it common for them to ask whether a statement
2 is being given by the suspect's own free will?

3 A Yes.

4 Q Is it common for them to agree that they were
5 given food and drink?

6 A Yes.

7 Q Why is it common?

8 A Because, um, police want to get into the record that
9 all of those things were done or not done; right?
10 That -- that they were -- they were -- they were
11 given their bathroom breaks, and food breaks, and
12 that the police want there to be a record that the
13 person says it was voluntary or fair, and no threats
14 or promises were made.

15 So it's really about creating a record
16 that's going to, um, help ensure a conviction and
17 building a stronger record against suppression to
18 the extent any weight is put on those statements.

19 Q And are police officers, in fact, trained to
20 elicit those statements from suspects?

21 A Yes.

22 Q Now, you -- in your studies of false confessions,
23 proven false confessions, have there been proven
24 false confessions where a suspect has said no
25 threats were made?

1 A Yes.

2 Q No promises were made?

3 A Yes.

4 Q That he -- that he gave the confession from his
5 own free will?

6 A Yes.

7 Q And it's conceivable that suspects who were
8 tortured have -- would say that as well; correct?

9 A Yes. Yes.

10 Q And if -- do you know of cases where suspects
11 were physically abused where they said that there
12 were no threats made to them?

13 ATTORNEY FALLON: Objection. Relevance.

14 THE COURT: Sustained.

15 Q (By Attorney Drizin) In your experience, do
16 suspects, um, understand the process of a threat
17 communicated through pragmatic implication?

18 A Yes.

19 ATTORNEY FALLON: Objection. Beyond
20 the -- no. No. I'll -- I'll withdraw that
21 objection.

22 Q (By Attorney Drizin) And whether or not they
23 understand it, is it your experience that they
24 can always verbalize that understanding?

25 A No.

1 Q Um, you reviewed Dr. Gordon's report in this
2 case?

3 A Correct.

4 Q You saw that Dr. Gordon described Brendan as
5 concrete?

6 A Yes.

7 Q Um, someone who is a concrete thinker, Doctor --
8 um, I'll strike that. Do you recall the
9 questions about, um, whether or not Steven Avery
10 had threatened Brendan Dassey?

11 A Yes.

12 Q Um, I'd like you to turn to page -- this is going
13 to be Exhibit No. 206, page 466.

14 A Okay. Two-o-six, 466?

15 Q Correct. Um, focus on the top five or six lines
16 if you will.

17 A Okay.

18 Q Who first introduced the idea that Steven had
19 threatened Brendan into this interrogation?

20 A Uh, this would be Wiegert.

21 Q I'd like you turn to Exhibit 209, please. This
22 is 209, pages 661 and 662. I'd like to play you
23 the clip -- very brief clip -- of the discussion
24 of whether or not Teresa had a tattoo.

25 "We know that Teresa had a tattoo on her

1 stomach. Do you remember that?"

2 (Unintelligible.)

3 "So you disagree with me when I say
4 that?"

5 "No. I don't know where it was."

6 Q (By Attorney Drizin) Does that sound like
7 resistance to you, Dr. Leo?

8 A No, it doesn't sound like resistance.

9 Q Now, some of the facts that Mr. Fallon mentioned
10 to you when he talked to you about resistance
11 included facts that asked Brendan to accept blame
12 for certain actions that he took; correct?

13 A Yes.

14 Q And in the interrogations that you reviewed,
15 there were occasions when Brendan would blame his
16 uncle; correct?

17 A Yes.

18 Q And that was one of the themes that Officers
19 Wiegert and Fassbender introduced into the
20 interrogation; correct?

21 A Yes.

22 Q And so to the extent Brendan was blaming his
23 uncle, what does that tell us about resistance?

24 ATTORNEY FALLON: Objection. Beyond the
25 scope.

1 THE COURT: I'll -- I'll overrule it.

2 ATTORNEY FALLON: All right.

3 THE COURT: It has marginal relevance.

4 THE WITNESS: Well, it suggests that he
5 wasn't resisting so much as going along with
6 their themes or their -- their minimization by
7 shifting -- trying to shift the blame onto
8 Mr. Avery. So it's consistent with their
9 interrogation strategy.

10 Q (By Attorney Drizin) Finally, Dr. Leo, um, the
11 last series of questions about what you could or
12 could not say about the re -- reliability of this
13 confession. Do you recall those?

14 A Yes.

15 Q If you were to testify at a trial in this matter,
16 what could you educate the jury about with
17 respect to Mr. Dassey's confession?

18 ATTORNEY FALLON: I would object. That
19 is clearly beyond the scope.

20 THE COURT: It is.

21 ATTORNEY FALLON: If not, already asked
22 and answered.

23 THE COURT: It is. Objection is sustained.

24 ATTORNEY DRIZIN: One minute, Your
25 Honor. No further questions, Judge.

1 THE COURT: All right. You may step down.

2 ATTORNEY DRIZIN: At this time the
3 defense will call Mark Fremgen.

4 THE COURT: All right.

5 ATTORNEY KRATZ: For the record, Judge,
6 I'll be the attorney handling Mr. Fremgen's --

7 THE COURT: All right. Come on up here,
8 Mr. Fremgen. Remain standing while the oath is
9 administered to you, then be seated, please.

10 THE WITNESS: All right.

11 **MARK FREMGEN,**

12 called as a witness herein, having been first duly
13 sworn, was examined and testified as follows:

14 THE CLERK: Be seated. State your name and
15 spell your last name for the record, please.

16 THE WITNESS: Mark Fremgen,
17 F-r-e-m-g-e-n.

18 **DIRECT EXAMINATION**

19 BY ATTORNEY DRIZIN:

20 Q Mr. Fremgen, just to get you caught up to speed,
21 there are a number of binders that are
22 surrounding you.

23 A Okay.

24 Q They are numbered one through five. At various
25 points during this examination I may refer you to

1 an exhibit in those binders, and I'll just ask
2 that you pick it up and -- and locate it.

3 A Okay.

4 Q Okay? Where are you currently employed,
5 Mr. Fremgen?

6 A I'm currently the Family Court Commissioner for
7 Winnebago County, located in Oshkosh, Wisconsin.

8 Q Okay. Would you rather me call you Mark? Or
9 Mr. Fremgen? Does it matter to you? Or
10 Commissioner Fremgen?

11 A No. Mark is fine.

12 Q Okay. Thank you. Prior to becoming a
13 commissioner, um, so -- prior to becoming a
14 commissioner, is that -- is a commissioner like a
15 judge?

16 A Yes, to some extent. Although I'm not elected, I'm
17 appointed by the judges.

18 Q Okay. And prior to becoming com -- a
19 commissioner, where were you employed?

20 A I had been in a partner with the law firm of Kindt,
21 Phillips, Friedman and Fremgen for about five years.
22 Prior to that I was in solo practice for about --
23 little over three years. And then for ten years
24 prior to that I worked for the State Public
25 Defender's Office in Oshkosh.

1 Q And in your law firm practice with Kindt,
2 Fremgen, and the other partner, did you do
3 primarily criminal defense work?

4 A I would say about 60 percent. Fifty to 60 percent
5 was criminal.

6 Q And in your three years of solo practice, was
7 that primarily criminal work?

8 A About the same, 50 to 60 percent.

9 Q So would it be fair to say that you have -- the
10 majority of your work over the last 18 years has
11 been in criminal defense?

12 A Yes.

13 Q You did only criminal defense work at the public
14 defender's office?

15 A There was some other. I would say 90 percent of your
16 work in the public defender's office is criminal
17 defense.

18 Q Okay. Can you estimate how many criminal clients
19 you've represented in that timeframe?

20 A I have probably represented over six thousand. Or
21 had at least six thousand different cases. Sometimes
22 you have repeat clients. Um, about 50 trial -- jury
23 trials and hundreds of court trials.

24 Q And were you qualified to try serious felony
25 cases?

1 A I was on the State Public Defender's homicide list.
2 For a while I was on their 980 list, but I asked to
3 be taken off that list.

4 Q And for the ignorant like me, what's the 980
5 list?

6 A Oh, 980 is sexual predator, um, com -- commitment
7 cases.

8 Q Okay. Had you handled any serious cases
9 involving youthful offenders?

10 A Yes.

11 Q Okay. And by juvenile, I mean under the age of
12 18.

13 A Yes.

14 Q Okay. I want to focus you back to the year of
15 2006. Okay? Um, when did you first hear the
16 name "Brendan Dassey"?

17 A Well, I -- I heard on the news or on the radio that
18 he was involved in the Avery matter.

19 Q And had you been following the story of -- of the
20 disappearance of Teresa Halbach in beginning of
21 November?

22 A Not -- I wouldn't say in depth. I probably caught it
23 on the news before I switched over to Sports Center.
24 But other than that, that's probably when I heard
25 about it.

1 Q Um, did you know the arrest of Steven Avery?

2 A Yes. That was hard not to -- not to hear about.

3 Q Okay. Um, do you recall when you first became

4 aware that Brendan Dassey was being represented

5 by Mr. Len Kachinsky?

6 A Yes.

7 Q How did you become aware of that?

8 A I heard, um, an interview on the radio coming into

9 work one morning.

10 Q Okay. And do you recall, um, anything about that

11 interview?

12 A I recall him making a comment about how -- was

13 looking at -- looking at some sort of plea

14 negotiation for this case. Something like that.

15 Q So the first time you remember hearing about

16 Mr. Kachinsky was in connection with comments

17 about plea negotiations?

18 A Correct.

19 Q Okay. Did you find that odd?

20 A For me, yes, that would be odd to come out and talk

21 about pleading your client to a -- anything, having

22 just been appointed, or just retained, just hired by

23 the person. I find that odd.

24 Q Why?

25 A Well, there's a number of reasons. Number one, and

1 this isn't necessarily about Brendan Dassey, but in
2 any case --

3 ATTORNEY KRATZ: Judge, I'm sorry. If I
4 could just interpose. Is this a hypothetical
5 that doesn't have to do this case? That's what I
6 understood it to be.

7 Why something like that might be odd.
8 If it's why was Mr. Kachinsky's strategy odd,
9 then I have a specific objection.

10 THE COURT: I -- I took it to be a
11 hypothetical.

12 ATTORNEY KRATZ: Okay.

13 THE COURT: Go ahead and answer.

14 THE WITNESS: Okay. Um, the reason I
15 find -- I would find it odd, if any attorney came
16 out and, upon the eve of or subsequent to their
17 appointment or retaining, talking about plea
18 negotiations, is I -- I don't know if there's any
19 case that I've ever been involved in where I know
20 everything about the case in that 24-hour or
21 48-hour period, let alone a case where the
22 magnitude of discovery that would be involved in
23 a homicide, um, I -- I certainly thought it was
24 strange, and I would find it strange, for any
25 attorney to talk about plea negotiations

1 immediately being retained or -- or appointed.

2 Q (By Attorney Drizin) Now, you said that, um, it
3 would be odd to you, I believe you said. Um, had
4 you had any prior experience with Mr. Kachinsky
5 before you learned he was appointed on the
6 Brendan Dassey case?

7 ATTORNEY KRATZ: Objection. Irrelevant,
8 Judge.

9 THE COURT: Sustained.

10 Q (By Attorney Drizin) Did you know Mr. Kachinsky
11 before he was represented? Before he was
12 appointed to represent Brendan Dassey?

13 A Yes.

14 Q Okay. How did you know him?

15 A He'd been an attorney on the public defender list
16 when I first started at the public defender's office.
17 Public defender list is private attorneys that take
18 public defender cases.

19 Um, I'd seen him in passing in the
20 courthouse. Spoke to him at times in the
21 courthouse. Um, knew of him.

22 Q Had you ever co -- tried a case with him before?

23 A No.

24 Q Okay. Had you ever heard Mr. Kachinsky make
25 public comments about his client's guilt before?

1 ATTORNEY KRATZ: Objection. Irrelevant.

2 THE COURT: Sustained.

3 Q (By Attorney Drizin) You were appointed to
4 represent Brendan in August of 2006? Do I have
5 that right?

6 A If -- if that's what -- I don't remember the date.
7 But it was in the early fall of 2006. August or
8 September.

9 Q And what were the circumstances that led to your
10 appointment?

11 A The -- the head of the assigned counsel division at
12 the State Public Defender's Office in Madison had
13 called and asked if I would be willing to take over
14 representation.

15 Um, originally I had said no. And they
16 called back, I think, about a week later, and
17 indicated that they would like me to reconsider
18 that. And, um, I agreed to take on the
19 representation with some conditions.

20 Q And who did you replace on the Dassey defense
21 team?

22 A Len Kachinsky.

23 Q And what was your understanding of the
24 circumstances for his withdrawal from this case?

25 A I -- I guess at that time I was actually under the

1 impression he was asked to be removed.

2 Q Okay. And what was your understanding of his
3 circumstances behind that?

4 A Brendan had sent a letter to the Judge. There was
5 some hearing. Um, and I believe the -- at least I
6 was under the impression then that the Court had
7 instructed Attorney Kachinsky to withdraw.

8 Q Okay. And after you were appointed, how did
9 Mr. Edelstein get involved in the case?

10 A That was the condition upon my being appointed by the
11 State Public Defender. That they would allow me to
12 pick a co-counsel, and they would pay him as a --
13 actually, the way they set it up is they paid him as
14 an expert.

15 Q Okay. And what was his area of expertise? Why
16 did you select Mr. Edelstein?

17 A I had known Ray -- I started in 1990 at the public
18 defender's office, and he came to Oshkosh in '91.
19 And I'd known Ray for whatever that is. Fifteen, 16
20 years.

21 Um, he handles a lot of the more
22 complicated, complex, difficult cases, criminal
23 cases in Oshkosh, and I knew that he had been a
24 prosecutor before that having handled capital
25 offenses.

1 So I knew he had the -- certainly the
2 experience, um, to handle a case like this, and I
3 also knew him well enough that I could work with
4 him.

5 Q Okay. After you were appointed to represent
6 Mr. Dassey, did you contact Mr. Kachinsky for
7 some kind of a transfer of the files or --

8 A He may have actually contacted me first. I think, if
9 I recall, he contacted me about whether I would come
10 up or he would come down to drop off the file. He
11 eventually came down to my office and dropped off two
12 banker's boxes of files.

13 Q Did you have any discussions about the case at
14 that time?

15 A His -- he made -- didn't make a lot of comments about
16 the case other than, um, he told me -- he said, be --
17 beware of the family. That was his only comment to
18 me.

19 Q Okay. And -- and when he gave you these files,
20 um, what can you describe for me about what he
21 presented to you?

22 A It was essentially two boxes filled with papers.

23 Q Okay.

24 A Um, there was nothing organized about it. It took me
25 about two weeks. But I should be fair, at the same

1 time I was receiving a lot of additional discovery
2 from the DA's office.

3 So it took me about two weeks, down in
4 our basement conference room in our office,
5 putting everything into some sort of cohesive or
6 organized manner chronologically. The way I got
7 it from Attorney Kachinsky was just pretty
8 haphazard as far as -- my opinion as far as how
9 it was organized.

10 Q Now, how soon after you were appointed did you
11 receive discovery in this case?

12 A It would trickle in. But there -- but I was also --
13 I recall talking to Attorney Kratz who had indicated
14 at one point to come on over anytime I wanted to and
15 look at the file. If there's something missing,
16 they'll make copies for me. I did do that, I recall,
17 once.

18 I'd call. Um, I think I e- -- may have
19 e-mailed, and would ask for things that I thought
20 I was missing. I was missing items because of --
21 by putting it in chronological, I could see that
22 there were gaps in the chronol -- chronology of
23 the investigation. So they would just turn
24 around and send copies over to my office.

25 Q How early in the -- in the -- in your

1 representation did you receive CDs or DVDs of the
2 various interrogations of Brendan Dassey, and --
3 and the transcripts?

4 A Well, I believe that, um, there was -- the DVDs were
5 in Len's file. Not all the transcripts were in Len's
6 file.

7 Um, I recall contacting the DA's office
8 in Calumet, and at one point they sent me, um,
9 a -- a transcript -- even though I think I was
10 just missing parts of it -- they sent me a
11 transcript. And I don't recall which one.

12 Um, so if the question is how soon,
13 probably right away I did get the -- the DVD.
14 Actually, I burned -- or I had my sec -- I
15 shouldn't say I did. My secretary burned copies
16 for Attorney Edelstein as well.

17 Q And how soon after you were appointed do you
18 remember watching the DVDs of the various
19 interrogations?

20 A After I -- it took me a while -- as I said, a couple
21 weeks -- to get everything organ -- I wanted
22 everything organized before we started getting
23 involved in it.

24 Um, it was, uh -- I went out and saw
25 Brendan at the Sheboygan Detention Center, and

1 then I -- I watched the video, or the DVDs, that
2 same -- either that day or the next day.

3 Q Okay. As you -- after you watched the DVDs and
4 began reviewing discovery, did you come to some
5 assessment about what evidence the State would
6 likely use to prove Bren -- Brendan's guilt at
7 trial?

8 A Absolutely.

9 Q Is it fair to say that the statements were the
10 primary piece of evidence that they were going to
11 use?

12 A I would think so.

13 Q Okay. Prior to his withdrawal from the case,
14 Mr. Kachinsky had filed a motion to suppress
15 statements on -- in, um, February and in May --
16 in March, excuse me, of 2006; correct?

17 A Yes.

18 Q Okay. And that motion was lost?

19 A Attorney Kachinsky's motion?

20 Q Yes.

21 A Yes.

22 Q Okay. Um, so in addition to the March and the
23 February statements, were there other statements
24 that you reviewed that you had to contend with at
25 trial? That you thought you would have to

1 contend with at trial?

2 A There was a November statement in Marinette.

3 Q Okay.

4 A Um, there -- there was then, also, the May statement.
5 The videotaped statement. Um...

6 Q And were there some --

7 A And then -- oh, I'm sorry.

8 Q Sorry.

9 A I was trying to think of all the chronology first.
10 And then there was some -- anywhere between seven and
11 ten phone calls that we thought would become an
12 issue.

13 Q And some of those phone calls included telephone
14 calls from Brendan to his mother?

15 A Mother, grandmother, and cousin I think were the ones
16 that we thought would become issues.

17 Q But, in particular, phone calls from Brendan to
18 his mother, um, were problematic for Brendan?

19 A There were two. One in particular. But there were
20 two that I recall.

21 Q Okay. And why were they problematic?

22 A Well, the one in particular was what appeared to be a
23 unsolicited phone call to his mom, saying, I did some
24 of the things that they said I did.

25 Q Okay. And you said, "appeared to be

1 unsolicited." Did you later come to the opinion
2 that it was not unsolicited?

3 A Well, there was some reference in the videotaped
4 statement in May of the officers suggesting that
5 Brendan should call his mom so that she doesn't learn
6 this on the street, so to speak.

7 Q Okay. Um, so before the May statements, um --
8 nope, I'll strike that.

9 So the number of statements that you had
10 to contend with in this case grew as a result of
11 the events of May 12 through May 13?

12 A Yes.

13 Q Okay. And one of the first things that you
14 recognized in this case was you had to try to do
15 something about those statements; correct?

16 A Yes. Correct.

17 Q And that included revisiting Mr. Kachinsky's
18 motion to suppress? The February and the March
19 statements?

20 A Yes.

21 Q And you were going to take -- did you take some
22 action with respect to the May statements?

23 A Yes. We file -- I filed motions, um, in particular
24 in regards to that statement asking that the --
25 essentially asking the Court suppress it based on

1 ineffective assistance of counsel.

2 Q Okay.

3 ATTORNEY KRATZ: Can we be clear, Judge,
4 what statement we're talking about?

5 THE WITNESS: Oh, I'm sorry. The May --
6 I was talking about the May statement. The May
7 videotaped statement.

8 ATTORNEY DRIZIN: Why don't we --

9 ATTORNEY KRATZ: Which one?

10 ATTORNEY DRIZIN: -- do this. Can
11 you --

12 THE COURT: Just hang on. Can you be more
13 explicit?

14 THE WITNESS: The May 13, 2006,
15 videotaped statement.

16 Q (By Attorney Drizin) Okay. Why don't you take a
17 look at Exhibits 218 and 219 if you will. I
18 think they're in binder four.

19 A What's the number?

20 Q Two--eighteen and 219. Do you recognize these
21 documents?

22 A Yes.

23 Q And are these some of the motions that you filed,
24 um, to address the statements that Brendan had
25 made in this case?

1 A It is the -- to address the statements from
2 February 27 and March 1, and then, again, to address
3 the statement made on May 13.

4 Q Okay. Prior to filing this motion, had you
5 reviewed Mr. Kachinsky's performance at the
6 motion to suppress?

7 A I had received a transcript of that hearing and I
8 reviewed the transcript.

9 Q Okay. And, um, did you believe that
10 Mr. Kachinsky's performance at that motion to
11 suppress gave you grounds to try to reopen the
12 motion?

13 ATTORNEY KRATZ: Objection. Irrelevant,
14 Judge. Beyond the scope of this witness'
15 expertise.

16 THE COURT: I'm going to overrule that
17 objection.

18 THE WITNESS: Could you ask that again?
19 I'm sorry.

20 ATTORNEY DRIZIN: Can -- can you read
21 that back? I'm sorry.

22 (Question read back by the reporter.)

23 THE WITNESS: Yes.

24 Q (By Attorney Drizin) Can you take a look
25 specifically at paragraph four on Exhibit 219?

1 That'd be the second page.

2 A Yes.

3 Q Have you had a chance to review that?

4 A Paragraph four?

5 Q What --

6 A Yeah.

7 Q -- were some of the reasons you sought to reopen
8 that motion to suppress based on Mr. Kachinsky's
9 performance?

10 THE COURT: Wait a minute. Exhibit 219
11 concerns a motion to suppress for the May 13, 2006,
12 statements.

13 ATTORNEY DRIZIN: You're right, Judge.
14 I apologize.

15 THE WITNESS: Okay.

16 Q (By Attorney Drizin) What was your basis for
17 moving to suppress -- moving to reopen the motion
18 to suppress the February statements?

19 A Uh, the basis of the re -- of the motion was that our
20 contention was that Attorney Kachinsky had not
21 provided effective assistance of counsel as to that
22 motion by not, um, raising, at the suppression
23 hearing, the idea that this was the product of a
24 undue suggestion. So, therefore, not knowing and
25 intelligently made.

1 Q And if you look at page 218, did you also have
2 concerns about the way Mr. Kachinsky performed
3 with respect to **Miranda**-related issues?

