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P R O C E E D I N G S

September 7, 2004

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THE COURT: Case Number 165368-01, State of Missouri
versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready, Judge.

THE COURT: What says the defendant?

MS. BENSON: Ready, Your Honor.

THE COURT: And what is the matter before the Court?

MR. CRANE: Judge, I think you were going to check
to see what the status of the discovery was, after our
discussion back on July -- or -- sorry.

THE COURT: It was the 2nd of August.

MR. CRANE: 2nd of August.

THE COURT: All pending motions were passed to
today.

MR. CRANE: Yeah.

THE COURT: There was a question about discovery, I
know, but --

MS. BENSON: That's correct.

THE COURT: -- there might have been some other
motions as well.

MR. CRANE: We've, I just wanted to report, tendered
discovery on August 16th and on August 19th, reference the
letter for additional discovery sent to us by Mr. McBride,

1 and I'm assuming Ms. Benson as well.

2 The one thing that is still hanging out are the lab
3 notes. I've got lab notes. I did go over to the police
4 department and look at the evidence, I don't know, three or
5 four weeks ago, and found some items that I needed to return
6 to the lab for further analysis. That work is not yet
7 complete.

8 What I would request is: To retain the lab notes,
9 and if you could -- if you could give me three weeks, tender
10 hopefully everything that had been generated earlier and
11 completed of late. And I guess if they don't have it done in
12 three weeks, I'll have to turn over what I've got.

13 THE COURT: Miss Benson, the defendant is here
14 personally.

15 MS. BENSON: Yes, he is.

16 THE COURT: For the record. And you may respond to
17 Mr. Crane. And let me know if there are any other matters
18 that are pending before -- that you have, that you want the
19 Court to consider.

20 MS. BENSON: There are no other motions pending at
21 this time, other than that motion to compel. And as
22 Mr. Crane stated, he has provided all the items to us, other
23 than the lab notes. He has indicated to you that they are in
24 his possession. They've been in his possession since at
25 least the date of this letter to us, which is August 16th.

1 We have a right to have those, regardless of what
2 their retesting finds. We have the right to all the lab
3 notes from all the testing, pursuant to Brady versus Maryland
4 and pursuant to Missouri discovery rules. They are relevant,
5 potentially, to my client's innocence. They are relevant to
6 the foundation issues related to the laboratory results.
7 There is no reason why we shouldn't have those at this time
8 as well, and then receive the additional lab notes from the
9 additional testing when they are done.

10 MR. CRANE: We don't have any disagreement with the
11 idea that they're discoverable, Judge. The discovery issue
12 is one of reasonableness. At this point what I'm trying to
13 do is discern what other items need to be tested, if any, and
14 will in no way dissuade the defense from preparing their
15 defense in this case. Will timely turn it over. What I'm
16 telling the Court is: If the lab hadn't gotten this
17 additional work done in three weeks, I'll turn it over,
18 whether they're completed or not.

19 MS. BENSON: And if I could, just briefly, Judge, I
20 just don't --

21 THE COURT: That's the end of the argument.

22 State appears by prosecuting attorney. Defendant
23 appears in person and by assistant public defender,
24 Miss Benson. Motion to compel production of lab notes now in
25 the possession of the state is sustained.

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P R O C E E D I N G S

November 15, 2004

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THE COURT: Case Number 165368-01, State of Missouri
versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready.

THE COURT: What says the defendant?

MR. McBRIDE: Ready, Judge. No evidence. Just
argument based upon the motion for bond.

MR. CRANE: I've got a motion to endorse.

THE COURT: All right. Let us take that up then
quickly.

MR. McBRIDE: Okay.

THE COURT: Let me ask first, is there an objection
on the motion to endorse?

MR. McBRIDE: I haven't seen it yet. I don't -- no,
I don't.

MR. CRANE: Really?

THE COURT: It was filed on the 12th. It looks like
there is a copy sent to you.

MR. CRANE: It's --

THE COURT: Harry Lett --

MR. CRANE: -- Charles Erickson, Richard Walker.
These two guys helped in the transport --

MR. McBRIDE: Okay.

1 MR. CRANE: -- of him back from Kansas City.

2 MR. McBRIDE: No objection, Judge.

3 THE COURT: All right. And you wish to have -- you
4 want a -- for bond -- motion for bond?

5 MR. McBRIDE: I do, Judge.

6 THE COURT: All right.

7 MR. McBRIDE: The -- can I go ahead?

8 THE COURT: You may make your argument.

9 MR. McBRIDE: Judge, the argument is contained
10 primarily in the written motion for release. Certainly the
11 offense is a serious matter, but it is aailable offense
12 under our constitution and our laws. And I believe that
13 there is a reasonable bond out there that the Court can
14 impose that will allow my client pretrial release pending the
15 trial on January 24th, to begin here -- actually in Lincoln
16 County with the jury selection and then to continue here.

17 Some of the Court's considerations include, you
18 know, the nature of the offense certainly. And, as I said,
19 is aailable offense. There's also the weight of the
20 evidence, which in this case is coming down to, quite
21 frankly, the testimony of Mr. Ferguson's codefendant, Charles
22 Erickson. There is no, to my knowledge, physical evidence
23 tying him or connecting him to this case.

24 And I'd ask the Court to, given those
25 considerations, to set a bond that would allow him pretrial

1 release.

2 I've also included in this request that the Court
3 consider, if there is a bond that can be set, that he can be
4 released on, we would agree to, of course, any conditions the
5 Court deems necessary to impose. But would also agree
6 specifically to the Boone County electronic monitoring
7 program, which would keep him here, in his home, with his
8 father, Bill Ferguson.

9 No prior offenses from my client. Nothing to
10 indicate a flight risk. He has significant ties to the
11 community, with both parents here. And of course, as stated,
12 would abide by any conditions you deem necessary to impose.

13 THE COURT: I do -- I'm looking back at the docket
14 entries, and I don't see that a bond has ever been set.

15 MR. McBRIDE: There has not been one set.

16 THE COURT: What is the state's position?

17 MR. CRANE: We're opposed, Judge. I would -- I
18 would just say, in terms of litigating the facts or the
19 significance of the evidence in this motion, I mean, I
20 suppose we could put on a mini trial here. I don't think
21 that would be an appropriate issue for the Court to consider.

22 I would say that, in passing, that while I'm not
23 going to argue with what Mr. McBride said, that we do have a
24 witness, the codefendant, that we just endorsed, Charles
25 Erickson, who we intend to call at trial. I have not

1 received any notice of alibi from the defense. We filed our
2 motion for disclosure to the defense back in May and have
3 received nothing in terms of that. Would request that, if
4 there is evidence of alibi, that that be provided to us.
5 We've been tendering disclosure to the defense.

6 I would generally oppose the motion for bond
7 release, based on the same reasons we made our request that
8 no bond be set when this crime was charged.

9 THE COURT: I have just looked to see if there was a
10 bond investigation. And I see that there -- there was a bond
11 investigation, and the recommendation was: Is no reduction.
12 And one of the reasons given was that the attorney for the
13 defendant did not want the defendant to be interviewed for
14 any bond reduction. And that was the reason given. I
15 suppose you've been informed of that.

16 MR. McBRIDE: I was the one -- I was the attorney
17 who made that recommendation or request to the bond
18 investigator at the time that I got in the case. I was brand
19 new to the case and had not had a lot of time to talk to
20 Mr. Ferguson about the bond situation. So I asked the
21 investigator not to conduct that interview without any
22 additional information that I had to convey to that
23 individual.

24 I believe the information we put in the motion today
25 includes that information that the bond investigation would

1 have revealed to the Court, regarding status in the
2 community, family ties, prior criminal history, those
3 matters.

4 THE COURT: Let me take a look.

5 Is it correct that you are not seeking the death
6 penalty, Mr. Crane, in this case?

7 MR. CRANE: That's correct. My understanding of the
8 current law is that we would be precluded from doing so.
9 While the case is on appeal, the most recent Supreme Court of
10 Missouri decision does not allow the state to seek death in a
11 case wherein the offender was 17 years of age.

12 THE COURT: At the time the offense was committed.

13 MR. CRANE: At the time. And that was the case
14 here. Correct. Alleged.

15 MR. McBRIDE: Correct.

16 THE COURT: Well, I'm really not able to rule on the
17 issue of the evidence -- the weight of the evidence in this
18 case, as I suppose the state's attorney mentioned, without
19 having a mini trial here. I don't -- I myself don't know
20 what the evidence will be, and haven't had enough evidentiary
21 hearings in this case to even make a guess, an educated
22 guess. So I really don't know about it. I only know how
23 it's charged and the nature of the charge against him.