4 A What page?

5 THE COURT: Do you -- do -- excuse me. Do
6 you mean Exhibit 218?

7 ATTORNEY DRIZIN: Exhibit 218. What did
8 I say?

9 THE COURT: Page.

10 ATTORNEY DRIZIN: Okay. Exhibit 218.
11 Thank you.

12 THE WITNESS: Yes, that's part of what
13 the arg -- well, that was part of our argument
14 for reopening the motion.

15 Q (By Attorney Drizin) What did you think of
16 Mr. Kachinsky's decision to concede that Brendan
17 was not in custody for the February interviews
18 and the March interview?

19 ATTORNEY KRATZ: Objection, Judge.
20 Calls for comment on the trial strategy with
21 another attorney.

22 THE COURT: That's sustained.

23 Q (By Attorney Drizin) Why did you want to reopen
24 the **Miranda** issues?

25 A We didn't feel that that was adequately explored by

1 Attorney Kachinsky at the original motion.

2 Q And -- and in what way was it not adequately
3 ex -- was it explored at all by Mr. Kachinsky in
4 the earlier motion?

5 ATTORNEY KRATZ: Judge, once again, if I
6 may, if this is being offered, um, as evidence of
7 Mr. Fremgen's performance, that is, whether he
8 performed deficiently or not, which is one claim
9 in this hearing, I don't have an objection. If
10 he's being asked to comment upon Mr. Kachinsky's
11 performance in the handling of the previous
12 motion, then I would renew my objection.

13 THE COURT: Counsel?

14 ATTORNEY DRIZIN: Judge, this -- this
15 relates to, um, the adverse effect of
16 Mr. Kachinsky's performance and how it affected
17 Mr. Fremgen's performance which we are going to
18 explore.

19 Um, what Mr. Kachinsky did had a direct
20 adverse and prejudicial effect on both Brendan
21 Dassey and Mr. Fremgen's performance.

22 THE COURT: Objection's sustained.
23 Besides, the motion speaks for itself --

24 ATTORNEY DRIZIN: Okay.

25 ATTORNEY KRATZ: And was --

1 THE COURT: -- as exhibits do.

2 ATTORNEY KRATZ: And wasn't it heard by
3 the Court and decided?

4 THE COURT: I think so.

5 ATTORNEY KRATZ: I suspect it was.

6 Q (By Attorney Drizin) Um, you stated that the
7 basis for reopening this motion was ineffective
8 assistance of counsel; correct?

9 A Correct.

10 Q Okay. What, in particular, was the basis for
11 that ineffectiveness claim?

12 ATTORNEY KRATZ: Objection, Judge. That
13 does call for a legal conclusion and this Court
14 did rule on that exact issue in this motion.

15 ATTORNEY DRIZIN: I understand that,
16 Your Honor, but he's allowed to tell me what his
17 thinking was when he filed a motion. It's not
18 very well spelled out in the motion.

19 THE COURT: Well, I think it is. And just
20 for the record, it's Exhibit 219. The objection's
21 sustained.

22 Q (By Attorney Drizin) Shortly after you became
23 involved in this case did you seek a -- a
24 professional evaluation of Brendan?

25 A I did.

1 Q Okay. And was that with respect to Brendan's
2 suggestibility in part?

3 A Yes. In part.

4 Q Okay. And had there been any other such
5 evaluations done prior to your involvement in the
6 case?

7 A I wasn't aware of any.

8 Q Okay. And, um, who did you retain?

9 A Dr. Robert Gordon from Janesville.

10 Q Okay. And, um, for what purpose?

11 A Well, two-fold, actually. When I -- when I spoke
12 with Dr. Gordon I wanted him to evaluate Brendan just
13 from the standpoint of basic competence. Um, but
14 also to evaluate him on the idea that the statements
15 that he gave were the product of undue suggestion.

16 Q Okay. Dr. Gordon's a forensic clinical
17 psychologist; correct?

18 A I believe so.

19 Q Okay. And what was his main focus going to be in
20 his evaluation?

21 A Well, I believe it would have been on the statements
22 themselves, and -- and I wanted to allow Dr. Gordon
23 to have a -- as much latitude, but I had indicated to
24 Dr. Gordon that one of my issues or concerns was that
25 the statements were partly due to undue

1 suggestibil -- or undue suggestion by the -- the --
2 by the officers and -- and that he might -- Brendan
3 might be open to suggestibility.

4 Q Okay. And did you contemplate Dr. Gordon also
5 opining on the way in which the police
6 interrogation tactics may have taken advantage of
7 Brendan's suggestibility?

8 A That was my understanding.

9 Q Okay. Now, um, you also filed a motion to
10 suppress the May 13 statements; correct?

11 A Yes.

12 Q And that would be Exhibit 219?

13 A That's correct.

14 Q Okay. Prior to filing this motion did you do
15 research on whether or not ineffective assistance
16 of counsel could be a basis for a motion to
17 reopen -- excuse me -- for a motion to suppress
18 statements?

19 A Maybe not in that limited context, but I did do a --
20 research on the issue of ineffective assistance of
21 counsel as a pretrial motion, yes.

22 Q Okay. And what did you find?

23 A I found that there were no cases on point in
24 Wisconsin that I could find other than some dicta
25 from a case that I cited.

1 Q Now, this was somewhat of a novel theory;
2 correct?

3 A Yes.

4 Q Okay. And at the time you filed the motion based
5 on ineffective assistance grounds did you believe
6 you had a basis to file a motion on voluntariness
7 grounds?

8 A As -- the problem that -- you know, first -- I guess,
9 first of all, I'm going to premise my answer by
10 indicating that a lot of this was done collectively.
11 Um, I -- I certainly don't want to take all the
12 credit for coming up with ideas, but when -- when
13 I -- Ray and I would talk, we would try to come up
14 with different ideas on all the different issues that
15 we were facing, and this was really the only way we
16 thought we could get into this statement, because it
17 didn't appear to either of us that there was
18 anything -- anything that would be considered
19 overreaching by the State.

20 From everything that we could tell, this
21 was, in essence, Brendan contacting the police,
22 via Attorney Kachinsky, to make a statement. It
23 wasn't as if the police came knocking on his door
24 and forced him to say this. That was our
25 impression from reviewing all of the discovery

1 that we had related to this issue.

2 Q Okay. And at the time that you made these
3 decisions with regard to how to proceed with
4 respect to the May statements, you believed you
5 had every document to describe the events or
6 every -- every piece of information that had
7 described the events that occurred on the weekend
8 of May 12?

9 A Yes.

10 Q Okay. Have you recently discovered that that's
11 not the case?

12 A Yes.

13 Q What documents and what information did you not
14 have prior to filing your motion to suppress the
15 May statements?

16 A Um, well, what you provided to us, that there was a
17 videotaped interview of Brendan by Investigator Mike
18 O'Kelly who was working for or hired by Attorney
19 Kachinsky.

20 Q Had you asked for any and all materials of the
21 defense investigator in this case?

22 A I don't know if I asked specifically to Attorney
23 Kachinsky for -- for that particular -- you know, all
24 the investigative materials. When I received
25 everything, including a packet from Attorney

1 Kachinsky that said, "investigation," I assumed
2 Attorney Kachinsky's not going to withhold anything
3 from me as Brendan's newly-appointed defender, so I
4 assumed I had everything.

5 Q And that videotaped statement on May 12 from
6 Mr. O'Kelly was not among the materials he
7 produced?

8 A No, it was not.

9 Q Okay. Were there any other documents that were
10 not produced to you that you've recently learned
11 about?

12 A Some e-mail exchanges between Mr. O'Kelly and
13 Attorney Kachinsky, and either -- I can't recall if
14 it was Attorney Kachinsky, or Mr. O'Kelly, and law
15 enforcement.

16 Q Um, and do you recall what those e-mails
17 concerned?

18 A I believe it concerned either -- well, it concerned
19 setting up an interview with Brendan at the Sheboygan
20 Detention Center where he could be allowed to bring
21 in a computer and -- a laptop and some other items.
22 A video camera.

23 And then a -- an e-mail exchange whereby
24 Attorney Kachinsky -- I believe it was with one
25 of investigators, I don't believe it was with the

1 prosecutor's office, I believe it was an
2 investigator, either Fassbender or Wiegert, I
3 don't recall which one -- about Brendan will be
4 able to provide more information to sustain
5 probable cause for a new search warrant at the
6 Avery location.

7 Q That was an e-mail of May 5 from Mr. Kachinsky to
8 Mr. Wiegert you're referring to?

9 A I don't have it in front of me but that -- that
10 sounds correct.

11 Q And Mr. Kratz was copied on that e-mail?

12 A Pard me?

13 Q Mr. Kratz was copied on that e-mail?

14 A I don't have it in front of me. If I do, I could
15 tell you. I -- I don't remember.

16 Q I'll put it in front of you.

17 A Okay.

18 Q But having reviewed these new documents that you
19 did not have before, okay, um, did they round out
20 your picture of what occurred during the weekend
21 of May 12?

22 A It changed the picture of what occurred in my mind.

23 Q How?

24 A Up until that point it was my impression and my
25 belief that Attorney Kachinsky just did a very poor

1 job. I -- I didn't -- couldn't believe any attorney
2 would, you know, for lack of a better term, sick
3 there own client on the wolves, so to speak.

4 Um, but that's the way this seemed to
5 appear, that there was really no agreement --
6 that didn't seem to be any agreement -- at least
7 nothing provided to me in the materials from
8 Attorney Kachinsky, that Mr. Dassey was going to
9 get some sort of a significant deal to provide
10 this additional videotaped statement.

11 And from all of the indication prior to
12 the -- seeing the O'Kelly tape, was that it just
13 seemed like a very ill-advised or poor choice on
14 Attorney Kachinsky's part to -- to contact law
15 enforcement to set up another video statement in
16 that it's not going to help Brendan. And, for
17 the most part, it probably's going to hurt him.

18 Q Okay.

19 ATTORNEY KRATZ: Judge, before going on
20 to the next question, uh, at this point, on
21 behalf of the State of Wisconsin, I would like to
22 renew our motion for the release of those
23 privileged logs.

24 Um, this witness has now opined that the
25 information that he did have in his possession as

1 of the time of the filing of the motion was
2 deficient, that it did not include some documents
3 in what Mr. Fremgen has now said did not include
4 some prior statements of Mr. Dassey.

5 Uh, this Court knows that we have
6 anticipated this very moment occurring in this
7 hearing, that Mr. Fremgen and others, but
8 Mr. Fremgen, specifically, would necessarily need
9 to indicate what documents and information he did
10 have in his possession in order to render the
11 opinion of not only ineffective assistance,
12 but -- of Mr. Kachinsky -- but what Mr. Fremgen
13 was going to do.

14 Um, although, Judge, we are not privy to
15 the information within the documents, within the
16 privilege log, they have been identified by
17 defense, and in their description and
18 identification, we have a reason to believe that
19 they include information that was in the
20 possession of Mr. Fremgen that includes a prior
21 statement or statements of Mr. Dassey.

22 Therefore, ask the Court to reconsider
23 its earlier ruling. We thought it was relevant
24 all along. I think it's inescapable now that
25 we're entitled to that information.

1 THE COURT: Response?

2 ATTORNEY DRIZIN: It's still not
3 relevant. I'm asking him about how it would
4 affect his decision with regard to a motion to
5 suppress statements that occurred on May 13 and
6 that followed a May 13 statement.

7 Um, what Mr. Kratz is referring to,
8 information that he should not have been entitled
9 to but was inadvertently disclosed, has nothing
10 to do with the decisions that Mr. Kachinsky
11 made -- excuse me -- Mr. Fremgen made with regard
12 to whether or not -- um, what basis he had to
13 move to suppress the May 13 statements.

14 So I don't believe that it has opened
15 the door at all. I was very careful in cabining
16 his testimony.

17 THE COURT: All right. The Court has
18 previously ruled on several exhibits that were part
19 of a so-called privilege log. The Court ruled at
20 that time on a motion in limine brought by the
21 State. The motion in limine simply means, in this
22 instance, that the State wished to have these
23 documents. The privilege log had been prepared by
24 the defense.

25 Uh, in Wisconsin, the attorney/client

1 privilege, as I understand it, has to be waived
2 by the client. That is the only one that has a
3 right to waive it.

4 The Court has looked at the documents in
5 the privilege log. Two of them intimately
6 involve the attorney/client privilege. I ruled
7 at that time that that privilege had not been
8 waived and those documents would not be released.
9 That ruling remains unchanged today.

10 I see no waiver here of any privilege by
11 this client. Consequently, those documents are
12 going to remain under seal.

13 ATTORNEY KRATZ: If -- if I may, Judge,
14 although not releasing the content of those
15 documents, would the Court consider releasing the
16 nature of those documents so that as they may
17 relate to this witness' claim of, if I would have
18 had so and so, here's what I would have done,
19 that we're at least able to intelligently
20 question this witness about that.

21 I'm not looking for the words,
22 themselves, or the privileged information. I'm
23 looking for the description of what those
24 documents are so that I may perform my
25 cross-examination.

1 THE COURT: Given the nature of the
2 documents, I -- I -- I don't think that would be
3 practicable. So the short answer is, no.

4 ATTORNEY DRIZIN: I'm sorry. Can you
5 read back the question that's on the table?

6 (Wherein question is read back by the
7 reporter.)

8 ATTORNEY DRIZIN: I thought there was
9 another question after that, but -- No? Okay.
10 I'm sorry.

11 THE WITNESS: I thought I did.

12 Q (By Attorney Drizin) You can answer that
13 question, Mark.

14 A I thought I did.

15 Q Oh.

16 A I don't know. I thought I had said that it -- I --
17 well, I thought I said it -- I wouldn't necessarily
18 say it rounded out.

19 Q Okay.

20 A But it would have changed my --

21 Q Okay. How would it --

22 A -- emotion --

23 Q How would it have changed your approach with
24 respect to the May 13 statements?

25 ATTORNEY KRATZ: And now, Judge, I -- I

1 will move, um -- or excuse me -- I will object as
2 irrelevant as the May 13 statement was not into
3 evidence in this case. Although relevant for
4 Mr. Kachinsky, it is certainly not for this
5 motion or discussing the merits of the May 13
6 motion.

7 THE COURT: I'll --

8 ATTORNEY DRIZIN: I was --

9 THE COURT: -- sustain the objection.

10 ATTORNEY KRATZ: Thank you, Judge.

11 ATTORNEY DRIZIN: Judge, can I be heard
12 on that, please?

13 THE COURT: Go ahead.

14 ATTORNEY DRIZIN: Okay. The May 13
15 statements were directly relevant to this
16 situation because it was the May 13 statements
17 that led to the May 15 phone calls, and ---
18 excuse me -- May 13 phone calls, and, um, had
19 Your Honor heard the arguments that Mr. Fremgen
20 was going to make about the May 13 statements and
21 the May 13 phone calls in light of what he -- was
22 kept from him, I think Your Honor would have come
23 down with a very different decision based upon
24 what Mr. Kelly did to Brendan in that video.

25 So it's directly relevant. Just because

1 the State chooses not to use a piece of evidence
2 at trial, doesn't mean that -- that they have
3 cured a problem which is, in part, of their own
4 making.

5 That evidence affected trial strategy,
6 that evidence affected the way Mr. Fremgen
7 approached the motions to suppress, and it --
8 it -- he's going to talk about a lot of the
9 prejudicial effects of having lost that motion to
10 suppress. A motion that we believe he would have
11 won had he seen that video.

12 THE COURT: The objection is sill -- still
13 sustained.

14 Q (By Attorney Drizin) With respect to the May 13
15 phone calls, Mr. Fremgen, okay, did you
16 ultimately move to suppress those statements?

17 A I -- I don't know if it was a formal motion. I
18 think, prior to trial in a motion in limine, though,
19 we may have -- if I had the motions in limine in
20 front of me I might be able to better answer that.

21 But I -- I recall there was -- we had
22 arguments before the Court prior to testimony on
23 one of the days on that particular issue. But
24 I -- it may have been in response to the motion
25 in limine that we had filed.

1 Q Okay. Had you had the video of Mr. O'Kelly
2 interrogating Brendan Dassey on May 12 would it
3 have affected your decisions with regard to the
4 May 13 telephone confession?

5 A Yes.

6 Q How?

7 A As I indicated before, one of the issues, or one of
8 the problems, that -- that Ray and I saw in -- in
9 arguing about the May 13 video was that there was
10 nothing we saw, found, or discovered from all the
11 information that was provided to us that pointed to
12 any sort of overreaching by the State. That the
13 State was involved, whatever, you know, law
14 enforcement was involved in something that
15 essentially made that statement an involuntary or
16 unknowing statement by Brendan.

17 The phone calls were even more difficult
18 because -- well, first of all, there's a Court of
19 Appeals case in Wisconsin that essentially
20 indicates that it's relevant and it's admissible,
21 um, and there really isn't a lot to argue to keep
22 it out, um, again, because the person has
23 voluntarily picked up the phone, and made the
24 call, and -- and said whatever they said that's
25 incriminating on the -- on the -- on the phone

1 call that's being recorded by whoever. By the
2 jail staff or whoever.

3 And so I -- I think we were left with
4 just trying to argue -- making arguments of
5 general relevance or, um, arguing undue
6 prejudice, which is, I think, what we were left
7 with, again, 'cause there's no overreaching that
8 we saw with the State.

9 The case law's pretty clear. You're in
10 jail, you make a phone call, you're subject to
11 tape recording. You know, beware what you say.

12 From the -- the video -- and -- and the
13 only thing -- well, you've referenced -- you
14 refer to it as documents. The only thing that I
15 received from you, besides the motion that you
16 provided to the Court on a CD, was three DVDs of
17 interview with Mr. O'Kelly and Brendan. And
18 that's it.

19 Um -- oh, I'm sorry, and a -- a -- a
20 transcript of the -- that video.

21 So those were the only items that you
22 had provided to me. That video, at first blush,
23 one of the thoughts that crossed my mind was, at
24 this point, I would have altered my position
25 on -- on the May 13 video, and everything that

1 came out of that, including the comment at the
2 end where the officers suggest that Brendan
3 should call his mom so that she doesn't hear it
4 on the street or that it come from him language.

5 Q How? How would you have altered your motion to
6 a -- to a -- a -- to include the new information
7 about the Michael O'Kelly video?

8 A Well, I certainly would have tried to. I should
9 point out that, obviously, I'm not the one that makes
10 the call. That's up to the Judge.

11 But my, um, argument would be different,
12 and it would involve, now, some, what I believe
13 would be, State action. And that is that, at
14 that point, Attorney Kachinsky and -- and his
15 investigator, who is actually acting in his -- on
16 his behalf, and -- and is -- Brendan's actually
17 his client, no -- no different than Attorney
18 Kachinsky's client -- had, in effect, been
19 setting Brendan up to act on behalf of law
20 enforcement.

21 Basically, they were acting on their
22 behalf to try to get Brendan to make another
23 incriminating statement that could be used to --
24 I think in one of the e-mails that Len said to
25 help get a better plea agreement. But in the

1 long run is going to help law enforcement in
2 their case against Steven Avery. That's how I
3 would have approached it differently.

4 At that point I think that, in effect,
5 Attorney Kachinsky and Mike O'Kelly had violated
6 Brendan's Sixth Amendment right to counsel. And
7 that's how I would have couched it.

8 Q Would it have also --

9 ATTORNEY KRATZ: I'm sorry. I'm sorry,
10 Judge. If -- if I may, I'm at least going to
11 object, um, at -- at this point as -- um, 'cause
12 I was waiting for the legal basis to challenge a
13 phone call, um, under these circumstances, and --
14 and -- and hadn't heard that. That's what I
15 thought the question was. Certainly the answer
16 didn't include -- include it.

17 And, therefore, Judge, I believe it to
18 be nonresponsive. If there is either case law or
19 a legal basis upon which to exclude a phone call
20 on issues of either agency, voluntariness, or
21 even adopting the Sixth Amendment, uh, I want to
22 see that. And without that, Judge, then it is
23 irrelevant.

24 THE COURT: What's irrelevant? The answer?

25 ATTORNEY KRATZ: Yes. And the question

1 as it turns out. If -- if he asks how you would
2 have done this differently, that presupposes that
3 Mr. Fremgen knows of some legal basis that that
4 phone call can be excluded. I know of none. I
5 haven't seen one.

6 But if Mr. Fremgen knows of one, that
7 was the answer I was anticipating.

8 THE COURT: All right. First of all,
9 the -- the objection, nonresponsive, belongs to the
10 questioner, not to you.

11 Secondly, I understood Mr. Fremgen's
12 answer, and you are correct in the sense that it
13 certainly weaved its way far from the intent of
14 the question. But I'm not going to -- I'm going
15 to overrule your objection.

16 ATTORNEY KRATZ: All right. Thank you,
17 Judge.

18 Q (By Attorney Drizin) Having seen the video of
19 Michael O'Kelly's interrogation of Brendan on May
20 12, do you believe that that video would have
21 given you additional or grounds to challenge the
22 statements and the phone call on the basis of
23 voluntariness grounds?

24 ATTORNEY KRATZ: Object as to the
25 statement, Judge, not the phone call. That's

1 irrelevant.

2 THE COURT: Sustained.

3 ATTORNEY KRATZ: This Court's found

4 that.

5 Q (By Attorney Drizin) The phone call, then, on

6 voluntariness grounds?

7 A So the question's as to the phone call?

8 Q Yes.

9 A I don't think the two are separate.

10 Q Thank you. So would that have given you a basis

11 to challenge the phone calls, the telephone

12 confession, on voluntariness grounds?

13 A Well, I would have to answer yes. It would pro --

14 I -- maybe even the better answer is it might provide

15 a better argument.

16 Q Okay. Well, what about the phone call? When --

17 you just saw the phone call in the last -- I

18 mean -- I'm sorry. The video of Michael O'Kelly.

19 The first time you saw that was when?

20 A I'd say three weeks ago.

21 Q Okay. And what was your immediate reaction upon

22 seeing that phone call?

23 A The video?

24 Q Yes. I'm sorry. The video.

25 A I was shocked.

1 Q Why?

2 ATTORNEY KRATZ: Objection, Judge,
3 unless it relates to the anticipated motion to
4 suppress the phone call. Everything --

5 THE COURT: I --

6 ATTORNEY KRATZ: -- else about that's
7 irrelevant. They've been bootstrapping that on
8 that 15-second call for two days now. That's why
9 I'm objecting.

10 THE COURT: Well, I'm not sure they've been
11 bootstrapping. But we certainly are -- we certainly
12 have paid a lot of attention to this. I'm going to
13 sustain the objection.

14 Q (By Attorney Drizin) You discussed a motion to
15 suppress on voluntariness grounds. You discussed
16 a motion to suppress on sixth Amendment grounds.
17 Is that correct? What would the basis be of
18 moving to suppress the statement on Sixth
19 Amendment grounds?

20 A You -- you mean I had said that?

21 Q Said that.

22 A I didn't discuss that with anyone --

23 Q No.

24 A I --

25 Q You said that -- (unintelligible).

1 A (Unintelligible) -- thought.

2 COURT REPORTER: One at a time, please.

3 Q (By Attorney Drizin) What would been -- what
4 would have been the basis for moving to suppress
5 it on Sixth Amendment grounds?

6 A Again, it was just a thought of response to reviewing
7 that -- the video of the Mike O'Kelly and Brendan
8 that, in effect, Len had no longer been, in my
9 opinion, representing Brendan Dassey. Appeared to me
10 now that he was working for the State.

11 Q And the same answer would go with regard to
12 Mr. O'Kelly?

13 A Absolutely. As -- as the investigator hired by
14 Attorney Kachinsky, he's under the same obligations
15 Attorney Kachinsky is.

16 Q Would you have taken any other actions as a
17 result of viewing that video?

18 A Well, I certainly would have provided a copy of the
19 video to the Court and to counsel. Um, one other
20 possibility would be that -- and that's where, um, my
21 thought process was once I saw that video -- was that
22 anything that occurred after the video I would
23 make -- I would try to make the argument that they
24 were all interrelated and connected so that once
25 there was a violation, the violation continued until

1 such time as Attorney Kachinsky was no longer
2 representing Mr. Dassey.

3 Q Would you have hired a psychologist to evaluate
4 Brendan Dassey and to talk about how the tactics
5 used by Michael O'Kelly on May 12 might have
6 affected the voluntariness of the phone calls,
7 the telephone confessions, on May 13?

8 A I may not have hired an a -- an -- a different
9 expert, but I would likely have asked Robert Gordon
10 if -- if that's something he could look at as well.

11 Q Would you have filed any motions with respect to
12 Mr. Kratz's actions with regard to the May 12
13 video?

14 A If there were any e-mails that were exchanged, and
15 we'd -- I didn't have anything to indicate that --
16 that the State was involved in that process, again, I
17 would probably think of moving to ask the Court for
18 special prosecutor, or recusal, those types of
19 motions.

20 Q You now have a May 5 video from Mr. Kachinsky to
21 Mr. Wiegert; correct? E-mail. May 5 e-mail from
22 Mr. Kachinsky to Mr. Wiegert; correct?

23 A I -- did -- yes, I saw that.

24 Q Okay.

25 A I don't --

1 Q Let me show --

2 A -- have it, actually.

3 Q -- let me show it to you. Could you look at

4 Exhibit 338, please? Binder five. When you've

5 had a chance to review, Mark, please just signal

6 to me.

7 A Okay.

8 Q Did you have this e-mail prior to the time that

9 you filed your motions in this case?

10 A No, I did not.

11 Q This is one of the documents that I've -- I sent

12 to you when I sent along the Michael O'Kelly

13 video; correct? Or maybe --

14 A I think, subsequent, you had sent an e-mail with some

15 other attachments, including this e-mail --

16 Q Okay.

17 A -- yes.

18 Q Okay. And what is the significance of this

19 document to you?

20 A Well, as I was saying before, it appears at this

21 point that Attorney Kachinsky, in my mind, is no

22 longer working for Brendan, but working for the

23 State.

24 Q And Mr. Kratz is copied on this e-mail? In the

25 cc line?

1 A Yes.

2 Q Okay. Knowing that Mr. Kratz was aware of
3 Mr. Kachinsky and Mr. O'Kelly's activities with
4 respect to this May 5 e-mail, at least, would you
5 have filed any particular motions to the Court
6 concerning Mr. Kratz's actions?

7 ATTORNEY KRATZ: Objection. Calls --

8 THE COURT: I --

9 ATTORNEY KRATZ: -- for a legal
10 conclusion, Judge.

11 THE COURT: Well, it -- it -- it's very,
12 very speculative.

13 ATTORNEY KRATZ: You know, what --
14 what -- is he getting at prosecutorial
15 misconduct? That certainly isn't part of a
16 motion that's before this Court if he is.

17 THE COURT: I'm going to sustain the
18 objection.

19 Q (By Attorney Drizin) Having seen the May 12
20 video of Mr. O'Kelly, um -- before I go there,
21 um, I want you to take a look at document 340,
22 please. Exhibit 340.

23 A Okay. Okay.

24 Q Have you had a chance to review this, Mark?

25 A I did.

1 Q Um, this is an e-mail dated Monday, May 8, 2006,
2 at 8:37, from Michael O'Kelly to Investigators
3 Dederling and Fassbender?

4 A Yes.

5 Q And Investigators Dederling and Fassbender were
6 investigators working on the Dassey case?

7 A Yes. I -- I do recall Fassbender. I -- I don't know
8 Detective Dederling's involvement. I can't recall his
9 extent, but, um, Special Agent -- I don't know if
10 that's what they go by -- but Fassbender was involved
11 as one of the lead investigators.

12 Q Okay. And what is your understanding of what's
13 transpiring in this e-mail?

14 ATTORNEY KRATZ: Objection. Calls for
15 speculation, Judge.

16 THE COURT: Unless there's a foundation,
17 for this it -- it does call completely for
18 speculation.

19 Q (By Attorney Drizin) Did you ever receive this
20 e-mail, Mark?

21 A No.

22 Q You've never seen this before?

23 A Yes, I have seen it before.

24 Q You've never -- you never saw it before the time
25 you filed your motions in this case?

1 A Correct. I had not.

2 Q Okay. How does this document affect your
3 thinking about how you would have filed your
4 motions in this case if at all?

5 A I think it would just -- it's additional -- my
6 opinion, again, is the same as it was before.
7 Michael O'Kelly is -- has the same responsibilities
8 as the attorney does, and was essentially working
9 outside of that relationship and appeared to be
10 working more with the State than for Brendan Dassey.

11 Q And so this would have been another piece of
12 information you would have used to establish
13 State action in your motions?

14 A Correct.

15 Q You're an officer of the court; correct?

16 A Yes.

17 Q You're now a commissioner as well?

18 A Yes.

19 Q You've reviewed that May 12 video of Mr. O'Kelly?

20 A Yes.

21 Q Have you taken any steps to bring any
22 disciplinary actions against Mr. Kachinsky?

23 ATTORNEY KRATZ: Objection. Irrelevant,
24 Judge.

25 THE COURT: Sustained.

1 ATTORNEY KRATZ: Certainly beyond this
2 hearing.

3 Q (By Attorney Drizin) Mr. Fremgen, prior to the
4 beginning of the trial in the Brendan Dassey
5 case, did Mr. Kratz try to persuade you to
6 convince Brendan to take a plea in this case?

7 A I don't know if I would call it persuade me. There
8 was an offer, and it was suggested that it was a fair
9 offer, but that's -- I think all prosecutors suggest
10 that their offers are fair.

11 Q I'd like to show you, um, if I -- if you will,
12 Exhibit 229, please?

13 A Okay.

14 Q Have you had -- why don't you have -- take a
15 chance, if you would, to review it. It's a
16 lengthy -- somewhat lengthy e-mail from Mr. Kratz
17 to you. Unless you already know what it's about.
18 I'm going to focus your attention to the second
19 page of Exhibit 229.

20 A Okay.

21 Q Okay. And this is a -- an e-mail from Mr. Kratz
22 to you dated November 30, 2006?

23 A Yes.

24 Q Nine o'clock -- 9:12 in the morning?

25 A Yes.

1 Q Okay. Do you remember receiving this e-mail?
2 A Yes.
3 Q Okay. And would you consider this sort of an
4 opening salvo for plea discussions between
5 Mr. Kratz and you?
6 A Well --
7 Q How would you character -- what is the
8 significance of this e-mail to you?
9 A Well, I think Attorney Kratz wanted me to know that
10 his case against Mr. Dassey was pretty much airtight,
11 and that if we wanted to make a deal, this is the
12 time to make it. Prior to the Avery trial.
13 Q Okay. And did Mr. Kratz use the existence of the
14 May telephone confessions from Brendan to his
15 mother as part of his, you know, discussion with
16 you?
17 A Yes.
18 Q Okay. And, in fact, that's the first specific
19 piece of evidence that he cited was the phone
20 calls to the mom --
21 A Actually --
22 Q -- in this --
23 A -- I think the first was the May statement to police.
24 Q Okay.
25 A And then phone call to mom.

1 Q Then the phone call to mom. Um, and he told you
2 that it would -- his opinion that these
3 statements had no chance of being declared
4 involuntary; correct?

5 A In his opinion, yes.

6 Q Right. Now, prior to the trial in this case,
7 okay, you assessed the State's case against
8 Brendan Dassey; correct?

9 A Yes.

10 Q And one of the things that you and Mr. Edelstein
11 discussed is the effect of these phone calls
12 should they be played in Brendan's case; correct?

13 A Yes.

14 Q Okay. What was your assessment of the impact of
15 these phone calls?

16 ATTORNEY KRATZ: Judge, if he could
17 be --

18 Q (By Attorney Drizin) May 13 phone call.

19 THE COURT: All right.

20 Q (By Attorney Drizin) Telephone confession from
21 Brendan to his mother.

22 A That one, in particular, we both thought was rather
23 damning and something that we, despite putting both
24 our heads together, couldn't really come up with any
25 way to defend against. Effectively defend against.

1 Q (By Attorney Drizin) You had no answer for how
2 to deal with that phone call?

3 A No.

4 Q Had you had Mr. O'Kelly's video, had you known
5 about it, would you have had an answer for that
6 phone call?

7 A Possibly.

8 Q Now, in fact, at Brendan's trial that phone call
9 was played. The May 13 phone call was played;
10 correct?

11 A Correct.

12 Q And it was referenced first when the State tried
13 to impeach Dr. Gordon; correct?

14 A It was brought up by, I believe, with Dr. Gordon,
15 correct.

16 Q And, um, then it was used to impeach Brendan
17 Dassey; correct?

18 A Yes.

19 Q And it was also referenced by Mr. Fallon in the
20 closing argument of this case; correct?

21 A Correct.

22 Q Okay. And when Brendan was cross-examined with
23 it, the tape was actually played for the jury to
24 hear?

25 A Correct.

1 Q Now, in your pretrial assessment of this case you
2 believed that the playing of that tape would be
3 damning; correct?

4 A Yes.

5 Q When it was actually played at trial, did it have
6 that effect on the jury in your opinion?

7 THE COURT: I'm going to interpose my own
8 objection. I don't care what his opinion is. The
9 jury -- the jury gave a verdict in this case. His
10 opinion doesn't count at this stage.

11 ATTORNEY DRIZIN: Okay. Judge, would
12 now be a good time to break before I go into
13 Mr. Fremgen?

14 THE COURT: Sure.

15 ATTORNEY DRIZIN: Thanks.

16 THE COURT: Back at one.

17 ATTORNEY TEPFER: Can we take care of
18 one minor housekeeping matter? During the
19 redirect of Dr. Leo we neglected to --

20 COURT REPORTER: Can you use the mic,
21 please?

22 ATTORNEY TEPFER: Okay. I'm sorry.
23 Sorry. This is Josh Tepfer. Um, during the
24 redirect of Dr. Leo, we forgot to move in, um,
25 Exhibit 367, which is the *Reid Interrogation*

1 Manual he referred to. I'd like to move that
2 into evidence.

3 ATTORNEY KRATZ: That's fine.

4 THE COURT: All right. Received. Three
5 sixty-seven.

6 ATTORNEY FALLON: To the extent that it
7 was -- of the questioning.

8 THE COURT: Yeah. To the extent that --
9 yeah, I think he testified specifically from a
10 couple of pages.

11 ATTORNEY FALLON: Right.

12 ATTORNEY TEPFER: Correct. That's fine.

13 ATTORNEY FALLON: So for that purpose we
14 have no objection.

15 THE COURT: All right. It's admitted for
16 that purpose.

17 ATTORNEY TEPFER: Thank you.

18 (Recess had at 11:59 a.m.)

19 (Reconvened at 1:07 p.m.)

20 THE COURT: Good afternoon, Mr. Fremgen.
21 Why don't you resume the witness stand. Go ahead.

22 Q (By Attorney Drizin) Mr. Fremgen, I -- I want to
23 clear up, for the record, what phone calls we're
24 talking about, okay?

25 Would you take a look at Exhibit No. 70,

1 please, in binder number two. Um, have you had a
2 chance to take a look at this exhibit? I believe
3 the bottom of page five is -- is where the most
4 probative part of this is.

5 A Okay.

6 Q Okay. Is this a transcript of the phone call
7 between Brendan and his mother on May 13, 2006?

8 A It -- it -- that's what it says on the phone call.
9 Brendan to mom, 5/13/06.

10 Q Did you prepare this transcript?

11 A I don't know if this is one that I did or Ray
12 Edelstein's secretary might have done.

13 Q Okay. Um, was there --

14 A I shouldn't say what I did. Either the State did or
15 Ray Edelstein's secretary did. But they had also
16 provided us transcripts at one point of the phone
17 calls that they intended to call.

18 Q And do you know whether this transcript or the
19 State's transcript was used, um, when this was
20 introduced into evidence?

21 A I don't recall.

22 Q Okay. Do you remember after reviewing this
23 that -- that you thought this was a fair and
24 accurate recollection of what took place in that
25 phone call?

1 A It appears to be, yes.

2 Q Okay. Now, I'd like you to focus on page five,
3 please?

4 A Okay.

5 Q Um, beginning with, um, Brendan's mother saying,
6 "How many years are you going to get?" Do you
7 see that? At the top? It's page five of Exhibit
8 70. Page five on the bottom?

9 A Oh, yes. I'm sorry, yes.

10 Q Okay. And I'd like you to read from -- not out
11 loud, but read to yourself, um, from the
12 bottom -- from, "How many years are you going
13 get?" to the bottom of that transcript.

14 ATTORNEY KRATZ: Judge, I'm sorry.
15 Does -- just for clarification, does Counsel know
16 what portions of this were played at the jury
17 trial itself? Is that included in this document?

18 ATTORNEY DRIZIN: Here's the problem,
19 Judge. We got a transcript of the trial, and the
20 portions of this tape that were played at trial
21 were never transcribed by the reporter. Um, so I
22 don't know what was played at trial, and I need
23 it to be part of the record for this matter.

24 Um, I don't know that I need to play the
25 whole transcript, but I do think I'd like at

1 least the parts that were played at trial, if
2 Counsel knows, to be part of this record. It's
3 not in the trial transcript.

4 ATTORNEY FALLON: This is Mr. Fallon
5 answering. Um, I know of a very clear
6 recollection that we did not play the entire
7 15-minute phone call. And my recollection is it
8 was a very brief segment. It could have been
9 less than a minute.

10 Um, I believe our -- Counsel's
11 suggesting that it's the last exchange at the
12 bottom of page five. Um, it begins, "You
13 wouldn't have had to have been scared," and ends
14 with, uh -- right here?

15 ATTORNEY KRATZ: Yes.

16 ATTORNEY FALLON: "Yeah. So who's all
17 home," or something to that phrase, which,
18 admittedly, that's the best of my recollection.

19 THE COURT: Where are we going?

20 ATTORNEY DRIZIN: I need this in the
21 record and it's not in the record currently,
22 Judge, because it wasn't transcribed at the time
23 of trial.

24 THE COURT: Are you asking to have the
25 entire trans--- the entire transcription here in the

1 record, or that portion that was played at the
2 trial?

3 ATTORNEY DRIZIN: Well, I think I would
4 like both to be part of the record for this
5 proceeding just to have a complete record. Um,
6 and because we don't know exactly what part was
7 played, um -- but I'm not going to focus on
8 anything other than what's on page five with
9 Mr. Fremgen. So...

10 THE COURT: Which portion on page five?
11 Just that (unintelligible) --

12 ATTORNEY DRIZIN: From --

13 THE COURT: -- portion?

14 ATTORNEY DRIZIN: From the words, "how
15 many years are you going to get" down to the
16 bottom of the page.

17 THE COURT: That's basically from the top
18 of page five to -- down to the bottom. Any
19 objection, Counsel?

20 ATTORNEY KRATZ: No.

21 THE COURT: All right. Go ahead.

22 ATTORNEY DRIZIN: So I'm going to read
23 this in the record, if that's --

24 THE COURT: Go ahead.

25 ATTORNEY DRIZIN: -- okay. Um, on May

1 Q (By Attorney Drizin) Um, on May 13, Brendan's
2 mother says: "How many years are you going to
3 get?"

4 Brendan says: "I don't know."

5 Um, mom says: "Well, what did you say
6 to me? Well, what -- what did you just say to
7 me?"

8 Brendan says: "That they, Teresa's
9 family, might ask the judge to be lenient or
10 whatever. They asked me if I wanted to be out to
11 have a family later on."

12 Brendan's mother says: "I don't hate
13 you, Brendan, I hate Steven, all right?"

14 Brendan says: "Yeah."

15 Brendan's mother says: "I wish you
16 would have told me, okay?"

17 Brendan says: "Yeah."

18 Brendan's mother says: "How did you
19 answer the phone at six o'clock when Mike called
20 then?"

21 Brendan says: "They told me that they
22 looked up at the records and that he didn't
23 call."

24 Brendan's mother says: "Huh?"

25 Brendan says: "They said that they had

1 the record and --"

2 Brendan's mother says: "What about when
3 I got home at five o'clock? You were here."

4 Brendan says: "Yeah."

5 Brendan's mother says: "Yeah. When did
6 you go over there?"

7 Brendan says: "I went over there
8 earlier and then came home before you did."

9 Brendan's mother says: "Why didn't you
10 say something to me then?"

11 Brendan says: "I don't know. I was too
12 scared."

13 Brendan's mother says: "You wouldn't
14 have had to have been scared because I would have
15 called 9-1-1 and you wouldn't be going back over
16 there. If you would have been here, maybe she
17 would have been alive yet. So in those
18 statements, you did all that to her too?"

19 Brendan says: "Some of it."

20 Brendan's mom says: "Did he make you do
21 it?"

22 Brendan says: "Yeah. So who's all
23 home?"

24 Is that your recollection of the -- the
25 most relevant part that was played at trial,

1 Mr. Fremgen?

2 A I -- I thought that maybe there was some of the --
3 page four.

4 Q From where on page four do you -- do you think?

5 A That section -- my recollection was about -- that
6 part that was played involved a section where
7 Brendan's mother says, "I'm your mother. Why didn't
8 you come to me?"

9 Um, but I -- I -- again, I don't
10 remember all of this conversation. I know it
11 wasn't the full tape that was played, but there
12 was -- my recollection -- my recollection was
13 that part of that involving, "I'm your mother.
14 Why didn't you tell me," um, was brought up,
15 but...

16 ATTORNEY DRIZIN: Does Counsel have any
17 objection to me reading in from that line,
18 "Brendan, I am your mother," through where we
19 first started?

20 ATTORNEY FALLON: Counsel, I'm looking
21 at my notes and we're looking at the trial
22 transcript.

23 ATTORNEY DRIZIN: Um-hmm.

24 ATTORNEY FALLON: And there's a lots of
25 questionings regarding a statement on May 15, not

1 May 13 in the testimony of Mr. Dassey and --

2 ATTORNEY TEPFER: What page are you
3 looking at?

4 ATTORNEY FALLON: We just have an
5 excerpt, unfortunately. And there's reference to
6 a May 15 audio.

7 ATTORNEY DRIZIN: I think there's reference
8 to both.

9 ATTORNEY KRATZ: There is.

10 ATTORNEY FALLON: There might -- I
11 believe that's true.

12 ATTORNEY DRIZIN: Yeah. So on page 54, the
13 first question you asked, is about May 13. And so
14 the -- the questions in the transcript immediately
15 following the tape that was played at that portion
16 related to the May 13 phone call.

17 This is the transcript of April 23,
18 2007, on pages 50 through 54 are questions
19 relating to the first phone call.

20 I mean, if Counsel will stipulate to the
21 portions that were played at trial, because they
22 were not recorded, I think we can -- we can move
23 on to my questions for Mr. Fremgen.

24 ATTORNEY KRATZ: On page 54, Counsel, it
25 says the first tape we played -- it was on -- it

1 was a May 15 tape. So are you including excerpts
2 of that as well?

3 ATTORNEY DRIZIN: No.

4 ATTORNEY KRATZ: How come?

5 ATTORNEY DRIZIN: I'm only interested in
6 the May 13 phone call.

7 ATTORNEY KRATZ: I'm sure you are. But
8 that's not a complete record, then.

9 ATTORNEY DRIZIN: If you want to find the
10 May 15 phone call and tell me what portions were
11 played, you know, I have no problem with that.

12 ATTORNEY KRATZ: I'll direct my comments to
13 the Court. Judge, it seems like Counsel's trying to
14 recreate the record. It is what it is. If it's
15 deficient, so be it.

16 He's not going to just read some of it
17 and say, well, let's just assume that's what
18 happened at trial. If the record isn't clear
19 about that -- it's clear that the May 15 and the
20 May 13 telephone calls were played from page 54
21 of the transcript. That notwithstanding, I --
22 I'm not sure what the --

23 ATTORNEY DRIZIN: Judge, if the record's
24 deficient, I think we have to -- we have to create
25 it. We have to fix it. I -- I wasn't there.

1 ATTORNEY KRATZ: We have to create it?

2 ATTORNEY DRIZIN: We have to -- well, I'm
3 not creating it.

4 THE COURT: Just -- if it's deficient, how
5 do we know what was played?

6 ATTORNEY DRIZIN: Because we have three
7 people in this room -- four people -- who were here.
8 And one remembers on the stand how much was played.

9 THE COURT: I don't think any of -- well,
10 I -- I'm speaking only for myself as one of those
11 people. I -- I certainly don't remember with any
12 absolute particularity.

13 I was just looking at my notes here, and
14 I have some video time starts and endings, but I
15 don't know that that is going to be terribly
16 helpful.

17 ATTORNEY DRIZIN: Um, perhaps Mr. Fallon
18 and Mr. Kratz could go look at the tape that they
19 played, or the portions of the tapes, and before
20 we're done here, we can fill in the record with
21 both 5/13 and 5/15.

22 I'm not trying to hide 5/15. It was
23 played at trial. I just want the Appellate Court
24 to know what happened.

25 THE COURT: I didn't record any start and

1 stop times for -- for any other transcripts, at
2 least that I can see, that are related to this. Um,
3 Mr. Kratz, do you have a recollection of -- with any
4 specificity of what was played?

5 ATTORNEY KRATZ: I do not, Judge. But
6 Mr. -- in all candor, Mr. Fallon did the
7 examination. He has his notes. He's going over
8 them now.

9 And perhaps you can ask Mr. Fremgen,
10 which is appropriate to do that, and then at the
11 conclusion of this examination we can revisit
12 this issue. I don't have any problem with that.