24 State appears by prosecuting attorney. Defendant
25 appears in person and by assistant public defender. State's

1 motion to endorse is sustained, with consent of the
2 defendant. Defendant's motion for bond release is argued.

3 I'm going to set bond at 20 million dollars.

4 MR. CRANE: Judge --

5 MR. McBRIDE: By way of just clarification, it's
6 really not a matter of pride for defense counsel, but just
7 for the bureaucracy concerns, I'm not a member of the public
8 defender's office.

9 THE COURT: I'm sorry.

10 MR. McBRIDE: That's okay.

11 THE COURT: You're special counsel?

12 MR. McBRIDE: No, Judge. Private.

13 MR. CRANE: He's retained counsel.

14 MR. McBRIDE: Retained counsel.

15 THE COURT: All right.

16 MR. McBRIDE: That's okay.

17 THE COURT: I'm sorry. I thought there was a public
18 defender involved in this. And perhaps I'm incorrect in that
19 regard.

20 MR. McBRIDE: There was initially. Miss Benson
21 represented Mr. Ferguson at the time.

22 THE COURT: She's not still in the case. Although
23 she's standing here in the courtroom.

24 MR. McBRIDE: She is in the case as private counsel.

25 THE COURT: Okay.

1 MR. McBRIDE: So we're -- yeah.

2 THE COURT: I'm sorry.

3 MR. McBRIDE: That's okay.

4 THE COURT: I will show that defendant appears in
5 person and by counsel. Without reference to the public
6 defender's office.

7 I'll give the state the file to --

8 MR. CRANE: You want those on the indictment?

9 THE COURT: I assume you would want to have that on
10 the indictment.

11 MR. CRANE: Yeah, I can do that.

12 Can I take it over to the table and do it, Judge?
13 Is that all right?

14 THE COURT: Yeah. Just as long as you don't forget
15 to give it back to me, Mr. Crane.

16 MR. CRANE: No, I'll remember.

17 THE COURT: All right.

18 (Hearing adjourned.)

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P R O C E E D I N G S

January 3, 2005

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THE COURT: Case Number 165368-01, State of Missouri
versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready.

THE COURT: And what says the defendant?

MR. McBRIDE: Ready, Your Honor.

THE COURT: Is this the state's motion to endorse?
Or is there some other matter?

MR. CRANE: I think we really ought to take up
probably the defense motion to continue first, and then I --
yeah, I do have a motion to endorse as well. Have you got
that motion to continue, Judge?

THE COURT: Let me look.

I do see, on the 29th of December, there was a
request to place it on today's docket.

MR. McBRIDE: Yes. Motion to continue the trial
that's scheduled to begin on the 24th of this month.

THE COURT: Yes.

MR. McBRIDE: Yes.

THE COURT: I'll hear you.

MR. McBRIDE: Judge, we're asking for additional
time to prepare, review, and investigate. There's been some
recently disclosed matters that have, you know, come to the

1 state's attention, and then of course to the defense
2 attention. We'll need to review those; continue our
3 investigation. There's also some discovery issues that we
4 need to, of course, provide to the state. And depositions
5 need to be conducted. Essentially, Judge, more time to
6 adequately and effectively prepare for Mr. Ferguson's defense
7 in this matter. Mr. Ferguson, although incarcerated, is not
8 opposed to this request, as is -- and the state is also not
9 opposed to this request.

10 THE COURT: Mr. Crane, is that correct?

11 MR. CRANE: Yeah. In fact, you'll notice, there's
12 a -- there's a mention in there -- Mr. McBride and I had
13 talked before he filed this motion. We are still in the
14 process of conducting some lab analysis. We don't know what
15 the results are going to be, obviously, but apparently is not
16 going to be done until right at the trial date, at the
17 earliest. I've notified Mr. McBride of that. He's
18 incorporated that in his motion, by my consent. So we have
19 no objection.

20 We would, Your Honor, in the event you sustain this
21 motion, ask that we have a conference at some time, we don't
22 have to do it today, reference a trial date for the future.
23 And I believe Mr. McBride agrees with that request.

24 MR. McBRIDE: I do, Judge. I'd appreciate, if by
25 chambers or however, to get together with the Court's

1 schedule and defense and prosecution's schedule; then of
2 course contact Lincoln County, regarding their availability
3 as well.

4 THE COURT: Have the parties, in the event that I
5 sustain this, discussed a potential date --

6 MR. CRANE: Yeah.

7 THE COURT: -- that they would both be available?

8 MR. CRANE: Oh, you mean to get together?

9 THE COURT: No. That you might be available for
10 trial. Assuming --

11 MR. CRANE: Well, here's what we are talking about.
12 And I'll stand corrected if I've got any of this wrong. We
13 both were thinking early March. Now, the only thing about
14 that is: I've got to check with Judge Hamilton.

15 THE COURT: It's not going to go for me. Early
16 March, the first week of March, I will be --

17 MR. CRANE: Well, actually it would be the second.
18 Starting like the second or third week of March.

19 THE COURT: All right.

20 MR. CRANE: Because we got to beat out spring break.
21 But the deal is this, Judge. Before I make any
22 representations on that, I know Mr. McBride's got to make an
23 analysis of it; I've got to talk to Judge Hamilton, because
24 I've got another trial set right in there. So that's why we
25 really can't do this today hardly.

1 THE COURT: All right. If you would, in the next
2 two weeks, get to me dates, multiple dates that you might be
3 available. Or -- you know, just for a conference -- either a
4 conference call, or, if you want to come to chambers, if you
5 happen to be in the courthouse, we could do that.

6 MR. McBRIDE: Okay.

7 MR. CRANE: Very good.

8 THE COURT: So that we can get it set. Because I
9 have some trials also set far out, both civil and criminal.
10 And the first week of March happens not to be --

11 MR. McBRIDE: Okay.

12 THE COURT: -- a good time for me, but -- and I
13 would be reluctant to do it the second week, if I'm going to
14 be gone the first week, because sometimes things come up.
15 And I would hate to be out of town until Sunday of that
16 week --

17 MR. McBRIDE: Sure.

18 THE COURT: -- before a trial was to start.
19 Assuming that that could be arranged otherwise.

20 MR. CRANE: Well, we'll get with you forthwith.

21 THE COURT: All right.

22 Now, Mr. Ferguson, your attorney has represented to
23 me that you are in agreement with his request to continue or
24 delay your trial, which is set three weeks from today. Is
25 that correct?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Mr. Ferguson, you understand that under
3 our constitution, both state and federal, you have a right to
4 a speedy trial.

5 THE DEFENDANT: Yes.

6 THE COURT: And the Court is in a position to have
7 to guarantee that right to you, regardless of what the
8 attorneys may say, assuming that they're prepared to go to
9 trial, if it's just an inconvenience. But you understand
10 from your attorney's motion that there are additional
11 investigation that he needs to do in order to adequately
12 defend you.

13 THE DEFENDANT: Yes.

14 THE COURT: From a very, very serious -- or serious
15 charges, as it is. And you understand that if I -- if I
16 grant this continuance or delay, at your request, with your
17 attorney's motion, that you can't later complain that,
18 because you didn't get to trial on the 24th of January,
19 you've been denied your right to a speedy trial. You
20 understand that.

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: You understand further that I will make
23 every attempt to look at my schedule and to reschedule it as
24 soon as practical, with your attorney and the state's
25 attorney, assuming witnesses are available, that -- so that

1 we can get this matter heard promptly. And you are in
2 custody right now. That's correct.

3 THE DEFENDANT: Yes.

4 THE COURT: All right. And so you're telling me
5 you're in agreement with this request, understanding what
6 your rights are and understanding what the reason for the
7 continuance or delay is.

8 THE DEFENDANT: Yes.

9 THE COURT: All right.
10 Defendant's motion for a continuance is sustained.

11 Would ask that, in the next two weeks, counsel
12 confer with the Court on a date for resetting.

13 Now, are there any other motions for the defense?

14 MR. McBRIDE: No, Your Honor.

15 THE COURT: For the state?

16 MR. CRANE: That motion to endorse, Judge.

17 THE COURT: And you have asked to endorse four
18 additional witnesses? Jenny Smith, Dawn Kliethermes, Aaron
19 Walters, and Dave Dawson? Is that correct?

20 MR. CRANE: Correct.

21 THE COURT: Does the defendant have any objection?

22 MR. McBRIDE: No, Your Honor.

23 THE COURT: State's motion to endorse is sustained
24 then.

25 Nothing further for the state, Mr. Crane?

1 MR. CRANE: That's correct, Judge. Thank you.

2 THE COURT: State appears by prosecuting attorney.

3 Defendant appears in person and by counsel. Defendant's

4 motion for continuance is sustained. Counsel shall confer

5 with Court in next two weeks for a trial resetting. State's

6 motion to endorse is sustained, with consent of the

7 defendant.