13 I wouldn't have start and stop time
14 notes, Judge, 'cause Mr. Fallon did the
15 examination.

16 ATTORNEY FALLON: Would the Court want a
17 comment from me or --

18 THE COURT: Sure.

19 ATTORNEY FALLON: I -- I -- I've looked
20 at my notes and this is -- I -- I have no
21 reference in my notes to May 13, but it's obvious
22 that something was played on May 13, um, by
23 virtue of the transcript.

24 My note reflects, um, several comments
25 attributed to the May 15 phone call. But I -- I

1 have no independent note of May 13. My -- my
2 hunch is that that was a spur of the moment idea
3 for cross, and I was aware of a segment of a
4 tape, and it was played, but I don't have a
5 independent note of that. Only a note of May 15.

6 ATTORNEY DRIZIN: Do -- you know, can you
7 tell by looking at the tapes that, you know, what
8 the start and stop times were?

9 ATTORNEY FALLON: Not on the audios.
10 We -- we did that for the videos. But the audios
11 were very short, brief, um --

12 ATTORNEY DRIZIN: Well, I would ask that I
13 be allowed to enter the entirety of Exhibit No. 70
14 into evidence through Mr. Fremgen. Um, and do we
15 have -- do we have a transcript of the other May
16 15 -- I have no problem with stipulating to any
17 transcript from May 15 into the record. One
18 prepared by the State.

19 THE COURT: Any objection?

20 ATTORNEY KRATZ: No.

21 THE COURT: With the understanding that no
22 one is contending here, or at least I don't think
23 anyone is, that the entirety of Exhibit No. 70 was
24 played at trial. A portion of it was.

25 ATTORNEY DRIZIN: That's right.

1 ATTORNEY KRATZ: That's fine, Judge.

2 THE COURT: Okay.

3 ATTORNEY DRIZIN: Okay.

4 ATTORNEY KRATZ: That's appropriate.

5 ATTORNEY DRIZIN: Thank you.

6 Q (By Attorney Drizin) Now, um, having reviewed
7 the segment of the May 13 phone call,
8 Mr. Fremgen, um, beginning, um, at the top of
9 page five with the word, "How many years are you
10 going to get?" through the bottom. Okay? Do you
11 recall what portion of this section you believed
12 to be particularly damning?

13 A Well, actually, my recollection was it may not be the
14 words as much as hearing mom basically ask Brendan,
15 did you do it, or did he -- in here, did he make you
16 do it, and Brendan say, yeah.

17 And at one point I thought that they
18 played a part where she was kind of sobbing or
19 almost crying, but it's not on this page.
20 There's some reference to another page.

21 Again, I don't recall -- I know the
22 whole thing wasn't played, but there was some --
23 and I could be getting May 15 mixed up, because
24 there was some comment about, you could have been
25 a hero, Brendan. That was also played, and that

1 was pretty dramatic as well.

2 Q Um, with regard to Exhibit No. 70 and the
3 conversation, are you referring to Brendan's
4 statement where he says, "Some of it."?

5 A The last page -- the last, like, three exchanges, or
6 two exchanges:

7 "Why didn't you say something to me?"

8 "I don't know. I was scared."

9 "You wouldn't have had to be scared."

10 Um, at the end of the conversation
11 she -- Mrs. Janda says:

12 "So in those statements, you did all
13 that to her too?"

14 Brendan's answer: "Some of it."

15 "Did he make you do it?"

16 "Yeah."

17 I think that -- that -- but, again, I
18 think it's also hearing the voices, and it's
19 hearing mom say it to son, and son answering to
20 mom, which is, you get -- you don't get the
21 context from the piece of paper that you do from
22 the actual voices on the tape.

23 ATTORNEY DRIZIN: Um, I don't want to
24 play the tape for you because it's a long tape.
25 Um, but I would ask that Exhibit No. 238, which

1 is the audio of the May 13 phone call, also be
2 admitted for the purpose of completing the record
3 with the understanding that the entire audio was
4 not played.

5 THE COURT: Any objection from the State?

6 ATTORNEY KRATZ: No.

7 ATTORNEY DRIZIN: Okay.

8 THE COURT: All right. It's received.

9 ATTORNEY DRIZIN: Thank you.

10 THE COURT: What was the number again?

11 ATTORNEY KRATZ: Two thirty-eight.

12 ATTORNEY DRIZIN: The Exhibit 70, and then
13 the audio was 238.

14 THE COURT: Thank you.

15 ATTORNEY DRIZIN: Thank you, Your Honor.

16 Q (By Attorney Drizin) And you and Mr. Edelstein,
17 as you looked at Exhibit No. 70, and the audio,
18 238 -- Exhibit No. 238 -- didn't really have an
19 answer to how to deal with this phone call at
20 trial?

21 A To any of the phone calls.

22 Q To any of the phone calls. Okay. How did you
23 come to select Dr. Gordon as your expert?

24 A Shortly after I was appointed by the public
25 defender's office I attended their annual criminal

1 defense conference in Milwaukee, and noted a breakout
2 session with two doctors. Um, I don't remember the
3 person from Florida, but there was a -- a
4 psychologist from Florida and Dr. Gordon from
5 Janesville, along with an attorney from either the
6 public defenders' Madison office or Beloit office,
7 putting on a presentation about undue influence,
8 coerced statements, those types -- that type of
9 topic.

10 And just, I think, ironically it was
11 they spoke at length about suggestibility and --
12 and involuntariness of statements. So I
13 approached Dr. Gordon after the program and
14 mentioned that I have a -- a case that might be
15 right on point with this topic of their
16 presentation.

17 And -- and we began to discuss this over
18 the phone a few times, by e-mail, and then I --
19 he agreed to do an evaluation. And -- and that's
20 how I had the -- sought the appointment of
21 Dr. Gordon through the public defender's office
22 as an expert.

23 Q Now, um, after you saw this presentation, what
24 did you think, particularly, he could do to
25 assist Brendan in -- at trial?

1 A Well, the topic that they were discussing was
2 essentially -- they could have called it the Brendan
3 Dassey case for the most part, because it would --
4 talked about characteristics of -- of sophistication
5 or lack of sophistication, the age, um, and how some
6 people are easily manipulated by persons in
7 authoritative position, such as law enforcement,
8 and -- and how they can be open to suggestion.

9 And so the topic just kind of lent
10 itself to this case, and it was -- seemed like
11 the perfect place to at least begin looking for
12 an expert.

13 I knew I needed an expert. I wasn't
14 going to simply walk in with a -- a book or a
15 para -- a chapter from a book and say I want to
16 use this to cross-examine the officers.

17 Q I want you to take a look, if you will, at
18 Exhibit No. 72. And I'm going to focus on the
19 bottom paragraph of that exhibit. But you can
20 read the whole thing. Okay?

21 A Okay.

22 Q Now, would it be fair to say that this is a
23 letter dated October 10, 2006, sent by you to
24 Dr. Robert Gordon?

25 A Yes.

1 Q And would this have been essentially your re--
2 retention letter of him?

3 A Yes. Yes.

4 Q And in this letter you asked Mr. Gordon, or you
5 told Mr. Gordon, what you wanted him to focus on
6 in his -- his evaluation of Brendan?

7 A We had had -- we had had other discussions, um, and
8 phone calls, but essentially what I did was
9 memorialize what we had talked about so that it was
10 firmly in a letter explaining what I was -- wanted
11 him to do in regards to meeting with Brendan.

12 Q And you wanted him to evaluate Brendan's
13 suggestibility; correct?

14 A Yes.

15 Q You wanted him to opine about whether Brendan
16 provided a questionable confession based upon
17 improper police questioning?

18 A Correct.

19 Q And you wanted him to give this testimony both at
20 a pretrial hearing?

21 A Correct.

22 Q On voluntariness?

23 A Yes.

24 Q And also potentially at trial?

25 A Yes.

1 Q On reliability?

2 A Yes.

3 Q Okay. So it's fair to say that you wanted

4 Dr. Gordon to look at both Brendan's personal

5 characteristics as well as the tactics that the

6 police officers used during the interrogation?

7 A Yes.

8 Q I want to show you, if you will, Exhibit 215. Do

9 you recognize this document?

10 A Yes.

11 Q And is this a -- a letter from Dr. Gordon to you

12 dated November 15, 2006?

13 A It is.

14 Q And is this a report that Dr. Gordon had prepared

15 to you after he had met with and evaluated

16 Brendan Dassey?

17 A Yes.

18 Q Okay. Do you need to review this report or are

19 you fairly familiar with it?

20 A It's been a while since I last saw it, but if you

21 want to point me towards a particular area -- I think

22 it's rather long.

23 Q Yeah.

24 A Five pages long.

25 Q My question for you is, is when you received this

1 report, did you think that Dr. Gordon had
2 answered the two questions that you had posed to
3 him in your retention letter?

4 A For the most part.

5 Q Okay. Did he cite to you specific questions and
6 specific answers from any transcript that -- um,
7 any police interrogation transcript in this
8 report?

9 A Not in the report.

10 Q Okay. And did he talk at all about the
11 reliability of Brendan's confession?

12 ATTORNEY KRATZ: Objection, Judge. It was
13 a legal conclusion that this Court specifically
14 ordered would not allow into evidence. Reliability,
15 believability of the statements was not going to be
16 part of this case and so it's irrelevant.

17 THE COURT: Sustained.

18 Q (By Attorney Drizin) You had asked Dr. Gordon to
19 opine about reliability; correct?

20 A Yes.

21 Q And the Court had not yet made any rulings about
22 whether or not this was going to be an issue at
23 the time he prepared this report; correct?

24 A Correct.

25 ATTORNEY KRATZ: Objection. Irrelevant.

1 THE COURT: Well, he can answer that
2 question. Overruled.

3 THE WITNESS: Correct.

4 Q (By Attorney Drizin) The report contains a lot
5 of information about Brendan's personality?

6 A Yes.

7 Q It talks about tests that were administered to
8 him?

9 A Yes.

10 Q Those tests go to his suggestibility; correct?

11 A I think some are -- the way I was -- we discussed
12 the -- those tests. My understanding was that the
13 tests help create the foundation, not necessarily all
14 the tests relate to suggestibility.

15 For instance, I think there were a
16 character -- character assessment test, the MMPI,
17 an IQ test, or a variance of an IQ test, and when
18 I had met with Dr. Gordon after the evaluation
19 and we discussed all of these, essentially I
20 wanted him to teach me so I didn't look like I
21 didn't know what I was doing in --

22 Q Um-hmm.

23 A -- the courtroom on this topic, but so that we could
24 both have a -- during direct, it would come off being
25 smoother.

1 Um, my understanding from Dr. Gordon was
2 these all create this foundation where a person
3 might be more suggestible than a person who might
4 have a more moderately higher IQ, or a different
5 set of character traits, or different result from
6 the MMPI.

7 Q But you had hoped that Dr. Gordon would opine not
8 only about suggestibility but about the police
9 interrogation tactics and how they might have
10 taken advantage of Brendan's suggestibility;
11 correct?

12 A Correct.

13 Q And he did not do that at least in this report?

14 A Not in the report.

15 Q Okay.

16 A Not -- I shouldn't say that. Not specifically in the
17 report.

18 Q Okay. Now, I want you to turn, if you will, to
19 page 217. Exhibit 217.

20 A Okay.

21 Q Um, and I want you to focus, if you will, on page
22 two of the motion.

23 A Okay.

24 Q This is a brief you filed in support of
25 Dr. Gordon's testimony being admitted?

1 A Correct.

2 Q Okay. I apologize, Mark. I -- I actually want
3 you to focus on page -- Exhibit No. 216 first.

4 A Okay.

5 Q And this was a motion in limine that you filed
6 with respect to introducing Dr. Gordon's expert
7 testimony on suggestibility?

8 A Correct.

9 Q Okay. I'd like you to focus on page two of
10 Exhibit 216 and focus on paragraph four, please.

11 A Okay.

12 Q Based on your representations to the Court, you
13 expected Dr. Gordon to testify not only about
14 suggestibility but also about the ways in which
15 police questioning, specific questions, took
16 advantage of his suggestibility; correct?

17 A From those reviews of those two taped statements,
18 yes.

19 Q Okay. And if you look at paragraph nine;
20 correct? Have you seen it?

21 A Yes.

22 Q At least up until this point in time you -- you
23 expected Dr. Gordon to testify about the
24 reliability of Brendan's statements as well?

25 A That's what I was requesting, yes.

1 Q Yes. Now, Dr. Gordon gave a videotaped
2 deposition in this case; correct?

3 A Yes.

4 Q And that videotaped deposition was essentially,
5 um, your proffer of what his direct examination
6 would be in the motion hearing to admit his
7 testimony?

8 A Correct.

9 Q Okay. And, um, you prepared him for that, um,
10 direct examination?

11 A We did.

12 Q Okay. And you reduced that examination to
13 videotape and you gave it to Mr. Kratz; correct?

14 A Yes.

15 Q And when it was played in court, or when it came
16 to court, Dr. Gordon appeared and he was
17 cross-examined by Mr. Kratz at the beginning of
18 the hearing; correct?

19 A Correct.

20 Q Now, the video deposition of Dr. Gordon was in
21 March of 2007; correct?

22 A That -- that sounds right.

23 Q Okay. And during that videotaped deposition of
24 Dr. Gordon, he repeatedly insisted that he was
25 not an expert on police interrogation tactics;

1 correct?

2 A He did say that, yes.

3 Q More than once?

4 A Yes.

5 Q And you tried to push him, if you will, to talk
6 more about the specific questions and answers
7 that police officers -- questions the police
8 officers used in their various interrogations?

9 A In this particular case.

10 Q Yes.

11 A Yes.

12 Q And he resisted that pushing, if you will, by
13 you?

14 A I -- I don't know if he did. He might have. I just
15 don't recall that he resisted it as much as he would
16 answer it different than the way I wanted it to be
17 answered.

18 Q Okay. He never was able to cite to you, you
19 know, passages from the various interrogations,
20 um, during that videotaped deposition that
21 illustrated how the police officers may have
22 taken advantage of Brendan's suggestibility; is
23 that fair?

24 A That's my recollection.

25 Q Okay. Now, Dr. Gordon, um, during

1 cross-examination in this case by Mr. Kratz at
2 the pretrial motion, again specifically said, I
3 am not an expert in police interrogation tactics;
4 correct?

5 A He did.

6 Q And he was barred from testifying, if you will,
7 or that portion of his testimony was he was not
8 allowed to testify at trial on police
9 interrogation tactics?

10 A Correct.

11 Q So at least the second goal that you had hoped
12 Dr. Gordon would meet when you first retained him
13 back in October of 2006, Dr. Gordon was precluded
14 from testifying about; correct?

15 A Correct.

16 Q Okay. In fact, when you -- when Dr. Gordon was
17 asked by Mr. Kratz during the March 26, 2007,
18 hearing, um, questions about his expertise, on
19 page 23 he said:

20 "I am not an expert regarding police
21 interrogation. That would be a Dr. Richard Leo,
22 attorney, social psychologist, and sociologist at
23 the University of California in San Francisco.
24 He would be much more in a position to talk about
25 external factors."

1 Do you recall that testimony?

2 A I -- I recall that he said that, yes.

3 Q Okay. So as a result of the Court's rulings with
4 regard to Dr. Gordon's testimony on police
5 interrogation tactics, going into trial you did
6 not have an expert to talk about the police
7 interrogation side of the question of whether or
8 not Brendan's statements were voluntary or
9 reliable; correct?

10 A I didn't have an expert to talk about the
11 interrogation techniques.

12 Q That's right.

13 A Correct.

14 Q Okay. Now, Mr. Fremgen, I want to take you back
15 to January of 2007; okay? And I want you to
16 focus on, if you will, Exhibit 225.

17 ATTORNEY DRIZIN: Just a second, Your
18 Honor.

19 Q (By Attorney Drizin) I'd also like you to have
20 Exhibit 73 in front of you as well.

21 A Okay.

22 Q Okay. Start with Exhibit No. 73. Um, in January
23 of 2007, were you contacted by an attorney by the
24 name of Jerry Buting?

25 A I think I might have contacted him first.

1 Q Okay.

2 A Yeah.

3 Q And, um, what did you ask him when you contacted
4 him?

5 A I -- I think I had contacted him -- I -- I think it
6 actually started with contacts with Dean Strang. And
7 then I had a few e-mail back and -- exchanges back
8 and forth with Attorney Buting.

9 And, originally, I wanted to know if my
10 client was going to turn on their client. But
11 eventually it resulted in, after their trial was
12 either on -- under way or they knew there wasn't
13 going to be any witness testimony from Brendan,
14 um, there was an issue involving, if he were to
15 testify, an immunity issue, essentially.

16 So I had mentioned I was looking for a
17 federal case. I didn't know the name of it. I
18 remember it had something to do with Ollie North.
19 Jerry sent me a -- an e-mail with the case saying
20 this is the case you're looking for.

21 And that's how it started. And then,
22 um, at one point he sent me an e-mail about some
23 information on Dr. Larry White down in Beloit.

24 Q Okay. So before this e-mail with Mr. Buting on
25 the 17th of January, 2007, you had prior

1 discussions, either by e-mail or by phone,
2 with -- with Dean Strang about Dr. White?

3 A Not Dr. White, but about other --

4 Q Other --

5 A -- issues.

6 Q -- matters. Okay. And you, generally, had a
7 cooperative relationship with Dean Strang and
8 Jerry Buting throughout the course of your
9 representation?

10 A I -- I knew that -- that my client potentially was a
11 problem for them. So, certainly, I -- I -- it was an
12 arm's length-type of an arrangement.

13 But I never had a problem with either
14 one, and was willing to share information, that
15 wasn't going to hurt Brendan, with them, and when
16 they asked if -- straight out when -- on a -- on
17 a phone conference once whether, as Jerry put it,
18 is your guy going to rat on Avery, um, you know,
19 that's -- that's kind of the type of
20 conversations we --

21 Q Sure.

22 A -- had.

23 Q But you also had conversations about what kinds
24 of experts to use with respect to the false
25 confession theory in this case?

1 A Yes, we --

2 Q Good.

3 A -- we --

4 Q Okay.

5 A -- talked about that.

6 Q And at least as of January 17, 2007, Mr. Buting

7 sent you a summary of what Dr. Larry White was

8 expected to testify about in Steven Avery's

9 trial; correct?

10 A He -- he actually sent me an outline of some cases

11 and some issues that come up in false confession

12 cases that Larry White had put together for him and

13 Dean.

14 He sent it to me, I think, as an

15 attachment to one of the e-mails, um, and then

16 he -- either he sent it to me a second time or

17 Dr. Larry White sent me the same outline. But it

18 was more of an outline of cases. That's at least

19 to my recollection.

20 Q Well, take a look at Exhibit No. 73. Okay?

21 A Um-hmm.

22 Q Does this --

23 A Okay.

24 Q Does this refresh your recollection about whether

25 or not he sent you a disclosure about what he

1 anticipated Dr. White would testify to in the
2 Steven Avery case?

3 A Yeah. For them, yes.

4 Q Yes.

5 A He did say -- send an e-mail about that.

6 Q Okay.

7 A Correct.

8 Q And was the context of this along the lines of
9 you might want to consider Dr. Larry White as an
10 expert in your case?

11 A Correct.

12 Q Okay. And you knew from this report that
13 Dr. White was going to testify not just about --
14 actually, he wasn't going to testify about
15 suggestibility, was he?

16 A No.

17 Q He was going to be a expert on police
18 interrogation tactics and the effect that they
19 might have on a suspect?

20 A Assuming the Judge let it in, yes.

21 Q Correct. And Exhibit 225, if you will?

22 A Okay.

23 Q This is another e-mail you received from -- I
24 believe it's Jerry Buting? Although it's hard to
25 tell.

1 A It -- sure, it -- it looks like something I recall
2 getting from Jerry.

3 Q Okay. And -- and in addition to this summary of
4 disclosure of what Dr. White's anticipated
5 testimony would be, he began to send you an
6 outline of an argument about how to persuade the
7 Court to allow that testimony?

8 A Admissibility, correct.

9 Q Yes. Okay. And this was in January of 2007;
10 correct?

11 A Yes.

12 Q Okay. And at this time in January of 2007, you
13 still hoped that Dr. Gordon would be able to
14 fulfill the two roles that we talked about
15 earlier?

16 A Yes.

17 Q Okay. Now, on April 5, 2007, the Court
18 determined that Dr. Gordon could not testify
19 about police interrogation tactics because he was
20 not a social scientist. Do you recall that?

21 A Uh, I do recall that he wasn't allowed to testify
22 about that, but I don't remember what the basis was.
23 I'd have to look at the order.

24 Q Okay. Um, but the following day, on April 6,
25 2007, you were contacted by Jerry Buting; is that

1 correct?

2 A Possibly. I don't recall.

3 Q Would you take a look at Exhibit 78, please?

4 A Okay.

5 Q Actually, Exhibit 77 and 78. Okay?

6 A Okay.

7 Q Exhibit 77, um, do you recall receiving an e-mail
8 from Jerry Buting on April 6, 2007?

9 A Yes.

10 Q And this was an e-mail that he sent you the day
11 after the Court's ruling with regard to the scope
12 of Dr. Gordon's testimony?

13 A Yes.

14 Q Okay. And he had learned about the Court's
15 ruling by reading a newspaper article, and he
16 wanted to tell you how important it was for you
17 to have a police interrogation expert?

18 ATTORNEY KRATZ: Judge, I'm sorry. I'm
19 going to object both as to hearsay and I can't think
20 of anything less relevant than Mr. Buting's opinion
21 as to trial strategy in Brendan's case. For that
22 reason, Judge, I'm going to object.

23 ATTORNEY DRIZIN: It's --

24 THE COURT: What's it being offered for?

25 ATTORNEY DRIZIN: It's being offered for

1 Mr. Fremgen's ineffectiveness in this case. That he
2 had a particular expert that he wanted to testify
3 about something. That that expert was -- was not
4 qualified to testify about police interrogation
5 tactics. And that he was repeatedly offered an
6 expert who was willing to do so, um, at little or no
7 charge.

8 THE COURT: Well, I'm not sure at this
9 stage I accept the character -- the complete
10 characterization that you're propounding here. But
11 I'll overrule the objection and he can testify.

12 Q (By Attorney Drizin) What -- what was the
13 significance of this e-mail, Mark?

14 A The e-mail indicates from Attorney Buting that I
15 should contact Dr. White. That if a problem comes
16 down with the Court thinking this is last minute,
17 they're not going to let us use Dr. White, that we
18 should argue that we weren't allowed to do so because
19 they had -- had him retained on for Avery. Now that
20 Avery's done, he's no longer -- or they're allowing
21 us to contact Dr. White and use Dr. White.

22 Q Okay. And, um, the report underscores the
23 importance of having an expert talk about police
24 interrogation tactics as well; correct?

25 ATTORNEY KRATZ: Judge, once again, in the

1 opinion of Mr. Buting, as long as -- as long as --
2 as we understand that's what it's being offered for.

3 ATTORNEY DRIZIN: Right. In the opinion of
4 Mr. Buting.

5 THE COURT: All right.

6 THE WITNESS: In his opinion, yes.

7 ATTORNEY DRIZIN: Yes. Okay.

8 THE COURT: That's what it's being received
9 for.

10 ATTORNEY DRIZIN: Okay.

11 Q (By Attorney Drizin) Now, around this same
12 timeframe in early April of 2007, you and
13 Mr. Edelstein began to think that you might want
14 a police interrogation expert of your own;
15 correct?

16 A For another reason, but, yes.

17 Q Okay. And, um, what was the reason you wanted a
18 police interrogation expert?

19 A I think it was around the same time that Attorney
20 Kratz or Fallon had sent us a CV and, um, a summary
21 report from someone from the Reid Institute in
22 Chicago.

23 Q Okay. And in -- in -- that would have been a
24 report from Mr. Joseph Buckley?

25 A Yes.

1 Q Correct? And in response to that report from
2 Mr. Buckley, Mr. Edelstein was charged with the
3 task of trying to locate a false confession
4 expert?

5 A I wouldn't say so. He knew a -- an officer when he
6 was prosecutor in Oklahoma that might be able to help
7 him out because he'd been trained in Reid as well,
8 and was a training officer in Oklahoma for other
9 officers. So he thought maybe that officer might be
10 able to help out.

11 Q And you learned around the same time that
12 Dr. Gordon was prevented from testifying about
13 police interrogation tactics, and that you were
14 being, um -- that Jerry Buting was suggesting to
15 you Dr. White, that the friend of Ray Edelstein's
16 was not going to be able to be of assistance to
17 you?

18 A About a week-and-a-half later, yes.

19 Q Okay. Um, I want to -- you to focus, if you
20 will, on Exhibit No. 78. I want you to begin,
21 because these are in reverse order, um, with the
22 first e-mail on page two of Exhibit 78, which is
23 April 6, 2007, from you to Dr. Gordon.

24 Um, there's a response -- there's a
25 response of Dr. Gordon on April 6, 2007, to your

1 e-mail at 6:34 p.m.

2 And then the next day there's an e-mail,
3 April 7, 2007, from you to Dr. Gordon.

4 And then, finally, in the middle of the
5 page, there is a response on Sunday, April 8, at
6 7:46 in the evening from Dr. Gordon to you.

7 Those are the cluster of e-mails --

8 A Yes.

9 Q -- I'd like you to focus on.

10 A Yes.

11 Q Okay. Have you read them?

12 A Yeah.

13 Q Okay. Um, what's happening? What's going on in
14 this e-mail? In these e-mail exchange?

15 A In the first e-mail, Dr. -- well, I spoke to
16 Dr. Gordon in the e-mail about the, um, fact that he
17 was ordered to turn over his entire file on Brendan,
18 including the tests, and results of those tests, so
19 that I could provide that to the prosecutor's office.

20 Um, he responds informing me when he'll
21 be back. He was actually over, I think, in the
22 South Seas doing a program. A -- a training
23 program.

24 Um, I indicated that I was going to
25 contact Dr. White, and that I received Dr. Leo's

1 PowerPoint. Dr. Gordon had met Dr. Leo,
2 apparently, at a training program, and contacted
3 me one night, indicating that I should contact
4 Dr. Leo. He had put on a similar program about
5 suggestibility and -- and coerced or -- or forced
6 confessions.

7 So I contacted Dr. Leo, and he said he
8 had just done a program like that, and sent to me
9 a PowerPoint, and I sent the PowerPoint to Ray
10 to -- to review.

11 Um, Dr. Gordon thanked me for keeping
12 him in -- in the loop.

13 And in the last e-mail was just a
14 reminder I needed to have that, um -- those
15 documents from his file, or his entire file, at
16 the -- if he could get it FedExed or couriered
17 over to the -- the hotel we were staying at in
18 Madison to pick the jury, and I would give it to
19 the prosecutors at that time.

20 Q Okay. Um, do you know the name of the expert, or
21 the police interrogation, um, expert, that Ray
22 Edelstein was looking to hire?

23 A I -- I wouldn't call him an expert. I don't know who
24 he is. Other than he was an officer that worked with
25 Ray when Ray was prosecutor in Oklahoma City or --

1 Q But his point was --
2 A -- one of the --
3 Q -- he was going to --
4 A (Unintelligible.)
5 Q I'm sorry.
6 COURT REPORTER: One at a time.
7 ATTORNEY DRIZIN: I'm sorry.
8 THE COURT: Let -- let Mr. Fremgen finish.
9 ATTORNEY DRIZIN: Okay.
10 THE WITNESS: I -- I said Oklahoma City.
11 I think it's a county outside of Oklahoma City.
12 ATTORNEY DRIZIN: Okay. I apologize for
13 interrupting.
14 Q (By Attorney Drizin) But Ray was going to hire
15 him to talk about the police interrogation
16 tactics in this case?
17 A Even up until picking the jury, he was still talking
18 to this guy.
19 Q Okay. That was my next question. When you wrote
20 Dr. White, you told him, in April 7, 8 area, that
21 your expert had begged off; correct?
22 A Correct.
23 Q That was Dr. Gordon?
24 A Gordon, actually --
25 Q Yeah.

1 A -- yes.

2 Q Um, when did that expert first express
3 reservations about testifying?

4 A I -- my impression is he had reservations from the
5 very beginning, because he was a training officer for
6 the state of Oklahoma police. Um, so I -- I think he
7 had reservations from the beginning, but that he,
8 uh -- his comment was that if he was -- received
9 approval from the highers up, then he would be
10 inclined to do it for Ray.

11 Q Okay.

12 A That was my understanding.

13 Q But at least as of April 7, the status of this
14 expert was that he was not going to be able to
15 help you?

16 A We -- the official word was, don't consider me for
17 the trial. But Ray kept talking to him anyways
18 because there was that little opening of, unless you
19 really, really need me, give me a call. They're
20 friends --

21 Q Right.

22 A -- so I'm sure that he wanted to, you know, help out
23 his friend. And that's the reason why there was
24 always that little opening.

25 Q So you -- so, um, Mr. Edelstein was continuing to

1 court this friend of his to be an expert, or to
2 testify about police interrogation tactics up to
3 the start of the trial?

4 A I think even after the trial started, Ray was still
5 having connect -- contacts with him. Up until -- and
6 I don't remember which day it was, but at one point
7 we had a -- a -- a meeting in chambers about, um,
8 this Buckley individual. I think it was at that
9 point that either the State, or the Judge, or maybe
10 it was a little of both, said this person's not going
11 to testify, and so that issue was kind of a moot
12 point.

13 Q Okay.

14 A We were concerned about the State putting on
15 Dr. Buckley, and having someone to actually respond
16 to what Buckley was going to say. I -- I actually
17 shouldn't say -- I don't know if it's Dr. Buckley,
18 but I know it's Buckley.

19 Q Yeah, it's Mr. Buckley.

20 A Mr. Buckley.

21 Q Um, April 11, 2007, I'd like you to focus on
22 Exhibit No. 79, please?

23 A Okay.

24 Q You finally got a hold -- or you finally
25 contacted Dr. White; correct? I mean, is this --

1 is this a letter from you dated April 11, 2007,
2 to -- an -- an e-mail to Dr. Larry White?
3 A No.
4 Q I'm sorry. What is this?
5 A It's an e-mail from Dr. White to me.
6 Q Ah, you're right.
7 A In response to my e-mail dated April 10.
8 Q Okay. Um, which is on page two of Exhibit 79;
9 correct?
10 A Correct.
11 Q Okay. So on April 10, 2007, at 2:07 p.m., you
12 contacted Dr. White?
13 A Correct.
14 Q Okay. And you contacted him in the hopes that he
15 might be an expert witness for Brendan Dassey?
16 Or why did you contact him, Mark?
17 A Well, I -- I wouldn't actually say I was contacting
18 him to hire him or retain him to be an expert as much
19 as feeling him out. I certainly wanted to get
20 whatever he could offer me to help me. If he would
21 testify, that would be even better. Um, but I wanted
22 whatever information, whatever assistance, he could
23 provide me.
24 Q And in this --
25 A If that meant testifying or being an expert, that

1 would be one -- that'd be great as well.

2 Q But you talked to him specifically about paying
3 him in this first e-mail; correct?

4 A Sure. Sure.

5 Q Okay. Um --

6 A Just go down through the e-mail. I just want to
7 point out I didn't come right out to him and say, I'm
8 going to hire you, or I want to hire you. I
9 suggested that this is a public defender case, and
10 that I certainly would like to hire him, and if
11 nothing else, if he doesn't want to do this, I
12 wouldn't mind if he'd review that letter from the
13 Reid person and give me his impressions on it.

14 Q Okay.

15 A So if nothing else, I was hoping to get something
16 free out of it.

17 Q Um, and at the time of this correspondence in
18 April of 2007, the 10th and the 11th, had you
19 seen a draft of Dr. White's report that he had
20 filed in the Avery case?

21 A I don't know if it was filed, but I received
22 something from Jerry Buting, and then Dr. White sent
23 me the same thing.

24 Q Okay.

25 A Whatever that was. And it appeared to be an outline

1 of cases. The issues involving false confessions.
2 Um, some of it dealt with, I think, in broad scope,
3 what he would say if called to testify in the Avery
4 case.

5 Q And do you recall if that document had specific
6 parts of the various interrogations and Brendan's
7 answers in it?

8 A There were some, yes.

9 Q Okay. So on April 11, Dr. Gordon responded to
10 your initial e-mail; correct?

11 ATTORNEY KRATZ: Dr. White?

12 THE WITNESS: Dr. White?

13 ATTORNEY DRIZIN: Dr. White. I apologize.

14 THE WITNESS: He did.

15 Q (By Attorney Drizin) Okay. Um, and after you've
16 received the April 11 response of Dr. White, did
17 you have any further contact with Dr. White?

18 A No.

19 Q Okay. Um, ultimately, you decided not to retain
20 Dr. White to assist you in Brendan's case;
21 correct?

22 A Correct.

23 Q Okay. And Dr. White --

24 A Actually -- I'm sorry can I --

25 Q Sure.

1 A -- clarify? Not just Dr. White. We chose not to
2 retain an expert, period.

3 Q Okay.

4 A Okay.

5 Q Um, in the letter that Dr. White sent to you, uh,
6 he told you that he could be available to testify
7 in Brendan's case; correct?

8 A At \$125 an hour, correct.

9 Q Correct.

10 A Yeah.

11 Q And you had received another e-mail from -- or a
12 card -- you had -- you had contact with
13 Mr. Buting, um, about Dr. White's fees as well;
14 correct?

15 A I recall conversation that if need be, he would help
16 me smooth things out with the PD's office and get --
17 get it paid. Something like that.

18 Q And do you recall him telling you that -- that
19 much of the work that he had done in the Avery
20 case could be used already in the Dassey case?

21 A Yes, he did say that.

22 Q Okay.

23 A I don't agree, necessarily, but...

24 Q Okay. I want to ask you, um, Doctor -- excuse
25 me -- Mr. Fremgen, about, um, some of your

1 trial-related decisions in this case.

2 A Okay.

3 Q Okay?

4 A Can I put these away?

5 Q You can.

6 A Okay.

7 Q I apologize, Mark. I need one more document for

8 you to review. Document --

9 A Okay.

10 Q -- number 74. Okay. Exhibit No. 74 you're

11 looking at; correct?

12 A Yes.

13 Q Okay. Do you recall receiving this from

14 Mr. Buting?

15 A Yes.

16 Q Okay. And this is an e-mail dated March 22,

17 2007, at 7:53 in the evening?

18 A Yes.

19 Q Okay. Um, what did Mr. Buting tell you in this

20 e-mail?

21 ATTORNEY KRATZ: Objection. Irrelevant,

22 Judge.

23 THE COURT: What relevance does this

24 have?

25 ATTORNEY DRIZIN: It's just -- it just

1 closes up the conversation that Mr. Fremgen already
2 testified to about switching the tab from the
3 Dassey -- Avery case to the Dassey case.

4 THE COURT: Are you referring specifically
5 and only to the last paragraph?

6 ATTORNEY DRIZIN: That's all I care about,
7 Judge.

8 THE COURT: All right. With that
9 understanding, the objection's overruled.

10 ATTORNEY FREMGEN: The e-mail
11 essentially is that e-mail you were just
12 referencing about Dr. White not costing the
13 public defender much because most of his work had
14 been done already for Avery. And then some
15 com -- comments about areas to look into as far
16 as the questioning, their interrogation
17 techniques.

18 Q (By Attorney Drizin) And he also talks about how
19 Dr. White can probably finish a report fairly
20 quickly; correct?

21 A Yes, he says that.

22 Q Okay. Okay. I'd like you to turn to Exhibit
23 315, please.

24 A Okay.

25 Q I'd like you to focus, if you would, on page six,

1 chapter one, clip 37. So it's the 6th page. Do
2 you see that?

3 A Thirty-seven?

4 Q Number 37.

5 A Yes.

6 Q I'd like to play that clip for you and then ask
7 you some questions about it, okay?

8 A Okay.

9 ATTORNEY DRIZIN: Um, Alex, will you
10 play clip 37, please?

11 "Where do you think you're going?"

12 "I don't know."

13 "You're going to juvie. That's where
14 you're going. To the juvie jail. About 45
15 minutes away."

16 (Unintelligible.)

17 (Unintelligible.)

18 "What happens if he says..."

19 (unintelligible) "... story's different but he
20 says he -- he admits to him doing it?"

21 "What do you mean?"

22 "Like, if his story's different. Like,
23 I never did nothing or something."

24 "Did you?"

25 "Not really."

1 "What do you mean, 'not really'?"

2 "They got into my head."

3 "Huh?"

4 (Unintelligible.)

5 ATTORNEY DRIZIN: Okay. That's the extent
6 of the clip. Thank you.

7 Q (By Attorney Drizin) Um, do you recall this
8 section of the March 1 interrogation of Brendan
9 Dassey?

10 A Yes.

11 Q Okay. And do you recall discussions amongst you
12 and Mr. Edelstein about whether or not to use
13 this clip in your defense of Brendan?

14 A Yes.

15 Q Um, and was it Mr. Edelstein's opinion that you
16 should play this for the jury?

17 A Yes.

18 Q Why did he think it was important that you play
19 this for the jury?

20 ATTORNEY KRATZ: Objection, Judge.

21 We're -- it's hearsay. We can ask Mr. Edelstein. I
22 assume he's going to testify.

23 THE COURT: Sustained.

24 Q (By Attorney Drizin) Did you discuss with
25 Mr. Edelstein playing this clip for the jury?

1 A We did.

2 Q Okay. Ultimately, you decided not to play this
3 clip for the jury; correct?

4 A It was decided it would be my call.

5 Q Right.

6 A And I --

7 Q And -- and you made the decision not to play this
8 tape to the jury; correct?

9 ATTORNEY KRATZ: Judge, once again, I'm
10 going to interpose an objection. And I would like
11 to hear from Counsel, since they're also claiming
12 Mr. Edelstein is deficient, did they want to play it
13 or not? Which -- which one of the two is deficient?
14 They get to pick now.

15 THE COURT: Overruled. He can answer.

16 THE WITNESS: I don't remember the
17 question.

18 Q (By Attorney Drizin) Did you decide -- was it --
19 you made the call on whether to play this tape?

20 A I did.

21 Q And you decided not to play the tape; correct?

22 A This portion, correct.

23 Q Okay. And Mr. Edelstein had a different opinion
24 about whether or not to play this tape?

25 A He did.

1 Q Okay. Um, did you view this as a recantation of
2 his earlier confession?

3 A No, I didn't.

4 Q Okay. Why didn't you play this tape, Mark?

5 A I felt that mom coming in, and going up to Brendan,
6 and what it appear -- what it appeared to me as mom
7 realizing, my son just did something serious and now
8 he's going to jail.

9 I didn't want other jurors to see that,
10 and -- and have that same reaction that, as a
11 parent, could almost empathize that this is how I
12 would react if my son admitted a very serious
13 offense.

14 So rather than have that personalization
15 of the -- of the three-hour clip, or the
16 three-hour videotaped confession, I would
17 rather -- I wanted it just to be as sterile as
18 possible.

19 Brendan ask -- being asked the questions
20 by the officers, we could then try to
21 cross-examine the officers on the different
22 interrogation techniques, and -- and leave out
23 this idea that this is a -- you know, to
24 personalize this and make this as non-dramatic as
25 possible. I thought that there -- this made it a

1 more dramatic videotape with it in than with it
2 out.

3 Q So you didn't want to play one particular clip,
4 um, of an interrogation? Um, you rather have --
5 have the jury just see the interrogation played
6 from start to finish?

7 A I -- I didn't want the part where he's eating the
8 sandwich and drinking a soda in there either.

9 Q I understand that.

10 A But for -- not necessarily because it was boring and
11 long, but because it looked mundane.

12 Q Okay.

13 A But that -- that's the reasons why. I'd rather --
14 it's like an autopsy photo. I'd rather use the
15 autopsy photo than the actual crime scene, because
16 it's very, um -- it's almost mechanical. Photog --
17 the photographs of the autopsy versus the crime
18 scene. The crime scene brings more context, and more
19 drama, and more emotion.

20 And that's what this was bringing, was
21 emotion to the confession versus just the
22 question, answer, question, answer with the -- a
23 child who has some clear deficiencies.

24 Q This is the only time during the course of the
25 day of March 1. Is this the only time where

1 Brendan is allowed to be alone with his mother?

2 A I don't recall.

3 Q Do you recall any other times when he and his
4 mother are in the interrogation setting and the
5 police officers are not with them?

6 A No, I don't recall any other times. Other than the
7 night before when they were at the resort.

8 Q And when Brendan says, "They got to my head," or
9 that -- I think that's what he says. "They got
10 to my head." Is that the only place on the
11 entire interrogation video where he gives any
12 explanation for why he confessed?

13 ATTORNEY KRATZ: Judge, I'm going to
14 object. It's speculative and conclusory that
15 that's an explanation for why he gave his --
16 his -- his statement. I've got an equally
17 plausible explanation for that.

18 THE COURT: I understand in the past
19 it's been referred to as a recantation. I don't
20 think it's being characterized that way right
21 now.

22 I think the question is, is that the
23 only place where he said why he's implicated
24 himself in the crime. And I don't think that
25 characterizes it one way or another. So it's

1 overruled. You can answer that.

2 THE WITNESS: Up -- up to this point? I
3 can't point to any other places he would have
4 said it up to this point.

5 Q (By Attorney Drizin) Okay. Now, Mr. Fremgen,
6 we're winding down here, thankfully. Um, the
7 prosecution in its opening statement to the jury
8 laid out 19 factors that they believe were
9 corroborated in Brendan's confession. Do you
10 recall that?

11 A Nineteen facts? Yes.

12 Q Nineteen facts. And they made that in their
13 opening statement and they also made that in
14 their closing argument; correct?

15 A Yes.

16 Q And those 19 facts were sort of a blueprint, if
17 you will, for how they were going to demonstrate
18 that Brendan's confession was reliable?

19 A Correct.

20 Q Okay. You did not, at any point during the
21 trial, attempt to rebut each of those 19 facts;
22 correct?

23 A No. I don't agree.

24 Q Did you systematically address each of the 19
25 facts that they pointed out in their opening and

1 their closing?

2 ATTORNEY KRATZ: I'm going to object,
3 Judge, as irrelevant. Certainly a matter of trial
4 strategy and not one that goes to deficient
5 performance.

6 ATTORNEY DRIZIN: I would --

7 THE COURT: Overruled. He can answer.

8 THE WITNESS: I believe we did address,
9 if not all of them, the context in regards to the
10 argument that the officers' questioning of
11 Brendan was an attempt to implant in him or
12 suggest to him the answers they wanted on some of
13 those facts.

14 Q (By Attorney Drizin) So with respect to the
15 possible contamination of Brendan's statement by
16 the officers, is it your testimony that you
17 highlighted for the jury each and every instance
18 of contamination?

19 A I'd have to read the entire transcript. I don't know
20 if we approached it that way, each and every fact. I
21 know we approached just -- I -- from my recollection,
22 all the facts, and if there were some that we didn't
23 actually approach, it was in -- the argument at the
24 end was still the same. You can't believe the
25 testimony that -- the statements, because of the fact

CONTAMINATION

1 that they were the product of suggestion.

2 Q Now, at trial the jury saw the interrogation
3 played from start to finish up until the point of
4 the time that -- that mom came into the room; is
5 that fair?

6 A Correct.

7 Q Okay. At no time during your examination of
8 Officers Wiegert and Fassbender did you play the
9 tape?

10 A I didn't do the cross-examination.

11 Q Okay. At no time did your co-counsel play the
12 tape?

13 A Correct.

14 Q In fact, at no time during your case did you or
15 your co-counsel ever play the tape?

16 A Correct.

17 Q Okay. And so to the extent that you attempted to
18 demonstrate contamination, it would have been by
19 reading portions of transcripts to the officers;
20 correct?

21 A Correct.

22 Q Okay. And you believed, didn't you, that there
23 were many instances where police officers had
24 suggested facts to Brendan during the course of
25 his interrogations?

1 A That was our position. Our defense.

2 Q Okay. Now, there were also, um -- the -- there

3 are other sources of potential contamination in

4 this case; correct? Besides police

5 contamination?

6 A I don't know what your -- mean by that.

7 Q This was a widely publicized case? Yes?

8 A Yes.

9 Q There were numerous newspaper articles and

10 television shows discussing the details of this

11 case?

12 A Yes.

13 Q Um, and at various --

14 A Well --

15 Q -- point --

16 A I'm sorry. Don't mean to interrupt you. Avery and

17 Dassey, yes.

18 Q So combined it was even more than it would be

19 individually?

20 A Correct.

21 Q Okay. And throughout the course of this

22 investigation many details of the police findings

23 were discussed in media coverage; correct?

24 A There was some, yes.

25 Q And, in fact, you collected, um, an extensive

1 amount of media coverage to use as an exhibit for
2 your motion to change venue; correct?

3 A Correct.

4 Q So you reviewed those media reports, and you saw
5 the extent to which details were in the public
6 domain? Is that fair?