8 And we'll hear from you then and try to coordinate

9 our calendars.

10 MR. McBRIDE: Thank you, Judge.

11 MR. CRANE: Yes, Judge.

12 (Hearing adjourned.)

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P R O C E E D I N G S

January 11, 2005

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The following proceedings were had by Court and counsel in chambers:

THE COURT: All right. We are here on State of Missouri versus Ryan William Ferguson, Case Number 165368-01. Prosecutor is here, and defense counsel is likewise here, for the purpose of finding a time to set this case. Is that right?

MR. McBRIDE: Correct.

THE COURT: All right. Tell me what month you all were thinking about, and I will look at the calendar, because I have the master calendar with me.

MS. BENSON: Ideally I think early April will be the best, from our perspective.

MR. McBRIDE: For the defense.

THE COURT: What is the state's position?

MR. CRANE: I've got, as it stands right now, and I was willing to talk to Judge Hamilton about this, but I've got a -- the Johnson -- Ernest Johnson retrial.

THE COURT: Well, Ernest Johnson retrial as I recall was --

MR. CRANE: Is set -- we're starting to pick the jury on the 10th of March.

1 THE COURT: Yes. That's right. And in Pettis
2 County.

3 MR. CRANE: And that would probably, I mean, I'd say
4 conservatively run well into the next week.

5 THE COURT: Okay.

6 MR. CRANE: And then I was planning to take some
7 time over spring break.

8 THE COURT: That's the week of the 21st.

9 MR. CRANE: Correct. And Judge, I mean, I realize,
10 you know, ideally you sit down and you go, Well, gosh, I'll
11 just work on that, and then go to the other one, and be ready
12 to do Johnson, and take a couple days off, and look up and do
13 Ferguson, but my life doesn't necessarily work as the defense
14 schedule.

15 MS. BENSON: We're willing to work with you Kevin;
16 all right?

17 THE COURT: I mean --

18 MR. CRANE: The other alternative --

19 THE COURT: Is there sometime later in April?

20 MR. McBRIDE: Well, and then I get into a spot with
21 my wife who's expecting a baby on April 27th. Now, I'm not
22 expecting the Court or the world to stop turning because
23 we're getting a kid coming, but that is, you know, a factor
24 that I like to, you know, to talk about. When we get into
25 late April. So, that's --

1 THE COURT: Well, what about the 11th?

2 MR. CRANE: Of?

3 THE COURT: Or the 18th?

4 MR. CRANE: Of?

5 THE COURT: April.

6 MR. CRANE: Well, there again, I'd get out of a
7 trial sometime along about the 17th or 18th of March.

8 THE COURT: Yes.

9 MR. CRANE: And then I guess I could cancel my plans
10 for spring break.

11 THE COURT: Well, I don't know that you have to do
12 that.

13 MR. CRANE: And that would give me two weeks --

14 THE COURT: Well, no, you'd have --

15 MR. CRANE: -- to jump over and start her up on the
16 11th.

17 THE COURT: Well, either that or the 18th.

18 MR. CRANE: I mean, here's one thing I was going to
19 propose. I said this in court. Was, you know, I could talk
20 to Judge Hamilton. The defense has moved for a continuance
21 in Johnson. And see if we could -- you know, see what he
22 thinks about, you know, plugging in -- putting Ferguson in
23 there, in the first or second week of -- probably like the
24 third week I guess would be the best, of March.

25 MR. McBRIDE: But we didn't want to do the spring

1 break thing. Remember? We didn't want to have it over
2 spring break.

3 MR. CRANE: No, it wouldn't. It would be before
4 spring break. Like the week of the 14th. Like pick the
5 jury, you know, Friday, the 11th, bring them back and start
6 it up Monday. I mean, I think -- I think we'd be done by
7 that week. But now maybe that doesn't give you enough time
8 to get done --

9 THE COURT: Are we talking about March now?

10 MR. CRANE: Yeah. That's if -- see, that's the
11 thing. I'm not going to set there and represent that Judge
12 Hamilton's going to do that.

13 THE COURT: Well, I'm not sure that he would either.
14 I mean, I can't certainly speak for him, but this isn't the
15 first time the case has been tried.

16 MR. CRANE: That's true. And it's punishment only.

17 THE COURT: Yeah, it is punishment only. And I
18 don't know how eager he is to continue it.

19 MR. CRANE: It's been continued. That's the thing.
20 I mean, it has been bumped several times, you know, so.

21 THE COURT: But you have a pending motion by defense
22 counsel in that case for a continuance?

23 MR. CRANE: Yeah. That has not been taken up. In
24 fact, he knew about this motion. I had permission from their
25 defense counsel to tell them about this motion. And I -- and

1 he basically said, Well, I'm not going to take that up until
2 you figure out what's going on in Ferguson. He's not going
3 to take up the Johnson motion until he figures out what's
4 going on in Ferguson.

5 MR. McBRIDE: Can we get ready in time for that?

6 MR. CRANE: Now the other thing would be to go ahead
7 and go into May. Which would give me time to prepare for
8 Ferguson, but there you go, that's a longer --

9 THE COURT: I was going to say --

10 MR. CRANE: -- longer time to wait.

11 THE COURT: Well, and let me remind you that state
12 versus Rios is being tried in May.

13 MR. CRANE: You got that one?

14 THE COURT: Yes.

15 MR. CRANE: When is that set?

16 THE COURT: The 16th.

17 MR. McBRIDE: During that same time frame, I also
18 have a murder case in Marion County that's going to be tried.

19 THE COURT: And I would like to avoid -- the reason
20 Rios was set on the 16th was to avoid those two holidays in
21 May. We still celebrate Truman's birthday. And part of the
22 problem is, of course, you have to pay marshals or allow them
23 double time.

24 MR. CRANE: June?

25 THE COURT: June is far off, but it's completely

1 free for me. But if I set it in June, I would certainly not,
2 unless there is some act of God or some totally unanticipated
3 matter, I wouldn't want to continue it.

4 MR. CRANE: Well, I wouldn't either.

5 MR. McBRIDE: I think Ryan Ferguson would kill us if
6 we continued it.

7 MR. CRANE: What do you want -- what should we do
8 about -- you don't want to -- you don't like March.

9 MR. McBRIDE: We don't like March. I think March is
10 too soon for the defense, given what we need to do. With
11 everything that needs to be done, I think we would be back in
12 a position of coming back to the Court.

13 MR. CRANE: And you don't disagree with my situation
14 in April.

15 MR. McBRIDE: No.

16 MR. CRANE: If I'm trying Johnson.

17 MS. BENSON: No. We understand that completely.

18 MR. CRANE: See, here's the way this is going to
19 work. It's a house of cards. If this gets set in April,
20 Hamilton's going to go -- he may well go, I'm not going to
21 continue Johnson.

22 MR. McBRIDE: Uh-huh.

23 THE COURT: I think you have to presume that you're
24 going to try Johnson, if we have an April setting.

25 MR. McBRIDE: Yeah.

1 THE COURT: It may not work out that way, but that's
2 what you're going to have to presume. And are there any
3 potential grandparents who might be here for the blessed
4 event that could fill in and help mom and the new baby?

5 MR. McBRIDE: Yes. Well, and particularly if
6 we're -- you know, I know it is long off, but what is your
7 June like, Kathryn?

8 MS. BENSON: June I'm okay, so. I can't think of
9 anything I have.

10 MR. McBRIDE: That does get me out of that window.
11 And there are people that can help. We'll be okay with, you
12 know, that situation. You know, honestly it's not the new
13 one; it's the two-year-old that we got to try to corral
14 during all that, so.

15 MR. CRANE: Let me look here. Okay. So you got
16 Memorial Day at the very end of May.

17 MR. McBRIDE: Uh-huh.

18 MR. CRANE: That Tuesday wouldn't be any good.

19 THE COURT: Well, Tuesday --

20 MR. CRANE: What --

21 THE COURT: -- that would give us -- I mean --

22 MR. CRANE: What week are you thinking?

23 MR. McBRIDE: Well, you know, June is open. So --
24 and if it's open for the Court --

25 THE COURT: I don't know why -- I mean, I don't know

1 if the 31st of May would work.