7 A Yes.

8 Q Okay. Did you ever ask Brendan Dassey whether or
9 not he had seen any of that news coverage?

10 A I never did.

11 Q Last series of questions. Do you recall the
12 closing argument in this case?

13 A Mine or Attorney Fallon?

14 Q The defense closing argument. Do you recall it?

15 A For the most part.

16 Q Okay. You took part of the argument, and
17 co-counsel, Ray Edelstein, took part of the
18 argument; correct?

19 A Correct.

20 Q Okay. Um, during Mr. Edelstein's closing
21 argument, do you recall a portion of the argument
22 where he essentially conceded that Brendan had
23 been at the fire and had seen body parts in the
24 fire? Do you recall that?

25 A Yes.

1 Q Was that a surprise to you when Mr. Edelstein --

2 ATTORNEY KRATZ: Objection, Judge.

3 Q -- said that?

4 ATTORNEY KRATZ: I'm sorry. I'm going
5 to object as irrelevant. And at this point,
6 Judge, given the lack of specificity in the
7 defense motion, um, I'm wondering if they believe
8 that is deficient performance to, um, make that
9 concession as a matter of trial strategy.

10 ATTORNEY DRIZIN: We --

11 ATTORNEY KRATZ: Not --

12 ATTORNEY DRIZIN: -- do. We do, and
13 it's in our motion. It's clearly in our motion.

14 ATTORNEY KRATZ: And who's going to say
15 that?

16 ATTORNEY DRIZIN: Both of them can say it.

17 THE COURT: Objection overruled. You can
18 answer.

19 THE WITNESS: Was I surprised?

20 Q (By Attorney Drizin) Yes.

21 A Yes.

22 Q Had it been anything you had discussed with Ray
23 Edelstein before he went to the podium and made
24 his closing argument?

25 A No.

1 Q Okay. And you were surprised why?

2 A Because it wasn't something that came up the night
3 before when we each bounced ideas off each other for
4 our closing.

5 Q And you knew that Mr. Edelstein's concession, if
6 you will, occurred after Brendan had testified in
7 this case; correct?

8 A Well, it was closing, yes.

9 Q Okay. And -- and Brendan had made no such
10 admission during his direct, uh, or during cross,
11 did he? He -- Brendan didn't say anything about
12 being at the fire when he was questioned on
13 direct?

14 A I don't think he said anything, correct.

15 Q Well, he -- he didn't say anything about seeing
16 Teresa in the fire when he was questioned on
17 direct; correct?

18 A On -- correct. On direct of Brendan?

19 Q Correct. Or on cross. He never made that
20 admission?

21 A He didn't, no. Not at the trial.

22 Q So did you and Mr. Edelstein discuss with Brendan
23 Dassey, prior to Mr. Edelstein's closing, whether
24 it would be okay for him to deliver that
25 concession speech?

1 A No.

2 ATTORNEY DRIZIN: Just a minute, Your
3 Honor.

4 Q (By Attorney Drizin) We talked about whether or
5 not you ever asked Brendan if he had seen media
6 coverage of the case. Do you recall that?

7 A I never asked him that.

8 Q And did you ever ask him whether he and his
9 family discussed the media coverage about the
10 case?

11 A No.

12 ATTORNEY DRIZIN: No further -- yeah, I'd
13 like to move in some exhibits through this witness,
14 Your Honor.

15 Exhibits 218 and 219. These are
16 Mr. Fremgen's motions that he filed in this case.

17 Exhibits 340 and 229.

18 ATTORNEY FALLON: What are those again,
19 Counsel, just so we're clear?

20 ATTORNEY DRIZIN: Exhibit 340 is an e-mail
21 from Michael O'Kelly to John Dederling and Tom
22 Fassbender regarding an interview form.

23 ATTORNEY FALLON: All right.

24 ATTORNEY DRIZIN: Exhibit 229. Exhibit 229
25 is an e-mail from Ken Kratz to Mark Fremgen dated

1 November 30, 2006.

2 Exhibit 72 is a letter from Mark Fremgen
3 to Robert Gordon dated October 10, 2006, the
4 retention letter, if you will.

5 Exhibits 215 through 217. Exhibit 215
6 is a November 15, 2006, letter from Dr. Gordon to
7 Mark Fremgen.

8 Exhibit 216 is a motion in limine.
9 Defendant's request to introduce expert testimony
10 raise suggestibility.

11 And Exhibit 217 is Mr. Fremgen's brief
12 in support of the admissibility of an expert.

13 Exhibit 2-2-5 is an e-mail dated
14 January 17, 2007, from Jerry Buting to Mark
15 Fremgen.

16 Exhibit 73 is an e-mail from Jerry
17 Buting to Mark Fremgen dated January 17, 2007.

18 Exhibit 77 and 78. Seventy-seven is an
19 e-mail from Jerome Buting to Mark Fremgen dated
20 April 6, 2007.

21 Seventy-eight is an e-mail between Mark
22 Fremgen and Dr. Gordon. This is a cluster of
23 e-mails from April 6, 2007, through April 8,
24 2007.

25 Exhibit 79 is an e-mail chain between

1 Dr. Lawrence White and Mark Fremgen. Um,
2 April 11, 2007, is the final e-mail in that
3 chain.

4 And Exhibit 74 is an e-mail from Jerome
5 Buting to Mark Fremgen dated March 22, 2007.

6 Um, I think that's the extent of the
7 exhibits, Your Honor.

8 THE COURT: Mr. Kratz or Mr. Fallon?

9 ATTORNEY KRATZ: We've already objected to
10 Mr. Buting's opinions, Judge. But other than that
11 we have no objections.

12 THE COURT: The Court is going to receive
13 all of the offered exhibits. In some instances the
14 Court will use them for the testimony that tied up
15 the exhibit to the witness. In fact, in all
16 instances.

17 All right. Mr. Kratz?

18 ATTORNEY KRATZ: Yes. Did you want me to
19 begin now, Judge? Uh --

20 THE COURT: Your call.

21 ATTORNEY KRATZ: This might be as good a
22 time as any for our --

23 THE COURT: All right.

24 ATTORNEY KRATZ: -- afternoon break.

25 THE COURT: All right. Let's take 15

1 minutes.

2 (Recess had at 2:40 p.m.)

3 (Reconvened at 3:00 p.m.)

4 THE COURT: All right. We'll resume.

5 Mr. Fremgen, you are now Mr. Kratz's witness.

6 THE WITNESS: All right.

7 **CROSS-EXAMINATION**

8 BY ATTORNEY KRATZ:

9 Q Mr. Fremgen, good afternoon. Could you describe
10 for me, please, the extent of your trial

11 experience? I don't want to hear about just

12 handling cases. But I assume your 18 years of

13 experience has encompassed jury trials as well?

14 A Um, correct. Uh, probably handled about 50 jury
15 trials. I've done intentional -- this is not the
16 first homicide trial. I've had, um, sexual assault
17 trials, OWI trials, misdemeanor trials, number of
18 felony trials. Um --

19 Q Not your first day at the rodeo as it were?

20 A No.

21 Q Mr. Fremgen, the public defender's system in
22 Wisconsin certifies lawyers for various kinds of
23 cases; is that true?

24 A Correct.

25 Q Are you certified by that agency to handle the

1 most serious felonies in Wisconsin, including
2 Class A felonies?

3 A At the time -- since February of 2009, I'm no longer
4 practicing. But up until then, yes.

5 Q Yes. Um, that's what I meant. And as a trial
6 lawyer, perhaps, unlike an appellate lawyer, do
7 you have other considerations in what evidence to
8 present other than what you can? Do you
9 understand the question?

10 A Um, I think I understand your question. When -- and
11 I -- if I go beyond what you're asking, please stop
12 me.

13 When I take on a case that I know it's
14 going to go to trial, I try to pick a particular
15 focus or strategy and stick with it. So
16 everything I do in the case is related to what I
17 hope to accomplish in -- in -- in the trial,
18 including --

19 Q Well, let me --

20 A -- if that's --

21 Q -- let me --

22 A -- what you're asking.

23 Q I'm going to stop you there, Mr. Fremgen. The
24 suggestion is that you should have done
25 everything, instead of sticking to one strategy.

1 Or at least I'll ask you that question. Why
2 don't you just do everything in front of a jury?

3 ATTORNEY DRIZIN: I'll object to that,
4 Judge. That's not any suggestion that I made.

5 ATTORNEY KRATZ: No. I get to ask him why
6 he doesn't just do everything, Judge.

7 THE COURT: Yeah. The -- the objection's
8 overruled. If he -- if you understand the question,
9 you can answer it.

10 THE WITNESS: I think I do. Um, well,
11 there's -- actually there is a strategy where you
12 could do just about anything, um, that -- I think
13 attorneys refer to that as throwing it up against
14 the wall and hoping something sticks. And that's
15 probably the last strategy you want to choose.

16 The way I've been trained over the years
17 at -- through the public defender's office and
18 through my own experience is that it always is
19 best to have a particular focus of your case and
20 work towards that focus so everything is logical
21 and connected with what your goal is.

22 And that's how I approach just about
23 every case as a trial preparation. Pick a
24 defense. Pick a strategy, whatever it is, and
25 everything else up to that point, including how

1 you question witnesses, should all be focused and
2 trained towards that goal.

3 Q Is it possible, then -- in fact, is it desirable,
4 or had you been trained, that in furtherance of
5 that goal you may sometimes forgo the
6 introduction of some otherwise relevant evidence?

7 A There are times.

8 Q All right. Now, Mr. Fremgen, I assume the
9 development of the trial strategy, at least in
10 some respects, includes discussions with clients;
11 is that true?

12 A Yes.

13 Q And do you usually choose a, um -- not just
14 limiting it to trial strategy, but a whole case
15 disposition strategy, jointly with a client?

16 A Not all attorneys do, but I -- I do. I want the
17 client to be part of the process because, if they're
18 not, they're not going to be helping get to that
19 ultimate goal.

20 Q Is jury trial the most common disposition -- case
21 disposition of cases that you're assigned?

22 A I would say probably over 95 percent of the case --
23 criminal cases that I handled over the years were all
24 dealt with through a plea negotiation.

25 Q Plea negotiations?

1 A Correct.

2 Q Are any of those plea negotiations ever pursued
3 when your client protests their innocence?

4 A Sometimes if the client also suggests getting the
5 best deal and wants to enter an **Alford** plea for
6 instance --

7 Q Um-hmm.

8 A -- they're still saying they're innocent, but the
9 deal is too good to give up --

10 Q I don't --

11 A -- but for the most part that's the exception not the
12 rule.

13 Q I don't mean at the time of the actual entry of
14 the plea. I mean, at some early stages in the
15 handling of the case have you had the experience
16 of having a client who indicates that they're
17 innocent or not guilty, but the case eventually
18 ends up in a plea disposition?

19 A There have been.

20 Q In fact, most cases for clients that care to
21 express their opinion to you, uh, at least at
22 some point, either minimize their involvement or
23 express outright innocence; isn't that true?

24 A You said most. A lot.

25 Q All right.

1 A I would agree with that.

2 Q It's not unusual for that to happen?

3 A Well, absolutely.

4 Q Well, we've heard in this case that Mr. Dassey,
5 at least in the early stages of Mr. Kachinsky's
6 representation and in yours, um, protested his
7 innocence. Would you say that was a fair
8 characterization?

9 A He claimed he had nothing to do with this.

10 Q Yet you, like Mr. Kachinsky, pursued possible
11 plea avenues; isn't that true?

12 A I don't know if I pursued. When I was offered any
13 offer of a plea agreement, I took those to my client.

14 The one time I recall having specific
15 negotiation, as in back and forth, was just
16 probably on the eve of trial, sometime in April,
17 um, where there was a discussion of felony
18 murder, and some combination of an offense.

19 And that discussion was -- wasn't just
20 the State saying, here's our offer. We went back
21 and forth on a couple of ideas. But I did end it
22 the same way I ended every plea conversation.
23 I'll have to go talk to my client.

24 Q And on each occasion was a plea offer, whether it
25 was just general or more specific, conveyed to

1 Mr. Dassey in this case?

2 A Every offer was conveyed to Mr. Dassey.

3 Q Now, is there a point in -- I'm talking

4 generally, not in this case. Is there a point in
5 representing a client, when a plea offer is made,
6 when you evaluate the strength of the State's
7 case, and when you're asked to actually make a
8 recommendation to your client, on whether they
9 should accept the offer or not?

10 A Just about every case.

11 Q Did that happen in this case?

12 A Yes.

13 Q And on more than one occasion, did you recommend
14 to Mr. Dassey that he accept an offer for a
15 change of plea?

16 A Yes.

17 Q In fact, you, based upon your 18 years of
18 experience, suggested to Mr. Dassey that it was
19 in his interest to at least consider the State's
20 offer; is that right?

21 A Yes.

22 Q Did you do that even while Mr. Dassey was
23 claiming to still be not guilty or not involved?

24 A I think I have an obligation to present every offer
25 and my opinion of the offer, whether my client says

1 he's guilty or not.

2 Q I'm saying in this case, did that happen despite
3 Mr. Dassey's claim of innocence?

4 A Correct.

5 Q So, generally, I assume that practice, the
6 practice of pursuing plea discussions despite a
7 client's claim of innocence, is not unusual in
8 your field or in the defense field?

9 A I can't speak for other attorneys, but my experience,
10 no, it's not unusual.

11 Q All right. Certainly wouldn't rise to the level
12 of being a bad lawyer or deficient performance,
13 generally; isn't that true?

14 A To not -- to not enter into discussions about pleas
15 even if your client says he didn't do it?

16 Q Yeah. Because your guy says he didn't do it --

17 A No.

18 Q -- to not pursue a plea?

19 A I -- I agree. No, that wouldn't.

20 Q All right. By the way, Mr. Dassey, um, did his
21 version, as far as you were able to determine
22 from those -- I'm only talking about those
23 statements now that, um, are reasonably related
24 to your representation and your claim of
25 deficient performance -- did Mr. Dassey's version

1 of events change over time in speaking with you?

2 A No. He generally stuck to the same story. At times
3 there were some -- I think, some minor differences in
4 what he might have said, but for the most part,
5 throughout my representation, when I would ask him to
6 go back over the timeline again, or go back over the
7 chronology, tell me where you were from here -- from
8 when you got home off the bus to, you know, the next
9 day, was essentially the same.

10 Q Mr. Drizin asked you specific questions about
11 Mr. Dassey's claims and why he may have tried to
12 explain why he confessed or made a statement in
13 this case. Do you recall those questions?

14 A Yes.

15 Q Do you recall Mr. Dassey's answers to you and
16 were they the same throughout time?

17 A No.

18 Q They had changed over time?

19 A That had changed. Why -- if -- again, let me just
20 clarify. If your question is that -- what Brendan
21 had said to us as to why he told the police what he
22 said?

23 Q Yes.

24 A Yes, that did change.

25 Q So Brendan didn't consistently tell you, I got

1 this all off the news? Never heard that, did
2 you?

3 A He never said that.

4 Q Never heard your client say, I got this from my
5 family or some other contaminated source, did he?

6 A From another source? Yes, he did at one point.

7 Q All right. What I'm saying, did he consistently
8 explain that's how I came up with all these
9 details?

10 A No.

11 Q He had a chance to tell you that, didn't he?

12 A Yes.

13 Q He had a chance to tell the jury that, didn't he?

14 A Yes. He testified.

15 Q In fact, his explanation for why he might confess
16 to a crime that he supposedly didn't do was an
17 important matter of trial preparation between you
18 and Mr. Dassey, wasn't it?

19 A Yes.

20 Q And didn't perhaps the most important opportunity
21 to explain it, that to the jury, do you remember
22 what Mr. Dassey said to the jury?

23 A I believe he originally have said, I don't know. But
24 then I believe he, on cross-examination, indicated he
25 got it from a book.

1 Q Okay. Well, let's -- let's go through -- through
2 the "I don't know" first, 'cause you remember,
3 at least on cross-examination, by far that was
4 Mr. Dassey's number one answer; isn't that true?

5 A And with us it was as well.

6 Q Correct.

7 A Not on direct, but in conversations.

8 Q I direct Counsel to the Dassey trial testimony --

9 A Oh.

10 Q -- bottom of page 44. I'm just going to ask if
11 you recall this, Mr. Fremgen. I'm going to talk
12 more specifics now. Do you recall Mr. Dassey
13 being asked:

14 "Why did you answer the questions to
15 them..."

16 Meaning the police.

17 "...the way you did?"

18 He answered: "I don't know."

19 "Do you have an explanation for
20 admitting this?"

21 Dassey's response was: "No."

22 Do you remember that?

23 A Yes.

24 Q Now, as far as you know, during that process,
25 during the trial process, there wasn't anything

1 preventing Mr. Dassey from explaining to the jury
2 why he may have admitted this; right?

3 A As far as I know, no.

4 Q Wasn't anything preventing him from saying, this
5 was a false confession, or this was fed to me, or
6 anything like that; isn't that true?

7 A That there wasn't anything stopping him from saying
8 that?

9 Q Yes.

10 A As far as I know, no.

11 Q In fact, if we were candid with each other, uh,
12 you would have found that easier to work with
13 than the answers that actually were provided by
14 the defendant, himself. The state of the record
15 as we sit here today; isn't that right?

16 A It would have been better, yes.

17 Q All right. Do you recall Mr. Dassey explaining
18 that he didn't just lie to the cops, but he lied
19 to his mom as well?

20 A I'm sorry. Ex -- I'm sorry. You said that, did I
21 remember him explain to the jury?

22 Q Do -- do you remember him explaining that he just
23 doesn't lie to the cops but he lied to his mom as
24 well?

25 A I don't recall. If it's in the transcript, I'll

1 concede you're right. But I don't recall it.

2 Q I'll just -- I'll -- I'll do it --

3 A Okay.

4 Q -- the easy way. Bottom of page 54:

5 "Why did you tell her you went over

6 there?"

7 "Answer: I don't know."

8 "Question: You lied to your mother as

9 well?"

10 "Answer: Yes."

11 A Okay.

12 Q Do you remember that?

13 A Okay.

14 Q And when asked why he lied to the cops,

15 specifically, on page 56, Mr. Dassey explained,

16 because I'm just like my family. I don't like

17 cops. Do you remember that --

18 A I --

19 Q -- explanation?

20 A I do recall that.

21 Q Now, so far, at least, in -- in what you recall,

22 and what I've read to you, you don't see anything

23 about promises, or inducements, or any of those

24 factors that might be consistent with a false

25 confession; is that true?

1 A That's true.

2 Q On the issue of promises, bottom of page 42,
3 Mr. Dassey, when he had a chance to explain to
4 the jury whether these cops made promises to him,
5 he said, "Sort of."

6 When being asked, specifically, "What
7 does that mean?"

8 Mr. Dassey said: "That if I told the
9 truth--" on the top of 43 -- "If I told the
10 truth, that I wouldn't go away for life."

11 Dassey was then asked: "What other
12 promises were made to you?"

13 Mr. Dassey said: "That's all I recall."

14 Recall him answering that way?

15 A That I do recall.

16 Q So when being given the opportunity to explain to
17 the jury, and once again the state of this record
18 as we sit here today, Mr. Dassey was unable to
19 indicate whether he was given any promises or
20 inducements in exchange for his statement. Is
21 that what you recall?

22 A Yes.

23 Q Now, Mr. Dassey was asked at trial if he'd ever
24 watched any news accounts, if he watched any
25 television about his or Steven's case. Do you

1 recall that question being asked of them?

2 A By me or --

3 Q By Mr. Fallon.

4 A Okay. Um, I think I vaguely do recall that, yes.

5 Q All right. Page 41, tell me if you remember
6 this, Mr. Fremgen.

7 "At some point your Uncle Steven is
8 arrested?"

9 Brendan answers: "Yes."

10 Brendan's then asked: "Did you watch
11 any TV accounts about that?"

12 Brendan's answer to the jury is: "Not
13 that I remember."

14 Do you recall those questions and
15 answers?

16 A Vaguely, yes.

17 Q So when being asked about, I guess, what Mr.
18 Drizin, and Dr. Leo, and others are calling
19 contamination from media, Brendan, at least as
20 far as your conversations, and the testimony, and
21 the state of this record today, said I didn't
22 watch any television.

23 Is that a fair statement?

24 ATTORNEY DRIZIN: Objection. That's not
25 what he said. He said, "Not that I remember."

1 THE COURT: Well, the answer speaks for
2 itself.

3 Q (By Attorney Kratz) "Not that I remember." I'm
4 sorry. Maybe it wasn't important for him to
5 remember that. At least as of the trial he
6 didn't remember watching anything; isn't that
7 true?

8 A I believe that's what he testified to.

9 Q Brendan seem like the kind of kid to you that
10 reads the *Milwaukee Journal Sentinel*?

11 A No, probably not.

12 Q Does he seem like the kind of kid that watches
13 news accounts, or CNN, or other kinds of widely
14 disseminated media reports about this case?

15 A Probably not.

16 Q Did he ever tell you he did?

17 A No, he never did.

18 Q He had a chance to do that, didn't he?

19 A Do you mean did we meet plenty of times and it could
20 have come up in conversation? Yes.

21 Q Absolutely. You asked him, didn't you?

22 A Did I ask him if he'd seen it?

23 Q Yes.

24 A No, I never asked him --

25 Q All right.

1 A -- if he'd seen it.

2 Q You'd asked him, though, for explanations about
3 why he may have confessed; is that right?

4 A Correct.

5 Q Now, Brendan also apologized in the March 1
6 statement, I believe, to the Halbach family, or
7 may have in a phone call. Do you recall if that
8 was March 1 or if it was in a -- a phone call?

9 A When he apologized to the Halbach family?

10 Q Yeah.

11 A I -- I can't recall if it was in one of the taped
12 conversations or it was, um, in the -- the aud --
13 excuse me -- the videotaped conversation in the jail
14 conversation. There was some con -- one of those
15 that did reference it.

16 Q I -- I'll just ask you, Mr. Fremgen, do you
17 recall, um, asking Mr. Dassey why he apologized
18 to the victim's family in this case?

19 A Yes, we did.

20 Q Do you remember what Brendan told you?

21 A He said, "I don't know."

22 Q How much preparation did you do with Brendan
23 prior to his decision to testify in this case?

24 A After the first meeting with Brendan, every meeting
25 with me we talked about one point or another that he

Asked for
EXPLANATIONS

1 may have to testify and explain his statements to
2 the -- to the police, and that would have -- I'd have
3 to hazard a guess, but I'd say seven, eight, nine
4 times.

5 Q All right.

6 A Um, the night before trial, the night before his
7 testimony, we did it at the jail the last time, Ray
8 and I.

9 And I don't know about Ray. He went on
10 different times to the jail to meet with Brendan
11 as well. That was one of our -- we sometimes
12 went together, sometimes separately, um, to see
13 whether Brendan would talk to one of us more
14 openly than the other.