2 MR. CRANE: Well, you're coming right off of
3 Memorial Day. See, we got to pick that jury --

4 MR. McBRIDE: We may have some people gone still.

5 MR. CRANE: How do we have this set up -- how did --

6 MR. McBRIDE: Currently we had it set up on the
7 January 24th date to start jury selection on that day, was my
8 understanding, and then come in after --

9 MR. CRANE: And what day of the week was that?

10 MR. McBRIDE: That was a Monday.

11 MR. CRANE: Well, I was wondering if you might want
12 to explore, Judge -- I mean, first of all, I would hope that
13 we would get this non death jury picked in a day.

14 MR. McBRIDE: I would too.

15 THE COURT: I don't know any reason why you
16 shouldn't. If there is not a death qualification.

17 MR. CRANE: I was wondering if we could do the thing
18 where we go up there on the Friday, the week before, and if
19 you can get out of your law day the following --

20 THE COURT: I would not have a law day. Is it going
21 to take five days to try? To present the evidence?

22 MR. CRANE: I guess we probably ought to have that.

23 MS. BENSON: I think we're probably going to get
24 pretty close to that.

25 MR. CRANE: Just give us a full week.

1 THE COURT: Including the Saturday, if we need it.

2 MR. CRANE: For the -- for the jury selection, if
3 there is a problem with the jury, we could go into the
4 Saturday. Or I guess we could come back and start evidence
5 on a Saturday.

6 THE COURT: Well, no, I was starting to say that if
7 we started the trial on a Monday, and we didn't get finished
8 by Friday --

9 MR. CRANE: Oh, that other Saturday.

10 THE COURT: That other Saturday.

11 MR. McBRIDE: The tail end Saturday?

12 MR. CRANE: That's worked for -- that's worked for a
13 couple of trials we've done change of venue on.

14 THE COURT: I guess my only qualm is, say we pick a
15 jury on Friday. We have the jury selected. We're up in
16 Lincoln County. What are we going to do with the jury over
17 the weekend?

18 MR. CRANE: The way Hamilton did it is he gives them
19 the charge and tells them to get on the bus, whatever that
20 is, Sunday night, and they ride in and are sequestered from
21 then on.

22 THE COURT: Do you have -- ever have problems with
23 people deciding they didn't want to come?

24 MR. CRANE: No. And I've never had problems with
25 any indication that they were tainted by media when we've

1 done that. You know, I mean, the only other option with that
2 Sunday in there is you just end up having to start on a
3 Monday and lose that day. And then, you see, you got the
4 travel time in the -- in that Monday/Tuesday too. So, you
5 might not get started until Monday afternoon, and --

6 MR. McBRIDE: But back to like the original plan,
7 was a Monday.

8 THE COURT: Yes.

9 MR. McBRIDE: And you avoid that potential for
10 jurors coming up and saying -- coming up with a reason or
11 something happening to them. You avoid some publicity
12 perhaps, that they would not --

13 THE COURT: And plan to go into Saturday to finish
14 it.

15 MR. McBRIDE: Yeah. And then maybe, again, pick it
16 on Monday, have Tuesday morning for travel, start Tuesday
17 afternoon.

18 THE COURT: Well, how long a drive is it up to
19 Lincoln?

20 MR. McBRIDE: It's north of St. Charles County.

21 MR. CRANE: About an hour and a half or something,
22 isn't it?

23 MR. McBRIDE: It may be two hours.

24 MS. BENSON: It may be two hours, yeah.

25 THE COURT: I would think we might get them --

1 MR. McBRIDE: Back here by noon on Tuesday?

2 THE COURT: Oh, before noon. Assuming that we got a
3 jury. In fact, if we got a jury, say, even by 6:00 the night
4 before, I might suggest that they could come back with their
5 suitcases at 8:00, for a bus ride to Columbia, to start
6 bright and early on Tuesday morning.

7 MR. McBRIDE: Uh-huh.

8 THE COURT: So, with that said --

9 MR. McBRIDE: I've got my calendar up and to the
10 6th.

11 THE COURT: The 6th of June?

12 MR. McBRIDE: But -- and there is -- I have nothing.

13 THE COURT: Mr. Crane? Are you going to be prepared
14 by the 6th? Yes?

15 MR. CRANE: Yeah, I'm just looking at the -- yeah.
16 Is that --

17 THE COURT: And that's a particularly good week,
18 because I do see that Judge Hamilton doesn't -- won't have a
19 jury on Wednesday, and will be out of the office on Thursday
20 of that week, for some reason. And so it would be in -- it
21 would be easier to -- we wouldn't have as many jurors to
22 occupy our marshals, who would want to be taking care of this
23 jury.

24 MR. McBRIDE: Uh-huh.

25 MS. BENSON: Does that look good for everyone?

1 THE COURT: And then we could go up on Sunday
2 evening, to be ready bright and early.

3 MS. BENSON: Uh-huh.

4 THE COURT: Now, the only -- the only fly in the
5 ointment is, I'm going to have to have Marla call, right now,
6 to see if they would be available on the 6th of June, if the
7 courtroom would be available.

8 MR. McBRIDE: Okay.

9 THE COURT: I suspect they don't set so far in
10 advance, but it may be the one law day of the summer.

11 MS. BENSON: Yeah.

12 THE COURT: I mean, something -- I don't know how
13 they try cases. You know, what they do up there. I don't
14 know the procedure. Let me talk to Marla.

15 Do we have another alternative? I guess --

16 MS. BENSON: The next week maybe.

17 THE COURT: The next week, the 13th?

18 MS. BENSON: (Nodding head up and down.)

19 (Judge Roper talking on the phone with the
20 secretary.)

21 THE COURT: No, I can't speak for them. If it were
22 here, I could speak.

23 MS. BENSON: Uh-huh. Judge, while we're waiting,
24 there is another issue that we wanted to address to you.

25 THE COURT: Okay. As long as it's not something

1 that requires the presence of the defendant while we're
2 discussing it.

3 MS. BENSON: Well, I don't believe so. And if you
4 have a differing opinion, let me know obviously.

5 He obviously is being held at Boone County Jail.
6 And there has been an issue arise where his people -- people
7 are indicating to him that his codefendant, Charles Erickson,
8 is showing them pieces of discovery, talking to them about
9 the case. And that's obviously creating a dangerous
10 situation for a potential -- a person to come forward and say
11 they have information from Ryan, when in fact that
12 information is coming from another source, and trying to make
13 a deal.

14 We are asking that he be transferred to the Callaway
15 County Jail, since that's a natural -- when they are
16 overstaffed -- not overstaffed, but overpopulated, to go
17 there. And my understanding from talking to Major Brewer and
18 the Callaway County Jail personnel is that there is no cost
19 associated with that, because they simply trade inmates all
20 the time. The Callaway County person didn't indicate any
21 problem with it. They've housed obviously serious -- people
22 with serious allegations before. Including murder
23 allegations. So it's not a security problem.

24 THE COURT: Tell me what your reason is again? I
25 didn't quite understand.

1 MS. BENSON: Apparently Charles Erickson, Ryan's
2 codefendant, is showing various jail inmates pieces of the
3 discovery in the case, talking to them about the case. Our
4 concern is that this can create a situation where someone
5 wants to make a better deal in their own case and going to
6 try come forward and say Ryan told them that. Basically
7 creating potential snitches that don't actually have
8 information from Ryan at all. And it endangers the case, the
9 integrity of the case. And since there is no cost associated
10 with it, I really don't see any problem.

11 MR. CRANE: We talked about this, and there's two
12 individuals who -- one of which came about months ago.
13 Richard Walker. He's an endorsed witness. And there's
14 another guy, Aaron Walters. And I tendered the discovery
15 reference the statements they've made.

16 Walters was not with Erickson until after he had
17 been housed with Ferguson. I checked this out with the jail.
18 So it's an impossibility that Walters was provided the
19 discovery by Erickson to rat out or make up a story that
20 Ferguson told him.

21 Walker goes way back in time. And has been -- that
22 discovery's been tendered for some time. And that individual
23 came forward and, you know, talked to the police and said,
24 "Hey, Ferguson's saying this." And they weren't -- that was
25 when Ferguson and Walker were housed together, but before he

1 was ever with Erickson. When he raised this.

2 Now, Kathryn says apparently Erickson's doing this.
3 And that it's causing snitches to come out.

4 MS. BENSON: Well, that's our concern.

5 MR. CRANE: Those are the only two people. Those
6 are the only two people I've heard of. And I've asked this,
7 but I've never heard one single thing, one single thing that
8 would indicate that Erickson is showing other people
9 discovery, A. And B, that he's doing so to elicit snitches
10 that are lining up, taking a number, going to rat out
11 Ferguson, because it's not happening.

12 The jail, I talked to Major Brewer at the jail,
13 because they raised this, and I said, "Well, let me check it
14 out."

15 THE COURT: Is he not Captain Brewer now?

16 MS. BENSON: Yeah, that's right.

17 MR. CRANE: Oh, he's a captain now.

18 THE COURT: He's changed his position.

19 MR. CRANE: He indicated that, first of all, on a
20 custody change like that, normally that's done at the -- the
21 jail's decision to switch inmates. If there is a safety
22 risk, or if there is some, you know, or at random,
23 overcrowding, they'll send somebody out to another jail, on
24 their own.

25 This whole idea of Erickson being the basis for a

1 transfer of Ferguson, we don't understand it. I mean, I
2 suppose what we could do is put Erickson in another facility,
3 but on the other hand, that seems strange, because I don't
4 think it's happening.

5 I think what it probably is is that, in Callaway
6 County, which is the county that the defense wants him to go
7 to, there's -- I believe -- it's my understanding the
8 visitation is different. And you can smoke cigarettes. And
9 it's a more conducive environment, in their view, or in
10 Mr. Ferguson's view.

11 Until there is any -- some evidence that Erickson is
12 going, "Hi, please read this discovery and then go to the
13 prosecutor and say you got it from Ferguson," I don't know
14 how we can base a transfer.

15 MS. BENSON: If I can say, first of all, it's not
16 based on Aaron Walter or Richard Walker. These are
17 allegations that have come up since those two people.

18 MR. CRANE: By whom?

19 MS. BENSON: Okay. Different inmates at the jail.

20 MR. CRANE: Who are they?

21 MS. BENSON: Well, I don't have their names with me
22 right now, Kevin. Okay?

23 Secondly, obviously we are not saying that Charles
24 Erickson is doing this and trying to promote someone
25 snitching, but the risk is there if he is showing people

1 discovery. He doesn't have to be telling them to go to the
2 prosecution, and we certainly don't think that he is, have no
3 reason to believe that, but if he is showing other inmates
4 discovery, it creates the risk that somebody could try to
5 generate some evidence in that way and make a deal for
6 themselves. Obviously the prosecution isn't above doing
7 that, because they have done it with two people so far.

8 MR. CRANE: Above doing what?

9 MS. BENSON: Making a deal with someone who says
10 they have information.

11 MR. CRANE: There is no deals.

12 MS. BENSON: So -- well --

13 MR. CRANE: We haven't made any deals. What deals
14 have we made?

15 MS. BENSON: Endorsing then. Okay.

16 Again, there is no cost. It's a normal overflow
17 site. And I just don't see a problem with it, if Callaway is
18 willing, which they indicated they would be. When I talked
19 to Major Brewer about it, he indicated to me there was no
20 cost. He didn't voice a specific objection, but merely
21 indicated he wanted to talk to Kevin Crane about it before he
22 took any position on it.

23 MR. CRANE: I talked to Major Brewer. Be happy for
24 the Court to talk to Major Brewer. I think it's a custody
25 issue. I'd prefer not to have Erickson out of there, because

1 when we get with him to prepare for the case, it's harder for
2 us to do over in Callaway County. Or anywhere else, for that
3 matter. I would suggest that the Court talk to Major Brewer
4 about his position reference transfers. And in this --

5 THE COURT: Isn't there some written policy about
6 transfers? I mean, I usually leave that to the discretion of
7 the gatekeeper there, the sheriff.

8 MR. CRANE: Exactly. And that's who I defer to.

9 THE COURT: The one who makes those kind of
10 policies.

11 MR. CRANE: He is not going: "If Kevin Crane says
12 it's okay." I called him up. He said, "We would not make a
13 transfer under these circumstances." But I'd be more than
14 happy not to speak for him and have the Court talk to Captain
15 Brewer.

16 THE COURT: Perhaps maybe it needs to be, if you
17 want to present some evidence relating to your oral motion, I
18 will hear it, and you can call whomever you choose to call,
19 to let me know that. But, you know --

20 MS. BENSON: Okay. I can do that.

21 THE COURT: Without Erickson even being there with
22 the discovery, people could make up something, and I assume
23 that you could, through your good cross-examination and
24 investigation, you know, destroy their story, which --

25 MS. BENSON: I understand. It's just --

1 THE COURT: I mean, as a matter of being an attorney
2 and determining the credibility of the witnesses that you
3 have and what they are. But, you know, if you want to
4 present some evidence on that -- that's Marla.

5 (Judge Roper talking on the phone to the secretary.)

6 THE COURT: We will do that.

7 Are there any kind of scheduling matters that you
8 want to bring up, like for complete disclosure to occur, or
9 for any depositions to take place, or things of that nature?
10 Or are you able to work that out pretty well yourself?

11 MR. McBRIDE: We are hoping to be able to use the
12 January 24th week for some depositions.

13 I need to get a hold of you to set those up.

14 MR. CRANE: Okay.

15 MR. McBRIDE: And there's -- the state's been, you
16 know, readily providing information, as they get it, as far
17 as I know. And we have information we need to get to the
18 state and get it ready to go. I don't know if there is an
19 order that needs to be presented to the Court or not.
20 Perhaps in March or something, if there is something going
21 on, we can take a look at it then.

22 THE COURT: I just want to make sure that you've
23 gotten everything done, so that we don't have another
24 postponement.

25 MR. McBRIDE: Yeah, I understand.

1 THE COURT: And if it's necessary for a court order
2 to do that, I'm willing to do it. If the parties can work it
3 out on their own, that's fine too. I'm not suggesting that
4 either side would be recalcitrant in getting things
5 scheduled; it's just I don't want to have to continue it
6 again.

7 MR. McBRIDE: Sure.

8 THE COURT: I will show that state appears by
9 prosecuting attorney. Defendant appears by counsel. With
10 consent of counsel, trial is continued to 6-6-05, 9:00 a.m.,
11 Division III. And then I'll put: Lincoln County. For jury
12 selection.

13 And Diana, you didn't speak up, but you gave me a
14 list of what times where you were going to be gone. And I
15 thought I had that with me.

16 THE COURT REPORTER: It's not a conflict.

17 THE COURT: I thought there was some in March and
18 April.

19 All right. I will show that defendant orally moves
20 to transfer defendant to the Callaway County Jail. Motion is
21 passed for the presentation of evidence.

22 And I do think that Mr. Ferguson has a right to be
23 present at the time the evidence would be --

24 MR. McBRIDE: Okay.

25 THE COURT: -- introduced.

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P R O C E E D I N G S

August 29, 2005

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THE COURT: Case Number 165368-01, State of Missouri versus Ryan William Ferguson. What says the state?

MR. CRANE: Ready, Judge.

THE COURT: And what says the defendant?

MR. ROGERS: Ready, Your Honor.

THE COURT: Before we proceed with the matters that are called for today, some time ago there was a motion for dental treatment for Mr. Ferguson that was heard via telephone conference call. And when we concluded that conversation, I had asked both the state and defense counsel to look into certain issues as to whether or not sheriff would permit a dentist to enter the facility and look at Mr. Ferguson. And I also asked defense counsel whether or not the dentist would be agreeable to do that. I've not heard from either the state or the defense regarding that, but I will tell you that Dr. Ogden called me, much to my surprise, telling me that Mr. Ferguson's mother had been advised by defense counsel to contact me personally. And I didn't speak to him. And I said that I would bring it to the attention of the parties to this litigation. And I've not ruled on the motion, because I was waiting for feedback from both sides in this area.

1 Let me ask if the state has anything further to say.

2 MR. CRANE: No. Our position has been: If he, you
3 know, needs dental treatment, and the defense can work it out
4 with the jail, that's okay with us. I haven't heard a thing
5 since we were -- had our motion with Mr. Weis.

6 THE COURT: You're talking to me about working it
7 out with the jail as in having the treatment done inside the
8 facility?

9 MR. CRANE: No. Whatever the jail and the defense
10 can work out with the provider, I was going to leave to them.
11 And that's -- I thought -- I thought we left it -- I thought
12 that somebody was going to confirm the situation, the dental
13 situation with the jail?

14 MR. WEIS: Yeah. And Your Honor, my name's Jeremy
15 Weis. I can speak to that.

16 THE COURT: Yeah. I think you were the one on the
17 telephone.

18 MR. WEIS: I was on the phone with you, yes.

19 THE COURT: Yes.

20 MR. WEIS: At the time, I had not actually spoken
21 with Dr. Ogden specifically regarding his availability. And
22 I think the Court requested -- or asked whether he would be
23 available to go in there. He has since told us that he was
24 not available during -- since the time that we've had --
25 since we had the motion hearing. He's available on

1 Thursdays. That's his day off. That would be the time he'd
2 be available to go out of the office and do it. Since then,
3 he has not had an available Thursday that he felt that he was
4 available to go to the jail. Therefore, we haven't requested
5 it from the jail to go in.