15 And you'll have to ask Ray, but my
16 recollection was it was the same type of
17 conversation and the same types of answers.

18 Q Do you remember at -- at one point Mr. Dassey
19 suggesting to you that maybe he had gotten these
20 ideas out of a book?

21 A He did. He did bring it up. Uh, I think it was the
22 night before, or maybe it was the Sunday -- Sunday
23 night when we went to go see him in the jail before
24 he testified.

25 Q Do you remember your and Mr. Edelstein's reaction

1 to that recent suggestion? Recent -- I mean,
2 recent to all the other times that you spoke with
3 him?

4 A I think one or both of us might have told him that
5 that was a ridiculous explanation. Something the
6 jury would likely not believe. And that might
7 actually be relatively close to a quote.

8 Q Immediately thereafter, did you recall Brendan
9 saying, well, maybe I dreamt it?

10 A On that conversation, the -- the Sunday night before
11 he testified, uh, that's the exact context. After he
12 mentioned the book, he also mentioned that he --
13 maybe he dreamt it. I -- I -- clarify. He didn't
14 say he dreamt it, he said maybe he dreamt it.

15 Q Okay. Well, and with your trial experience,
16 Mr. Fremgen, did you suggest, then, to Mr. Dassey
17 how that might be viewed by a jury?

18 A I think I actually asked him what -- does he think he
19 could convince a jury on that defense that he's not
20 guilty.

21 Q I'm going to go back just briefly to the plea
22 discussions that you had with the State. Do you,
23 um, recall whether there was a dynamic at play in
24 plea discussions with Brendan that, um, either
25 hampered or at least was a factor for you to

1 consider in those discussions? Do you know what
2 I'm asking you?

3 A It -- it never -- I know what you're asking. I don't
4 think it ever directly interfered with me, but from
5 information that we received from outside sources
6 there were times, for instance, when we went to the
7 jail to talk about an offer that occurred while the
8 trial was going on, that the next day we were told
9 there was a conversa -- Brendan must have talked to
10 his mom on the phone about it before he gave us his
11 answer.

12 So I would have to say that there were
13 times Brendan would talk to his family before he
14 would, um, get back to us with his decision.

15 And there was one particular time that I
16 actually called Brendan's mom and -- and had her
17 and -- and Brendan's father come to the jail, and
18 we met with Brendan first, and then they came in
19 as part of the discussion as well.

20 Q You don't know, do you -- and I'm talking about
21 whether you have first-hand specific knowledge of
22 whether Brendan's extended family was concerned
23 about the possibility of him testifying against
24 Uncle Steve?

25 A I received, and as part of the discovery, a -- oh,

1 gosh, maybe 30 or 40 CDs of telephone calls that were
2 intercepted at the jail between Steven Avery and
3 whoever he was calling, and there were times when he
4 was expressing his concerns to usually either his
5 mother or, um -- actually Brendan's mother at one
6 point, but there were other people that he would call
7 expressing concerns about Brendan and whether Brendan
8 was going to take a deal, and, um, concerns about
9 how -- you know, what was happening with Brendan.
10 How it was impact on his case.

11 Q How it impacted Steven Avery?

12 A Correct.

13 Q Let me ask you, Mr. Fremgen, was Brendan always
14 the individual relaying the response to the plea
15 offers to you or did he have that done in a
16 representative capacity at times?

17 A No, he always was the one who declined the offer.

18 Q Let's -- let's speak for a moment about your
19 motion to revisit the suppression ruling by the
20 Court. You had made a motion to -- basically a
21 motion to reconsider; is that right?

22 A To reopen, correct.

23 Q All right. And that was, um, argued by you; is
24 that correct?

25 A Yes.

1 Q Was that briefed as far as you recall?

2 A No, I don't believe so, other than what was on the
3 motion.

4 Q And before submitting that argument to
5 reconsider, did you ask the Court consider both
6 the voluntariness and what would be the **Miranda**
7 issues?

8 A I don't think we brought up the **Miranda** issue at that
9 time.

10 Q Let me ask you, as a defense attorney, are you
11 required to file motions that have no basis in
12 fact or law?

13 A No. Quite the opposite.

14 Q In fact, if there is a baseless -- or what we
15 sometimes called a specious -- argument to be
16 made, you're precluded from bringing that, aren't
17 you?

18 A Or face sanctions, correct.

19 Q Did you make a professional judgment before you
20 made that decision whether there was a viable
21 **Miranda** issue here?

22 A I think the discussion when -- no, quite frankly, I
23 think it was Ray that was more the proponent of that
24 motion when we discussed it.

25 My recollection was there was even a

1 conversation with the Court about the various
2 motions that we had filed, and noting that that
3 issue had been waived by Attorney Kachinsky
4 before, so that we really didn't have much of a
5 basis to pursue it now. That was my recollection
6 of our conversa -- Attorney Edelstein and my
7 conversation. So we decided we weren't going to
8 pursue it.

9 Q Well, I don't -- and if your -- if your memory
10 is -- is -- is not clear on this issue, please
11 tell me, but as you independently think back, did
12 you believe there to be a viable **Miranda** issue
13 either on the 27th or the 1st of March?

14 A At that time when we reviewed, no.

15 Q All right. I do want to talk about the phone
16 call on the 13th, since that was the only part of
17 that weekend that was ever introduced.

18 Do you recall in what part of the case
19 that -- that phone call or phone calls on 13th
20 and 15th were introduced?

21 A I recall that one or both -- well, I recall that one
22 was used in, um -- when Dr. Gordon testified. I
23 recall at least one being played by Attorney Fallon
24 during his cross-examination of Brendan. And I also
25 recall, in the closing, a reference to -- at least,

1 specifically, I refer -- I recall a -- in closing, a
2 reference to, "Brendan, you could have been a hero"
3 comment in one of those phone calls.

4 Q Right.

5 A I think there was actually an emphasis about the --
6 the hero versus where -- what he was now.

7 Q And although this is a -- a matter of law, it --
8 it goes to your decision-making, you are aware,
9 are you not, that statements used either in
10 cross-examination, or what's called "rebuttal
11 purposes," there's a different admissibility
12 standard than if you use it in what's called the
13 "State's case in chief"? You understand that?

14 A Yes.

15 Q And, in fact, even statements that are improperly
16 obtained, save voluntariness for just a moment,
17 but they're improperly obtained by the police,
18 can still, and oftentimes are, used in
19 cross-examination and rebuttal; that true?

20 A In the discretion of the court, yes.

21 Q And, in fact, in some of my correspondence to
22 you, at least one case, uh, I had referenced that
23 that phone call on the 13th, if used at all,
24 would only be used in the rebuttal part of the
25 State's case. Do you recall?

1 A I think that was part of that e-mail that was brought
2 up previously by Attorney Drizin.

3 Q All right. Now, as we sit here today,
4 Mr. Fremgen, you have opined that if you had
5 known about Mr. O'Kelly's behavior on the 12th of
6 May, you may have made some other arguments to
7 the Court regarding admissibility of some
8 statements; is that right?

9 A I think the question was would I have addressed it
10 differently. And my honest answer is, yes, I would
11 have probably addressed the motion differently.

12 Q All right. Um, well, you've had a chance, now,
13 to think about that issue. In other words, you
14 didn't think about it for the first time when you
15 walked into court today; is that right?

16 A No. I thought about it the minute I watched the
17 video.

18 Q And is there anything -- specifically about the
19 phone call now. Is there anything by way of case
20 law, whether it's Wisconsin or otherwise, that
21 you believe would support the, um, exclusion of
22 that phone -- phone call for rebuttal purposes?

23 A Without having researched it, I don't know of any
24 cases off the top of my head.

25 Q I'm curious, then, what you would have done

1 differently?

2 A How I would have approached it differently at
3 rebuttal you mean?

4 Q How would you have approached, as that statement
5 was, in fact, used at trial, in the rebuttal part
6 of the State's case, how would you have
7 approached the admissibility issue differently
8 given the State's concession that it would only
9 be used during rebuttal?

10 ATTORNEY DRIZIN: Judge, I'll ob --

11 THE WITNESS: Well --

12 ATTORNEY DRIZIN: Judge, I'll object
13 only to the form that -- that at the time of the
14 motion to suppress he had no -- he would have had
15 no idea how the State was planning to use that
16 statement. Whether it would be in rebuttal or
17 in -- in his case in chief.

18 ATTORNEY KRATZ: I could maybe ask it as a
19 hypothetical, Judge. Maybe that would be an --

20 THE COURT: I think --

21 ATTORNEY KRATZ: -- easier way to --

22 THE COURT: -- that would cure --

23 ATTORNEY KRATZ: -- do that.

24 THE COURT: -- the objection.

25 Q (By Attorney Kratz) Hypothetically, then,

1 Mr. Fremgen, if the State, um, intended to or, in
2 fact, did use that statement only for rebuttal
3 purposes, is there a -- a different argument or a
4 different tactic that you would have taken
5 knowing what you know now?

6 A A lot of it would probably depend upon what happened
7 with the original motion. And it's not a copout, but
8 I'm trying to explain my answer.

9 If the original motion -- if I would
10 have presented that video of -- the O'Kelly
11 video -- and if the Judge was so inclined to find
12 it so egregious to say you can't use that May
13 statement, I would have made that argument again,
14 even on rebuttal, let's assume just the phone
15 call, because if it is so egregious, the
16 connection between that phone call and that video
17 is just as equally tainted that, in the Court's
18 discretion, 'cause the Court gets to decide
19 what's admissible regardless of whether it's
20 rebuttal or -- or case in chief, that would have
21 been my argument.

22 Q Here's the 50 thousand-dollar question then.
23 Since the statement -- the same kind of call was
24 made without any State action on the 15th of May,
25 how would you have kept that one out?

1 A I -- well, you're asking how would I keep it out, or
2 how would I approach it. I'm not saying I'm keeping
3 anything out, okay? Let's be -- be fair.

4 I mean, I don't make that call. Neither
5 do you. The Judge does. And I know -- you know,
6 we might make arguments. Sometimes they're just
7 protect the record, sometimes it's because we
8 have to say something.

9 I probably would make the same argument,
10 that -- that the overreaching -- until Attorney
11 Kachinsky was officially withdrawn from the case
12 by the Court, that everything that occurred
13 between that O'Kelly video and the withdrawal, or
14 the removal of Attorney Kachinsky, is all tainted
15 by the same problem. Whether it's successful or
16 not, that would have been my argument.

17 Q All right. Mr. Drizin asked you about Exhibit
18 No. 3-4-0. It was an e-mail and an attachment
19 from Mr. O'Kelly to Mr. Fassbender, which
20 included a blank interview form. Do you recall
21 that?

22 A Yes, I do.

23 Q Now, interestingly, you had an opinion on direct
24 that you believe, as you sit here today, that
25 that showed some kind of State action -- I wrote

1 down those words -- on behalf of Mr. O'Kelly.

2 Can you explain that?

3 A I think my answer actually was this, along with the
4 previous, um, video, shows that Mr. O'Kelly wasn't
5 working on behalf of Mr. Dassey, which was his --
6 should have been his only client, but appeared that
7 he was now an arm of the State, yes. That I -- I
8 would -- with that condition, I would agree with what
9 you just said.

10 Q Would you agree that sending a blank interview
11 form --

12 ATTORNEY DRIZIN: Objection to the
13 characterization of it as blank, Your Honor.

14 THE COURT: Well --

15 ATTORNEY KRATZ: Not filled --

16 THE COURT: -- that's true.

17 ATTORNEY KRATZ: -- in?

18 THE COURT: Portions of it are filled in.
19 The heading portions. But the -- the interview
20 portions, which would form, of course, the substance
21 of the form are not filled in.

22 ATTORNEY KRATZ: I can rephrase it, Judge.

23 THE COURT: All right.

24 Q (By Attorney Kratz) As presented, uh,
25 Mr. Fremgen, as -- as 340 sits in front of you --

1 A Um-hmm.

2 Q -- would you agree that it would have little, if
3 any, utility to any investigating officer in this
4 case?

5 A Does this have any assistance to law enforcement?
6 No.

7 Q All right. Let us talk about Dr. Gordon and --
8 and Dr. White for -- for just a minute. Did you
9 and Mr. Edelstein discuss the strategy and
10 decision of retaining Dr. White?

11 A It came up, yes.

12 Q And, in fact, it came up, didn't it, under the
13 same conversation as when Mr. Buckley, as a
14 potential State witness was discussed; is that
15 right?

16 A Essentially, it was always related to Buckley.

17 Q All right.

18 A Correct.

19 Q Now, Mr. Buckley, would you agree, um, is,
20 perhaps, the -- if not "the," certainly one of a
21 number of -- the foremost expert witnesses on the
22 issue of interrogation techniques?

23 A He's prominent in that field --

24 Q All right.

25 A -- yes.

1 Q Let me ask you this, Mr. Fremgen: From your
2 years of experience, have you ever heard --
3 excuse me -- have you ever heard of a concept in
4 trial parlance called "a battle of the experts"?

5 A Yes.

6 Q What does that mean?

7 A Well, you put on yours, we'll put on ours.

8 Q And from a, um, battle of an experts, at least as
9 it -- it may influence a jury's decision, is that
10 a consideration that you, as trial counsel, make
11 in retaining an expert witness?

12 A I think, more importantly, it's when there's an issue
13 that might be uniquely suited to somebody with more
14 expertise than 12 reasonable jurors. Even smart
15 attorneys.

16 Uh, so that's when I would consider an
17 expert. When we need somebody to better explain
18 an issue or a topic. For instance, DNA. I don't
19 think any of us -- well, I'll speak for myself.
20 I couldn't explain DNA effectively to a jury. I
21 would probably want to have an expert to do so.

22 And I'm not sure that 12 reasonable
23 jurors off the street are going to walk in with a
24 working knowledge of DNA and all aspects of DNA.

25 So that would be the type of expert

1 situation where you'd want to have somebody else
2 come in and do the presentation.

3 Q In this case, however, in adopting your trial
4 strategy, did you purposely hope to make the
5 issue of this interrogation, that is the March 1
6 interrogation, something relating to common sense
7 rather than expert testimony?

8 A During our preparation, Ray -- as Ray and I talked
9 about this, Ray's focus was always on the -- the
10 statements. His -- you know, that was what he was
11 being paid, indirectly, for. His -- his focus would
12 be dealing with that topic and that issue.

13 And, all along, it was always the -- our
14 strategy to focus on what people, normal
15 individuals, your 12 normal jurors, would
16 understand.

17 Um, and we thought -- I still think --
18 that a lot of what was in those statements could
19 easily be addressed with a jury without having
20 somebody with M.D. or Ph.D after their name
21 trying to explain the same thing.

22 Q Just in arguing common sense and what would be
23 concepts that lay people could understand?

24 A Absolutely.

25 Q But there were experts available, Mr. Fremgen,

1 that could explain it. Isn't that always better?

2 A Well, not necessarily. And in this case I -- I think
3 what our -- with the expert issue, it was always
4 about, if you're going to put on yours, we,
5 hopefully, would have one that we can counter with.
6 But if you weren't going to put on one, I think it
7 would have been just as effective, and I agreed with
8 Attorney Edelstein, who, again, kind of took the lead
9 on this, as effective to do it without.

10 Q If the issue of interrogation techniques would --
11 would have or was to become an issue at this
12 trial, were you and Attorney Edelstein concerned
13 with that battle of the experts concept?

14 A To -- to some degree I never thought you'd get
15 Buckley in. With that said, yes, we were a little
16 concerned if he did -- if he was allowed to testify,
17 we'd probably have to scramble and find somebody.

18 Q Because at least -- and -- and correct me if I'm
19 wrong -- but at least in your, and probably my,
20 opinion that issue that came between Buckley and
21 Dr. White, Buckley was going to win the battle of
22 the experts; is that right?

23 ATTORNEY DRIZIN: Objection.

24 ATTORNEY KRATZ: Well, I'm asking his
25 opinion, Judge.

1 THE COURT: Overruled. If he has an
2 opinion, he can give it.

3 THE WITNESS: I'm not so sure.

4 Q (By Attorney Kratz) Fair enough. Dr. White did
5 tell you, though, um, that he wasn't eager to be
6 involved in Dassey's case; isn't that true?

7 A I think his e-mail he suggested that he didn't.
8 He -- he would prefer not to, but didn't eliminate
9 the possibility that he'd be available.

10 Q I understand. But that, at least, was a term he
11 used? He wasn't eager to be involved?

12 A Correct. Correct.

13 Q The last point on the decision to retain
14 Dr. White or not. You said Mr. Edelstein had
15 consulted a, um, colleague of his from the state
16 of Oklahoma; is that right?

17 A That's correct.

18 Q That'd be a, uh -- I think his first name is
19 Kendall. But it'd be a Mr. Ballew, B-a-l-l-e-w?

20 A I -- I can't remember his name.

21 Q All right.

22 A Sorry.

23 ATTORNEY DRIZIN: What was his first
24 name? I'm sorry.

25 ATTORNEY KRATZ: Kendall, K-e-n-d-a-l-l.

1 I'm -- I'm asking. It's the notes I have -- that
2 I've written down here.

3 Q (By Attorney Kratz) But, Mr. Fremgen, the -- the
4 question is, is it common for defense attorneys,
5 and, really, all lawyers, to contact
6 acquaintances that they might have from other
7 trials, or other areas of -- of their life, in
8 deciding whether an expert will be retained?

9 A I did in this case. I contacted a sheriff's officer,
10 who I'd known for years, and asked him just to take a
11 look at the video, and -- 'cause I knew he'd also
12 been trained in the Reid technique -- just to confirm
13 what I knew. And he said, absolutely. This is what
14 they teach you.

15 Q So on the very same issue that Mr. Edelstein, um,
16 contacted his friend in Oklahoma and on the same
17 issue for which Dr. White may have been asked to
18 testify; is that right?

19 A Well, I didn't ask him -- I -- I didn't contact this
20 person about being an expert, but I just asked him
21 about, is this your familiarity with Reid technique,
22 and his answer was -- after watching just the March
23 video, his answer was yes.

24 Q Your decision not to play the part of the clip, I
25 think it's clip number 37, from the March 1

1 statement to Brendan's mother, which included the
2 statement, "They got to my head," was there a
3 strategic -- and I know you mentioned the emotion
4 that might be involved --

5 ATTORNEY KRATZ: And, Judge, it's as
6 compound a statement as I could make -- I
7 could -- compound a question as I could ask. I'm
8 doing my best.

9 Q (By Attorney Kratz) Anyway, let me start over,
10 Mr. Fremgen. I'm -- I apologize.

11 ATTORNEY KRATZ: And Mad -- Madam Clerk.

12 Q (By Attorney Kratz) "They got to my head." Do
13 you know what Brendan meant by that?

14 A No.

15 Q As you looked at not only the words but the
16 context in which that was said, did you believe
17 that that was open to more than one potential,
18 um, explanation?

19 A As the reason why I did -- I chose to have that
20 redacted --

21 Q No.

22 A Or --

23 Q I'm --

24 A Oh.

25 Q -- just saying from your view of the video,

1 itself, do you believe that "They got to my head"
2 carries with it more than one possible
3 explanation?

4 A I suppose, yes.

5 Q Have you ever heard the term "confessor's
6 remorse"?

7 A Yes.

8 Q Do you know what that means? Just in general
9 terms and lay terms, and if --

10 A Well, in lay terms they're -- you know, some people,
11 after they've honestly made a confession to having
12 done something, often not -- I shouldn't say often --
13 will sometimes recant, and it's just because of the
14 fact that, you know, now their families have to
15 explain this to families and friends, and it can be
16 difficult for them to accept itself.

17 Q And are you familiar with sometimes that includes
18 apologies to people like parents? I'm sorry,
19 mom, they got to my head. Something like that?
20 Have you heard of something like that?

21 ATTORNEY DRIZIN: Objection. That's not
22 what he said.

23 THE COURT: Sustained.

24 ATTORNEY KRATZ: Oh.

25 Q (By Attorney Kratz) By the way, in March --

1 March 1 statement, when Brendan's mom comes in,
2 did you at all view Mr. Dassey standing up or in
3 any impassioned way saying, wait a second, I made
4 this all up?

5 A No.

6 Q You contacted a Dr. Leo in this case for, if
7 nothing else, a consultation; is that correct?

8 A Okay. I don't know if I call it consultation, but I
9 contacted Dr. Leo.

10 Q I'll ask you. Why did you contact him?

11 A Dr. Gordon said he met this guy by the name of
12 Dr. Richard Leo from San Francisco, and he might be a
13 good resource for some information on a -- this same
14 topic.

15 So I contacted Dr. Leo, and indicated
16 that I got his name from Dr. Gordon, and told him
17 a little bit about what was going on in
18 Wisconsin, and he sent me a PowerPoint of a
19 program he put on that was pretty close to the --
20 these issues. The suggestibility issues --

21 Q And --

22 A -- and police techniques.

23 Q I'm sorry. And, if for no other reason, to give
24 you a better working knowledge of the concept of
25 false confessions; is that -- is that fair?

1 A Yes, as a resource. Correct.

2 Q Back to reliability for just a moment. Did you
3 understand that, ultimately, in this case, this
4 Court, um, ruled that the issue of reliability or
5 believability of a statement was not going to be
6 a matter for expert opinion?

7 ATTORNEY DRIZIN: Judge, I -- I don't know
8 if that's what you ruled.

9 THE COURT: I don't think I ruled that.
10 And I'm not sure I equate, necessarily, reliability
11 with believability. I think the ruling was that
12 Dr. Gordon couldn't testify as to whether or not
13 this was, uh -- the confession was false.

14 ATTORNEY KRATZ: Oh, okay. I'm sorry.
15 I'll phrase it that way.

16 Q (By Attorney Kratz) You understand that the
17 ruling of this Court was that there was, at least
18 with the expert that had been offered, uh, not
19 going to be expert opinion regarding whether this
20 was a false confession?

21 ATTORNEY DRIZIN: Objection, Judge. That
22 expert was never retained for that purpose.

23 THE COURT: Well, that's correct. The
24 expert wasn't retained for that purpose. But that
25 was a portion of the ruling. So the objection's

1 overruled.

2 THE WITNESS: Yes.

3 Q (By Attorney Kratz) All right. Perhaps this
4 question is just stating the obvious, but you
5 don't know if Judge Fox's ruling would have been
6 different with Dr. Leo, or Dr. White, or
7 Mr. Drizin being asked to testify, do you?

8 ATTORNEY DRIZIN: Objection. Calls for
9 speculation.

10 THE COURT: Sustained.

11 Q (By Attorney Kratz) You mentioned that a
12 Mr. Buting, Attorney Buting, had e-mailed you, or
13 at least had provided you with some opinion early
14 on in this case; is that correct?