6 In addition, he has told us, and I can provide the
7 Court a letter that I just received today from Dr. Ogden,
8 saying that frankly going in without an X-ray machine and
9 looking at Mr. Ferguson's teeth would not prove beneficial,
10 because he wouldn't be able to tell anything, short of an
11 X-ray.

12 So his opinion frankly is that, as it stood
13 previously, as he had notified the Court, that Mr. Ferguson
14 had cavities; they have not been addressed; that the problems
15 are likely to still be there, but he wouldn't be able to give
16 a professional opinion with respect to the treatment
17 necessary, short of doing an X-ray.

18 THE COURT: Well, then, I'll just rule on the motion
19 based on the information that I have.

20 MR. WEIS: Would you -- can I submit --

21 THE COURT: Have you shown that -- has that been --

22 MR. WEIS: I have not --

23 THE COURT: -- copied to the state?

24 MR. WEIS: It's substantially similar to what was
25 presented last time.

1 (Mr. Weis providing document to Mr. Crane.)

2 MR. CRANE: Yeah. And I mean, here we go again.
3 I'm not a dentist, but. I mean, if, you know, the security
4 issues and the protocol for the jail, which we went over ad
5 nauseam the last time we had this hearing, can be addressed,
6 I mean, I'm sure there's some way, if he has a need, that we
7 can get him -- dental care can be provided. You know, I'd
8 have to, you know, consult with Major Brewer on the ups and
9 downs of, you know, what he needs, when he needs it, and how
10 he's going to get it.

11 THE COURT: Well, it was my understanding that
12 Mr. Ferguson's parents were willing to compensate deputies
13 necessary for security reasons to go to the office when the
14 dentist was available to treat him, and that it would not be
15 something that the county or the state would have to -- I
16 understand that there may be limitation on the number of
17 people available, who are on duty, and I certainly don't know
18 personnel now in the jail and who's available and who is not,
19 but subject to that, I understood that his parents were
20 willing to actually pay whatever it cost to --

21 MR. CRANE: Right. And then I don't remember -- in
22 their motion there was some, and I don't want to waste too
23 much time with this, there was a difference between the
24 cavity thing and oral surgery and going to another care
25 provider. And you're talking cavities now?

1 MR. WEIS: Well, that was -- that was the initial
2 thing. He said if there were -- if it required an oral
3 surgeon, he was not, and that he may need to do a referral to
4 that. That it may be in addition. But he wasn't aware of
5 that.

6 To speak to a couple things, Your Honor. The
7 Ferguson family, you're correct, they have agreed to pay the
8 additional cost for transportation associated with that. In
9 addition, one thing, Mr. Ferguson turns 21 during the
10 course -- what would be during the middle of his trial.
11 His -- his dental insurance runs out when he's -- when he's
12 21, or if he's not in school, which, of course, he won't be
13 at that time. So it would be substantially more expensive.

14 THE COURT: All right.

15 MR. WEIS: And one final thing. We have never
16 requested that Dr. Ogden specifically contact you. We had
17 asked --

18 THE COURT: Well, I did not --

19 MR. WEIS: We had asked for the letter, and that's
20 what we received, so.

21 THE COURT: Well, I suspected that defense counsel,
22 being experienced, would never suggest that a provider
23 contact me directly. And I told Dr. Ogden that, and that I
24 couldn't talk to him, but he needed to convey that
25 information. And that letter probably is a result of that.

1 I'm not suggesting that you did.

2 MR. WEIS: Okay.

3 THE COURT: That's just what he told me.

4 MR. WEIS: And could I submit the letter, Your
5 Honor?

6 THE COURT: Yes. You may submit the letter. And I
7 will rule on that motion accordingly then.

8 All right. It is my recollection that the state had
9 filed a motion to endorse. That was the initial motion the
10 state filed. And I believe the state has also filed a motion
11 in limine. And subsequent to that, the Court did receive
12 some pretrial motions that defense counsel had filed. I
13 guess there were four motions relating to that. And since
14 the state filed its motions first, then I will allow the
15 state to go forward first with its motions.

16 MR. CRANE: As to the motion to endorse, defense
17 counsel and I have talked about these individuals. I believe
18 they have been -- our discussions have identified them
19 sufficiently. We'd ask that these witnesses be endorsed. I
20 didn't think there's an objection. There may be.

21 MR. ROGERS: We do not have an objection to the
22 endorsement, Your Honor. Some of these witnesses we
23 anticipate will be testifying within matters that are covered
24 by our other motions in limine, and so we can discuss those
25 at the time.

1 THE COURT: But all these witnesses have been
2 disclosed.

3 MR. ROGERS: That's correct.

4 THE COURT: All right. The state's motion to
5 endorse Michelle Hudson, David Igleheart, Jon Cole, Brian
6 Dunn, Kim Bennett, Mark Kempton, Delaney Dean, Randall
7 Nichols, Don Hawkins, Shelley Jones, Michael Moore, David
8 Kitchen, Bill Hawes, Jim Robertson, Dan Gill, Christine Lo,
9 and Kelly Ferguson --

10 MR. CRANE: And there's one more guy on the back.

11 THE COURT: I'm looking. I'm going to the next one.
12 And Cary Maloney, that motion is sustained.

13 Then there is a -- the state's motion in limine.
14 And I'll hear you on that.

15 MR. CRANE: Yeah. It's the "other suspect"
16 evidence. And this is going to be some -- we're going to get
17 into some interesting discussion I think on one of the -- at
18 least one of the defense motions with respect to this
19 subject, because they also, to a degree, argue that this is
20 appropriate, although I don't think in that case I'm arguing
21 about other suspects.

22 But generally, Judge, the case law is clear that
23 a -- the defense can't introduce evidence that another person
24 committed the crime without some showing, some proof, that
25 they committed an act directly connecting them with the

1 crime. And I'm sure the Court's seen this motion before.
2 We'll stand on it.

3 MR. ROGERS: Your Honor, if I understand the motion,
4 I think it does correctly state the law. And we don't intend
5 to point the finger at any particular individual as the
6 perpetrator of this murder of Mr. Heitholt.

7 I do want to make it clear that I do not understand
8 this motion to be intended to preclude us from evidence
9 having to do with the crime scene, evidence having to do with
10 the description of individuals seen at the crime scene,
11 evidence having to do with the course of the police
12 investigation, because I think that is clearly proper. And I
13 don't think it's within the "other suspect" evidence.

14 If we knew who killed Mr. Heitholt, we certainly
15 would be trying to present such evidence, but we would have
16 to have evidence to present, and we don't. But there is
17 evidence that there is a hair found in Mr. Heitholt's hand,
18 which is not the hair of Mr. Ferguson, not the hair of
19 Charles Erickson, and not the hair of Mr. Heitholt's. And so
20 I think that is evidence that somebody other than
21 Mr. Ferguson committed the crime, but I don't think it's
22 within the purview of their motion.

23 MR. CRANE: And I think we're really going to get
24 into the last -- that last factual issue with your motion in
25 limine, but.

1 Judge, the state is unable to anticipate every
2 single scenario in which there may be an objection pursuant
3 to this motion as the trial proceeds. This was a lengthy
4 investigation. There may be things that I've anticipated and
5 things that I don't anticipate that may put this motion in
6 play. The state files this as a general reference point to
7 refer to for future potential objections if and when the
8 defense should tender such evidence. Or offer to tender such
9 evidence.

10 THE COURT: Are those the motions that the state has
11 filed?

12 MR. CRANE: Yes.

13 THE COURT: All right. The defendant has filed,
14 just recently -- and I assume with consent of the state we'll
15 take up the recent motions that the defendant has filed?
16 Mr. Crane? You're consenting that we won't have to
17 reschedule this?

18 MR. CRANE: Yes, I am.

19 THE COURT: All right. And there is -- I'll -- I'll
20 just let defense counsel handle those, however -- whichever
21 order you wish to. I have them on the bench. And you may
22 make your argument, unless there's some evidence that you
23 want to introduce on any of them.

24 MR. ROGERS: Your Honor, we're going to trade off on
25 some of these.

1 Let me start out with the motion concerning this --
2 I think the title is defendant's suggestions concerning jury
3 selection procedures.

4 THE COURT: All right. Let me get back to that.

5 And you will remember that when we scheduled this
6 for trial, there was another case involving a sequestered
7 jury that had already been set at the same -- around the same
8 time. And we had a discussion at that time about the
9 priority of that case going forward. I have no reason to
10 believe it's not, but I -- that Judge certainly knows that
11 we're interested in it. And if there are any pretrial
12 matters that come up, we definitely will be advised if the
13 case gets settled or continued.