15 A Yes.

16 Q Well, early and late, actually. You, um --
17 wasn't shy about his opinions, or at least to
18 share them with you; isn't that right?

19 A True.

20 Q Now, you mentioned that you kept this a little
21 bit at arm's length. Did you appreciate the fact
22 that his goals may be somewhat inconsistent from
23 yours?

24 A And he was very blunt about it, yes. Yeah.

25 Q So Mr. -- or Attorney Buting's obvious goal of

1 advocating for Mr. Avery may not always be in
2 Brendan's best interest. That's fair, isn't it?

3 A That was part of what I was thinking when I -- when I
4 spoke with either Dean or Jerry.

5 Q And, finally, Mr. Fremgen, the -- um, the last
6 point I have here to talk to you about is maybe
7 more art or more style than it is science.

8 You decided in this case not to chop up
9 the videotape and to play it clip, by clip, by
10 clip, or a few seconds at a time; is that right?

11 A It never crossed our mind to do it.

12 Q All right. Let me ask it this way, then. Would
13 that presentation style have fit within your
14 overall presentation or trial strategy in this
15 case?

16 THE COURT: Which presentation or --

17 ATTORNEY KRATZ: I'm sorry, Judge.

18 Q (By Attorney Kratz) The breaking the -- the clip
19 up into little few second segments?

20 A It -- it could have -- could have been more
21 effective, yeah.

22 Q Okay.

23 ATTORNEY KRATZ: Just have one moment,
24 Judge? I think I'm done, but let me just make
25 sure. No. That's all I have. Thank you,

1 Mr. Fremgen.

2 THE COURT: Any re -- redirect?

3 ATTORNEY DRIZIN: Yes, Judge.

4 THE COURT: Go ahead.

5 ATTORNEY DRIZIN: I'm getting deluged with
6 paper here. Just a minute, Your Honor.

7 **REDIRECT EXAMINATION**

8 BY ATTORNEY DRIZIN:

9 Q Let's start with some easy questions,
10 Mr. Fremgen. Um, Mr. Kratz asked you, um, about
11 Mr. Dassey's lack of passion when his mother came
12 into the room. Do you recall that question?

13 A Yes.

14 Q In your many contacts with Mr. Dassey, did he
15 ever demonstrate a lot of passion?

16 A No.

17 Q Okay. And we talked about what Brendan and
18 you -- when you talked to Brendan about why he
19 confessed. Do you recall that part of the
20 conversation?

21 A Yes.

22 Q And isn't it fair to say that the words, "I don't
23 know" were the explanation he gave more than any
24 other word -- explanation?

25 A At -- at the trial and oftentimes -- most of the time

1 in conversation.

2 Q Sometimes he told you, "They made me say that."

3 Correct?

4 A The first time I met with him, the first words out of
5 his mouth to me were, "They made me say that."

6 Q Okay. Um --

7 A And let me -- um, there were other times he said that
8 his -- well, I don't want to make it sound as if
9 Brendan only said it the one time, but it was
10 interesting how having never met this person, and
11 within the first five minutes of meeting him, he
12 wanted to tell me that "They made me say this," and I
13 explained to him, we'll get to that. And we did get
14 to that, and he did say, "They made me say it."

15 Q Did he say anything else besides "I don't know"
16 and "They made me say it."?

17 A Later, yes.

18 Q I'm not talking about when he testifies --

19 A No.

20 Q -- at trial.

21 A Just before trial.

22 Q I'm not talking about the book instance --

23 A No.

24 Q -- either. Were there anything else besides
25 "They made me say it" and "I don't know."?

1 A And not including the book and the dream?

2 Q Yeah.

3 A Yeah. That -- that would be it.

4 Q Okay. And he said these more than once to you;

5 right?

6 A Not the book and dream, but the "I don't know." Yes.

7 Q Yes. And the made -- and that "They made me say

8 it."?

9 A Yes.

10 Q Okay. And in your experience with Brendan, is --

11 is Brendan somebody who was prone to give

12 narrative accounts?

13 A No. He had a -- pulling teeth to get him to talk.

14 Q And -- and he wasn't someone who demonstrate a

15 lot of insight into, um, his own behavior?

16 A No. No. He wasn't -- very introspective.

17 Q And he wasn't a very verbal person?

18 A No. Unless you talked about games or *Harry Potter*.

19 Q So safe subjects. Games and *Harry Potter* he

20 might talk a little bit more about?

21 A Oh, yeah.

22 Q Okay. But when it came to talking about what

23 happened to him in this case, he shut down?

24 A Correct.

25 Q Okay. And, um, when you tried to press him for

1 more details about, "What do you mean, 'They made
2 me say it,'" what were his answers?

3 A Mostly, "I don't know." Um, he would -- he would
4 try -- there was one conversation where he talked a
5 little more detailed about what it was that they made
6 him say, but he might have had one ex -- um, example
7 and that was it. And then after that it was, "I
8 don't know."

9 Q Did he also tell you, um, "They put words in my
10 head."?

11 A I don't know if that -- I recall him ever saying that
12 as -- he might have said, "They put words in my
13 mouth."

14 Q Okay. Well --

15 A Something -- I mean --

16 Q -- maybe that's better.

17 A That same sentiment but --

18 Q Okay. But that was the extent of his ability to
19 relate to you what had happened to him?

20 ATTORNEY KRATZ: Judge, I'm going to
21 object as -- as speculation. His ability or his
22 choice, it does call for this --

23 ATTORNEY DRIZIN: I'll rephrase.

24 ATTORNEY KRATZ: -- witness to
25 speculate.

1 THE COURT: Sustained.

2 ATTORNEY DRIZIN: I'll rephrase.

3 Q (By Attorney Drizin) That was the extent of --
4 of his communications to you about, you know, why
5 he confessed to this crime? Those --

6 A Un --

7 Q -- explanations?

8 A Until the book and dream --

9 Q Until the book and dream.

10 A -- yes.

11 Q Yeah.

12 A You know, I -- can I -- I'm sorry --

13 Q Sure.

14 A -- Attorney Drizin, you didn't ask me the question,
15 but I want to just clarify, you said the book and
16 dream. There was one other.

17 Q Okay.

18 A And it just came to me. I'm trying to log my memory
19 as to different conversations that Brendan and I had.
20 He also had said on a different occasion that, uh --
21 I'm trying to remember exactly what his word -- it
22 wasn't, "I don't know." And it wasn't the book. And
23 it wasn't the dream.

24 But it was more of a question. What if
25 somebody else told me what happened? Or question

1 like that. Versus, they, the officers, made me
2 say it. What if somebody else -- there was a
3 conversation like that?

4 And that's as far as it went. He never
5 really ex -- I didn't explore it with him, and he
6 didn't go into any detail.

7 Q So there's somebody else that he referred to in
8 that comment could have been the police officers?

9 A Well, I didn't take it that way, because in the past,
10 he always talked about "they." And when I would ask
11 him who "they" -- because it -- the first con --
12 first meeting we had, we had a problem with "they."
13 And "they" was Mike, Mark, and Tom.

14 Q Tell me about that problem?

15 A I didn't know who Mike was. I knew who Mark and Tom
16 were. Tom Fassbender and Mark Wiegert. And I
17 kept -- he said -- kept saying Mike. And I said, no,
18 I -- "Mike who?" "Mike O'Kelly." I said, "No, Mike
19 O'Kelly wasn't your investigator." The invest -- so
20 he was equating those three together. And sometimes
21 when he said, "they," he was referring to those
22 three, collectively.

23 Most of the time he referred to Mark and
24 Tom, 'cause I would ask him, "What do you mean by
25 they?" Because we had that problem in the very

1 beginning. So he would then say "Mark and Tom."

2 Q Okay.

3 A Most of the time it was Mark. He'd say "Mark."

4 Sometimes "Mark and Tom."

5 So then that last comment I mentioned
6 about that other conversation, the "they" wasn't
7 the same "they," if that makes any sense to you,
8 that we'd had in prior conversations.

9 He didn't -- I could tell he wasn't
10 talking about Mark or Tom. He was talking about
11 somebody else. But it was this question, what if
12 they told me to say it?

13 Q And did you think that he was talking about
14 Michael O'Kelly?

15 A I didn't think that at the time.

16 Q But now that you've seen the video, is that what
17 you think?

18 ATTORNEY KRATZ: Objection.

19 Speculation, Judge.

20 THE COURT: He can answer. Overruled.

21 THE WITNESS: I don't know, to be honest
22 with you. I -- I don't -- I don't think I could
23 say yes on that either.

24 Q (By Attorney Drizin) Okay. So you don't know
25 what he may have --

1 A Yeah.

2 Q -- meant by that?

3 A Yeah.

4 Q Okay. Now, um, do you remember that Mr. Kratz
5 talked to you about outside pressures on Brendan
6 in this case?

7 A Yes.

8 Q And that -- that -- that with regard to plea
9 discussions, specifically, that, um, at least
10 Mr. Kratz was concerned, that his -- Brendan's
11 family may have been, you know, consulting with
12 him about those plea negotiations?

13 A That -- that's my understanding of the outside
14 pressure.

15 Q There's no problem with a family member, a
16 mother, consulting with a child about a potential
17 plea, is there?

18 A No.

19 Q Okay. It's not unusual in your experience for
20 family members to do so?

21 A No.

22 Q And, in fact, you brought Barb into the plea
23 negotiations, um -- or I -- I should say you
24 brought Barb into your discussions with Brendan
25 on occasion, um, when you presented his plea

1 options?

2 A I do recall one particular occasion, and it was
3 because it was probably at that point the best offer
4 I'd heard. Very good offer. And I knew the dynamic.
5 Just like you said. Families sometimes are involved.
6 And I knew that if this is going to be an acceptable
7 offer, Barb is going to have to be involved. And
8 that's why we call -- in fact, I think, within
9 minutes of getting off the phone with Attorney Kratz,
10 I called Barb.

11 Q It's fair to say Barb did not say, Brendan, under
12 no circumstances should you take a plea?

13 A I think she might have been even very close to
14 teetering on encouraging him to take it.

15 Q Okay. Do you recall her saying, if you did it,
16 Brendan, you should plead. But if you didn't, if
17 you're innocent, then don't plead?

18 A I think that's almost exactly what she said.

19 Q And Brendan rejected the plea offer; correct?

20 A He thought about it for a little bit, and then
21 rejected it.

22 Q Now, we've talked about the 5/13 phone call;
23 correct?

24 A Yes.

25 Q I'd like to turn your attention back to page five

1 of that exhibit, which -- if you'll give me a
2 second -- Exhibit -- Exhibit 70, I believe.

3 ATTORNEY KRATZ: I'm sorry, Judge, is this
4 something different than what we had on direct
5 examination?

6 THE COURT: Well, we're going to hear.

7 ATTORNEY KRATZ: He read the whole thing.

8 THE WITNESS: Okay.

9 Q (By Attorney Drizin) This is Exhibit 70, um --
10 one second here -- page five at the top. Okay?
11 Have you had a chance to review it?

12 A Yes.

13 Q Now, Mr. Kratz, during his questioning, and
14 throughout this case, has suggested that Barb
15 Dassey, um, was pressuring Brendan not to take a
16 plea because of some loyalty to Steven Avery.
17 Okay? Um, was that your experience in this case?

18 A That Barb was, um, pressuring --

19 Q Pressuring Brendan --

20 A -- Brendan not --

21 Q -- not --

22 A (Unintelligible.)

23 Q I apologize. To -- that Barb was pressuring
24 Brendan not to take a plea out of some loyalty to
25 Steven Avery?

1 A I didn't see it.

2 Q Did you see her express to Brendan that Brendan
3 was her primary concern?

4 A Yes.

5 Q And that she didn't care what happened to Steven
6 Avery?

7 A I don't know about that. I don't think I've ever --
8 I'd ever discussed Steven Avery with her.

9 Q Okay. And in this 5/13 phone call she says, "I
10 don't hate you, Brendan, I hate Steven. All
11 right?" Do you see that?

12 A Yes.

13 Q And on page two of this phone call, um, about a
14 third of the way down when he's talking to his
15 mother, do you see where Brendan says, "Well,
16 Mike, and Mark, and Matt came up one day and took
17 another interview with me."?

18 A Yes.

19 Q And said, "Because they think I was lying, but
20 so -- they said if I come out with it, that I
21 would have to go to jail for 90 years."?

22 A Yes.

23 Q When you referred to "they" before, um, Mike, and
24 Mark, and Matt, who is Mike?

25 A Mike O'Kelly.

1 Q And who is Mark?

2 A Mark Wiegert.

3 Q And who is Matt?

4 A Matt was never brought up.

5 Q Okay. Um --

6 ATTORNEY KRATZ: I'm -- I'm sorry,
7 Judge. Is Mr. Drizin asking, in this exhibit,
8 who are Mike, and Mark, and Matt?

9 THE COURT: He is.

10 ATTORNEY KRATZ: Then I'm going to
11 object to speculation. I thought he'd asked him
12 in prior conversations who is Mike and Mark.

13 THE COURT: Well, I -- the witness has
14 answered. Let's move on.

15 ATTORNEY DRIZIN: Sure.

16 Q (By Attorney Drizin) Would you -- you -- you
17 retained Dr. Gordon in this case to evaluate
18 Brendan; correct?

19 A Yes.

20 Q And in his report do you recall Dr. Gordon saying
21 that Brendan had some memory problems?

22 A Yes, I believe so.

23 Q Okay. And in your experience with Brendan, did
24 he have some difficulties remembering things?
25 Particularly conversations between people?

1 ATTORNEY KRATZ: I'm going to object,
2 Judge.

3 THE WITNESS: I don't know.

4 ATTORNEY KRATZ: Judge, I'm going to
5 object as irrelevant.

6 THE COURT: Well, it's -- it's -- it's
7 certainly leading. But go ahead and answer it. The
8 objection's overruled.

9 THE WITNESS: I -- I -- I don't know if
10 I could honestly say that I think he had memory
11 problems. At least not from conversations with
12 me I could deduce that. That's what his score
13 records reflected. That was Dr. Gordon's
14 opinion.

15 Um, from my experience with Brendan,
16 I -- I think it could -- anything that might be
17 attributed to a memory problem could also be
18 attributed to just not having -- lacking the
19 social skills to be able to talk to a -- an
20 attorney, or an adult, or any person.

21 Q (By Attorney Drizin) Um, we spent a fair amount
22 of time talking about what you would have done
23 had you seen the Michael O'Kelly video; correct?

24 A We did.

25 Q I just want to ask you two quick questions about

1 that that come up from what Mr. Kratz asked you.

2 Um, during your testimony earlier, you
3 said that you would have moved to re -- um, you
4 would have moved to suppress the 5/13 statements
5 and the phone calls; correct?

6 A Yes.

7 Q And you viewed them as a package; correct?

8 A Yes.

9 Q Okay. And one of the bases that you were going
10 to raise in light of the O'Kelly interrogation
11 was a voluntariness argument; correct?

12 A Yes.

13 Q And had the Court ruled that these statements
14 were all involuntary, part of a process that led
15 Brendan to believe he had no choice but to
16 confess, or to make statements to his mother, the
17 State would have been precluded from using those
18 statements even in rebuttal; correct?

19 ATTORNEY KRATZ: Well, Judge, he can ask
20 what his understanding is. I don't know that he
21 can make that legal determination.

22 THE COURT: What's your understanding?

23 THE WITNESS: My understanding is that
24 that still would be up to the Judge for purposes
25 of rebuttal.

1 Q (By Attorney Drizin) That's fair. Remember in
2 response to Mr. Kratz you said that, as a defense
3 attorney, you take a strategy and you stick with
4 it; correct?

5 A That's what I try to do, yes.

6 Q Okay. And you build your case around that
7 strategy?

8 A That's my attempt, yes.

9 Q And every witness that you question filters into
10 that strategy?

11 A Yes.

12 Q You said that to --

13 A Yes.

14 Q -- Mr. Kratz?

15 A Yes. Yes. I agree.

16 Q Okay. Um, early in this case you hired
17 Dr. Gordon; correct?

18 A I did.

19 Q And you hired him for two purposes; isn't that
20 right?

21 A I wanted to, yes.

22 Q One of those purposes was to evaluate Brendan's
23 suggestibility?

24 ATTORNEY KRATZ: Objection. Asked and
25 answered. If we aren't plowing the same field here,

1 Judge --

2 THE COURT: Sustained.

3 Q (By Attorney Drizin) You wanted Dr. Gordon to
4 opine about the police interrogation tactics and
5 their effect on Brendan Dassey; correct?

6 ATTORNEY KRATZ: Same objection, Your
7 Honor.

8 THE COURT: Sustained.

9 Q (By Attorney Drizin) That was your strategy.
10 And did you follow through on that strategy?

11 ATTORNEY KRATZ: Objection. Asked and
12 answered, Judge.

13 THE COURT: I'm going to sustain it.

14 Q (By Attorney Drizin) Mr. Kratz talked to you
15 about common sense notions for the jury. Do you
16 recall that?

17 A Yes.

18 Q Okay. Um, and we also talked about you receiving
19 a report from Dr. White at some point in this
20 case. Do you remember that?

21 A Yes.

22 Q Okay. Now, did Dr. White in his report to you
23 tell -- opine about whether or not jurors
24 understand the problem of false confessions?

25 A I'd have to look at the memo.

1 Q Did you have any basis to think that it would be
2 within the common sense of jurors that they would
3 understand the problem of false confessions?

4 A No. I don't think that would be a problem with most
5 jurors.

6 Q You think they would understand it?

7 A The concept of false confession? Concept, yes.

8 Q And that police interrogations could play a role
9 in false confessions?

10 A I think, again, the concept, yes.

11 Q Okay. How about the social psychology of police
12 interrogations? Is that something the jurors
13 understand?

14 ATTORNEY KRATZ: Objection. Speculation.
15 I don't know that that would have been allowed,
16 Judge. It really requires, um, this Court to --

17 THE COURT: We're starting to --

18 ATTORNEY KRATZ: -- re-try that.

19 THE COURT: -- wander again. The
20 objection is sustained.

21 Q (By Attorney Drizin) Did you review any research
22 prior to deciding not to call a false confession
23 expert or a police interrogation experts on what,
24 in fact, juries understand about the police
25 interrogation process?

1 A About what juries understand?

2 Q That's right.

3 A No.

4 Q You assumed that they might understand something
5 about this process? That it was within their
6 common sense?

7 A Yes, I would agree with that.

8 Q But you didn't know the -- whether there was any
9 research to dispute your assumption?

10 A Research? No.

11 Q Okay. When you sought to reopen the motion to
12 suppress, one of the bases that you sought to
13 reopen them on was that the statements by Brendan
14 were unknowing and unintelligent; correct?

15 A Yes.

16 Q And did you also believe that his understanding
17 of a *Miranda* warnings were unknowing and
18 unintelligent? Was that a concern of yours?

19 A It was brought up in our conversations more from Ray
20 than me. It was an issue that Ray looked into and
21 wanted to even look into it further. But if you're
22 asking if I thought it was an issue, no, I didn't
23 think it was an issue.

24 Q But Ray might have?

25 A Yes.

1 Q Okay. So there was a split of opinion between
2 you on the **Miranda** issue?

3 A Yes.

4 Q Okay. And would you agree with the statement
5 that a confession is among the most powerful
6 pieces of evidence in a court of law?

7 A Yeah, I -- I would agree with that.

8 Q Whether that confession is true or false, it has
9 tremendous persuasive power?

10 ATTORNEY KRATZ: Objection.
11 Speculation.

12 THE COURT: We're starting to do a direct
13 examination all over again instead of a redirect.
14 Objection --

15 ATTORNEY KRATZ: Or a closing.

16 THE COURT: -- is sustained.

17 Q (By Attorney Drizin) You talked about how that
18 you would have tried to persuade the Judge that
19 Mr. O'Kelly's phone call was so egregious that
20 everything that flowed from it would be -- should
21 be suppressed. Do you remember that?

22 A The O'Kelly video.

23 Q The O'Kelly video.

24 A Yes.

25 Q Okay. Have you ever seen an interrogation as

1 egregious like -- as that in your career?

2 ATTORNEY KRATZ: Objection. Irrelevant,
3 Judge.

4 THE COURT: Sustained.

5 Q (By Attorney Drizin) What were you going to
6 argue to the Judge about why that interrogation
7 was egregious?

8 ATTORNEY KRATZ: Objection. Asked and
9 answered, and beyond the scope of cross.

10 THE COURT: Sustained. Counsel, do you
11 have any more redirect questions?

12 ATTORNEY DRIZIN: I think all of these
13 matters were covered on Mr. Fremgen -- Mr., uh,
14 Kratz's, um, cross. But give me one minute, Your
15 Honor.

16 Q (By Attorney Drizin) I just want to focus your
17 attention on just one last matter. This is the
18 May 13 phone call, which is Exhibit 70, and page
19 three.

20 A Okay.

21 Q Okay. I want you to focus about halfway down the
22 page. Um, beginning with Brendan saying -- with
23 mom saying, "What do you mean?" and ending at,
24 um, the question "What makes a difference? He
25 ain't going nowhere now, is he?"

1 "Brendan: No."
2 Do you see that?
3 A Yes.
4 Q Okay.
5 A Okay.
6 Q Okay. We talked about how Barb -- Barb would
7 advise Brendan from time to time with regard to
8 plea deals; is that correct? She was brought in
9 to consult with --
10 A Yes. Yes. Yes.
11 Q Okay. And one of the points has been made is
12 that there were pressures being brought to bear
13 from other family members, um, out of a concern
14 for what Brendan's testimony might do for
15 Steven's case?
16 A Yes.
17 Q Okay. Um, does this phone call reflect what
18 Barb's position was with respect to Steven's
19 case?
20 ATTORNEY KRATZ: Objection. Speculation,
21 Judge.
22 THE COURT: Well, the exhibit speaks for
23 itself. If you think you know, go ahead and answer.
24 THE WITNESS: I have no reason to
25 dispute that's her opinion.

1 Q (By Attorney Drizin) And is this consistent?
2 Her position that Brendan has got to do what he's
3 going to do is consistent with what she expressed
4 to you?

5 A To me? Yes.

6 Q Throughout the course of your representation of
7 Brendan?

8 A Yes.

9 Q Okay.

10 ATTORNEY DRIZIN: No further questions.

11 THE COURT: You may step down.

12 THE WITNESS: Okay. Thank you.

13 THE COURT: You have a ten-minute witness?

14 ATTORNEY DRIZIN: I wish.

15 THE COURT:: Rather than start a new
16 witness, it makes sense to simply reconvene tomorrow
17 morning at 8:30. I'd like to see counsel in about
18 five minutes in chamber -- chambers.

19 (Recess had at 4:20 p.m.)
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