14 MR. ROGERS: Okay.

15 THE COURT: If you'll remember that.

16 MR. ROGERS: Right. I do recall --

17 THE COURT: All right. I have your suggestions
18 concerning jury selection procedures.

19 MR. ROGERS: And my understanding is that the state
20 disagrees with our suggestion that there be a jury
21 questionnaire administered, above and beyond the one-page
22 form that is routinely filled out in Lincoln County by
23 prospective jurors.

24 Your Honor, our position is that this questionnaire
25 gives us a lot of information which we're entitled to. I

1 don't think they have an objection to any of the questions on
2 the questionnaire. I think they just object generally to the
3 use of a questionnaire.

4 I think it gives us a lot of information that we
5 would otherwise be compelled to ask in open court. I think
6 there are several advantages to the use of a questionnaire.
7 First of all, it is less embarrassing to the venire people to
8 fill out a questionnaire in the privacy of their own homes,
9 sitting at their kitchen table, than it is to answer
10 questions in front of strangers or questions in front of
11 their friends and neighbors who may be on the jury panel as
12 well.

13 Mainly, Your Honor, it saves a lot of time and a lot
14 of in-court time, not only for the lawyers, but also for the
15 Court.

16 We are -- we've scheduled basically an entire Friday
17 in Lincoln County to do the voir dire of this case, which
18 should be sufficient for that. I think the use of the
19 questionnaire makes the difference between a very long day
20 and a relatively short day of voir dire. And I think -- I
21 don't -- I don't see a down side, because there's -- we
22 certainly are not seeking to preclude the state from making
23 any inquiry they want to make that's at all relevant and
24 permissible. Whether the subjects are covered by the
25 questionnaire or not, if they want to spend in-court time

1 doing it, I think that's their right. But I think that it
2 does tend to focus the questions. I think -- I've used
3 questionnaires in many cases. Several cases, I guess. And
4 they -- it tends to shorten the in-court voir dire; it tends
5 to focus the questions; it tends to lead to productive areas
6 of individual questioning that you would not want to take up
7 with everybody else on the panel if you didn't need to.

8 The other thing is: We would be willing, the
9 defense would be willing to defray whatever additional
10 postage costs would be involved in doing this. I mean, yes,
11 sending out a questionnaire with the summons and, rather than
12 just the one-page form, and then having them mail it back may
13 cost \$150 more. I don't know. We're willing to defray that
14 cost, whatever it is. So I don't see any down side from the
15 Court's point of view.

16 And so that's why we think that the use of a
17 questionnaire -- this is an unusual case. I've been
18 practicing for close to 30 years. And when I started, I had
19 hair. I had long hair. And --

20 THE COURT: Didn't we all.

21 MR. ROGERS: I have never had a case like this,
22 where there is one guy saying, "I did it with him." And it's
23 not a situation of doing this to get some kind of sweetheart
24 deal. He's getting a fairly harsh deal, in my view. And
25 yet, from my investigation, it seems pretty clear that he

1 didn't. And certainly Mr. Ferguson's position is that he
2 certainly was not involved with Charles Erickson in any type
3 of murder. Certainly not the murder of Mr. Heitholt.

4 And so this is an unusual case, with unusual issues,
5 because we're not saying this person has made up a story to
6 blame my guy and shift guilt from himself. He's come up with
7 a story that somehow puts guilt on both of them.

8 And I think these are the kind of issues that need
9 to be explored in some depth, and I think the questionnaire's
10 a good way to at least begin that process.

11 THE COURT: I'm looking for the questionnaire,
12 Counsel, both the one that Lincoln County uses, because I'm
13 not familiar with that particular questionnaire.

14 MR. CRANE: Did we not -- did we not get that to
15 you, Judge?

16 THE COURT: I did not get that. Nor do I --

17 MR. CRANE: It was attached to our --

18 THE COURT: Well, just a minute. I don't see the
19 proposed questionnaire that counsel for the defendant
20 referred to. I see his suggestions. And I do not --

21 MR. ROGERS: I filed last week a revised proposed
22 questionnaire that was like a final --

23 THE COURT: All right. Let me see if I can find --

24 MR. CRANE: Oh, I've got a copy of it.

25 THE COURT: Let me see if I can find it. It may be

1 here in the file. I do see one that was filed in May. And
2 you filed one subsequent to that?

3 MR. ROGERS: Yes, Your Honor. Last week.

4 THE COURT: Okay. Then let me see.

5 MR. ROGERS: Week before last maybe.

6 THE COURT: Aha. Here we go. I have -- I do have
7 it now.

8 And Mr. Crane, you claim that your -- the Lincoln
9 County questionnaire is appended to your --

10 MR. CRANE: My --

11 THE COURT: -- suggestions in opposition?

12 MR. CRANE: Correct.

13 THE COURT: It is not appended to the one I had,
14 that you filed on May the 3rd.

15 MR. CRANE: Yeah, I --

16 MR. ROGERS: It was on the copy I got.

17 MR. CRANE: You got it? Well, I'll give you a copy,
18 Judge. In fact, I can give you an original.

19 Judge, I'm giving you what we received from Lincoln
20 County as the original jury questionnaire. And defense
21 indicates they've got a copy of that.

22 THE COURT: They would like a copy of it?

23 MR. CRANE: No. They got one.

24 THE COURT: They have a copy. All right.

25 Let me just ask one question to defense counsel.

1 Assume that the Court would permit a different questionnaire
2 to be used. Would counsel for either side be precluded from
3 asking and exploring issues that are contained in that
4 questionnaire?

5 MR. ROGERS: I don't think so, Your Honor. I mean,
6 I think that once you get the questionnaires back and you
7 look at them, that there's no reason to, but I don't think
8 you're precluded to. And certainly it's not our intention,
9 by the use of a questionnaire, to preclude the state from
10 asking whatever they want to ask.

11 THE COURT: Well, I mean, defense counsel might
12 choose --

13 MR. ROGERS: Sure.

14 THE COURT: -- to ask questions.

15 MR. ROGERS: And then follow-up questions on it or
16 to address things. I -- I view this as more of an inclusive
17 than an exclusive process.

18 THE COURT: All right. Mr. Crane, you may be heard.

19 MR. CRANE: Judge, there is no constitutional right
20 to the submission of a written jury questionnaire. Moreover,
21 as we've indicated in our motion, it's the well-settled
22 preference that oral voir dire be the primary means by which
23 information is elicited, other than the information that is
24 on the questionnaire from Lincoln County.

25 I don't know if the Court has had an opportunity to

1 read through the proposed questionnaire.

2 THE COURT: I have not.

3 MR. CRANE: I'm not exactly sure what the
4 differences are between the most recent or -- and the earlier
5 questionnaire. These questions include: What -- list the
6 three best movies you've ever seen, what TV shows you
7 regularly listen to, radio stations, radio programs,
8 newspapers, magazines, bumper stickers on your car, political
9 affiliation. There's some questions about feelings on
10 certain issues.

11 There is questions -- we were talking about the
12 witness that the state intends to call, Mr. Erickson.
13 There's a question on Page 12: "What's your opinion of
14 so-called 'recovered memories?'" I don't know, maybe I'm
15 mistaken, I don't know that there's any definition for
16 recovered memories. It asks the jurors to go through
17 basically committing to what their position is on the term
18 "recovered memories" from: A, "They're made up," to F, "I
19 have no opinion about so-called 'recovered memories.'"

20 The questions are some of which things that I've
21 never heard asked in an oral voir dire, and then some of them
22 are phrased generally in along the lines that would be asked
23 potentially in voir dire. However, these multiple choice
24 scenarios I think can potentially be fraught with confusion.

25 For instance, number 42 on page 12: You may hear

1 testimony from a witness who's been convicted of a crime
2 unrelated to the charge in this case. Would you: A, Always
3 believe that kind of testimony; B, Never believe it; or C,
4 Judge that kind of testimony like any other. I don't think
5 that question is appropriately asked in a written
6 questionnaire.

7 I mean, I think the parties have got to have an
8 opportunity to talk about such things orally. And that a lot
9 of these questions, Judge, the state, with all due respect, I
10 think the defense indicated that I would not have objections
11 to specific questions. I would.

12 And generally we've got an objection to this
13 questionnaire. I don't think it's going to save any time. I
14 think it's going to add time.

15 And the -- the Lincoln County questionnaire, coupled
16 with oral voir dire, is the appropriate way to handle jury
17 selection in this case, as is indicated by Missouri courts.

18 THE COURT: You may briefly reply.

19 MR. ROGERS: Thank you, Your Honor.

20 I don't think there's any case law that says it's
21 wrong or illegal or improper or inappropriate to give a
22 questionnaire. I -- we're not claiming that there's a
23 constitutional right in this case to give this questionnaire.
24 We're asking the Court to exercise its discretion and to do
25 that as a means of I think expediting the process and giving

1 the parties more information with which to exercise both
2 challenges and peremptory strikes.

3 I don't think that the -- Mr. Crane has never
4 pointed out to me particular questions to which he objected.
5 And he has pointed out a couple apparently to the Court.
6 Although I don't know that he objects to those questions
7 being asked at all; I think he just objects to them being
8 asked either in the questionnaire or the way they're asked.
9 You know, I have this on my computer back at the office, and
10 we can change questions, if that's desirable. But I do think
11 these are things that should be inquired about. I think it
12 would be burdensome to ask people these things in oral voir
13 dire, without having given them a chance to go over them
14 first. And so I do think that it's still a better idea to
15 give the questionnaire than not to. I'm not saying we have a
16 constitutional right to it, but I am saying that there's
17 certainly nothing in the law that says you can't do, but
18 we're asking you to do it.

19 THE COURT: All right.

20 MR. CRANE: Judge, I was going to draw your
21 attention to one quick thing. It might -- and again, we
22 generally object to the use of a questionnaire, other than
23 the one provided by Lincoln County.

24 And another thing I notice here is: There's --
25 there's a -- there's -- gosh. How many pages is this? 30?

1 26 pages. Another question here. I'm assuming these people
2 would be asked to answer these questions at their residence.
3 They'd get this by mail?

4 MR. ROGERS: That's -- that's my assumption.

5 MR. CRANE: Page 21. "The charges in this case are
6 murder in the first degree and armed criminal action. They
7 arise from an incident in Columbia, Missouri, November 1,
8 2001, where Kent Heitholt, Sports Editor of the Columbia
9 Tribune, was killed." I mean, right there -- and there's a
10 series of other questions about media attention. I mean, I
11 think that's fraught with danger, Judge, from the standpoint:
12 Here these people are sitting at home. I mean, unlike in the
13 jury pool, where they come in not knowing what we're talking
14 about, they could get right on their computer and go back to
15 the article and read it.

16 So, I mean, I think there's a number of problems
17 with this. I think that we can get a fair jury without it.

18 THE COURT: I will consider it.

19 You may move on to your next motion. And I had it
20 here on the bench, and I need to find it.

21 I have it. Which one do you wish to take up next?

22 MR. WEIS: Take up, Your Honor, the one -- let me
23 pull it up here. State's motion in limine to prohibit the
24 state's use of pretrial in-court identification of
25 Mr. Ferguson by Jerry Trump.

1 THE COURT: You mean the defendant's motion in
2 limine.

3 MR. WEIS: Yes. I'm sorry.

4 THE COURT: I thought I heard you say state's.

5 MR. WEIS: I think I did say state's. I'm looking
6 at defendant's, though, yeah.

7 THE COURT: All right.

8 MR. WEIS: And this one, just generally, I mean, I
9 think we've covered the factual background with respect to
10 this. Mr. Trump, one of two employees that observed two
11 individuals at the Columbia Tribune parking lot, standing at
12 or near Mr. Heitholt's body. At the time Mr. Trump gave a
13 description to the police department and provided information
14 that gave a sketch to -- or provided information to a sketch
15 artist that was used in the investigation. Wasn't able to
16 make an identification.

17 While sitting in prison, in March of 2004, sometime
18 after March of 2004, after Mr. Ferguson and Mr. Erickson had
19 been arrested, Mr. Trump was provided a copy of the front
20 page of the Columbia Tribune. And we've yet to be able to
21 identify which one. It was one of either March 11th or March
22 12th, 2002. Front covers of those newspapers, where he
23 observed two pictures under headlines: "Tips lead to murder
24 arrests" or "An investigation unfolds," with both
25 Mr. Erickson's picture and Mr. Ferguson's picture.

1 He indicated in his deposition that, upon seeing
2 that, he was -- those -- he was sure that those were the two
3 individuals that he observed two and a half years prior, even
4 though he was unable to make an identification then or give
5 specific information respecting height, weight, facial
6 features, and so forth.

7 What we're saying is that the procedures used to
8 identify Mr. Ferguson and Mr. Erickson, and specifically
9 Mr. Ferguson, were wholly suggestive, and that they only
10 offered two pictures of two individuals under a caption
11 clearly indicating that these were the two that had committed
12 the crime two and a half years prior. To allow the
13 identification in trial would suggest that it was accurate
14 and -- when there is nothing -- or that it's reliable, when
15 nothing in his statement or nothing in the circumstances
16 would suggest otherwise.

17 Again, we quoted case law, where they talk about the
18 reliability of an identification. The opportunity to view
19 the criminal. He had a very short opportunity to view it, by
20 his own testimony. The degree of attention paid. He
21 indicated during his testimony that he was, frankly, paying
22 attention to Mr. Heitholt, who was lying on the ground.
23 Third, the accuracy of the description. He gave a very brief
24 description of the individual, which does not, in fact, match
25 Mr. Ferguson or Mr. Erickson. The level of certainty, which

1 is difficult to determine, since no one was there at the time
2 in prison with him when he was shown the pictures. And then
3 finally, the length of time between the crime and the suspect
4 identification. As we've noted, it's over two and a half
5 years after the crime occurred that he identified, under
6 suggestive techniques, to identify both Mr. Ferguson and
7 Mr. Erickson.

8 And we suggest that, as a matter of law, that the
9 Court should exclude this, his in-court identification and
10 pretrial identification of Mr. Ferguson.

11 THE COURT: Are you suggesting that law enforcement
12 was the entity that presented these suggestive photographs to
13 this witness?

14 MR. WEIS: No. Apparently it was his wife that sent
15 him the front page of the paper. But there is case law that
16 suggests that, as a matter of law, the Court can rule under
17 Missouri law. And I have --

18 THE COURT: I have your -- I have your suggestions.

19 MR. WEIS: Well, no, I mean, there's another case
20 that I did not cite, State versus Lawrence, 700 S.W.2d 111.
21 And that's in the Eastern District.

22 MR. CRANE: I've got a copy of that for you, Judge,
23 and for defense.

24 THE COURT: I'll write it down. 700, 111?

25 MR. WEIS: S.W.2d 111.

1 THE COURT: Yeah.

2 MR. WEIS: I mean, and that's one where there is no
3 governmental action, but they suggest in the dicta that the
4 court could rule as a matter of law that it is so inherently
5 biased and suggestive that the court shouldn't allow it.

6 THE COURT: I understand that position. I just
7 wanted to make sure that I understood that it was not anyone
8 in law enforcement that made this suggestion, or anyone from
9 the prosecutor's staff, for that matter, that did this.

10 MR. WEIS: That's right. And we're not suggesting
11 that they did.

12 THE COURT: All right. You may respond.

13 MR. CRANE: Well, Judge, I've got Jerry Trump here,
14 and would be prepared to call him. But I think the matter is
15 resolved by State versus Lawrence, 700 S.W.2d 111, which the
16 defense just brought up and which you have a copy of. That,
17 where there is no governmental action, there is no balancing
18 test applicable, as to the suggestive nature.

19 The defense concedes, based on the deposition
20 testimony of Mr. Trump, that he received this from his wife
21 on December 21 of last year. Mr. Trump was in my office
22 with -- my investigator was in the room. And he indicated
23 that he had seen this photograph. I don't think he
24 remembered it necessarily in the deposition. We have not
25 shown him, since then, to date, no one from the Columbia

1 Police Department, anybody in law enforcement or my office,
2 has shown him the article that he -- or the photographs and
3 the article that he saw. I noted that the defense attached,
4 let me see if I can find it, a report to their motion.

5 THE COURT: There is -- there is a police report.

6 MR. CRANE: Well, the physical copy that I got,
7 Judge, has a supplement from the report. It's actually the
8 first report on this. Number 1. It's got the case number
9 and then slash number 1.

10 THE COURT: Yes. It does say "Followup Report,"
11 though.

12 MR. CRANE: Yeah. There are actually two other
13 reports, wherein Mr. Trump was interviewed, that the
14 defense -- I wanted to give those to you too -- that the
15 defense has received in discovery. And those have also got
16 supplement numbers on them. And I can get those to the
17 defense if they are unable to locate them.

18 Mr. Trump did, in fact, give detailed descriptions
19 of these individuals. We're prepared to put Mr. Trump on the
20 stand today and inquire, if the Court would be willing to
21 receive that evidence. But based on the representations of
22 the parties, I think it's clear that he will -- it would be
23 appropriate to put him on the stand and discuss his
24 observations on the night of the crime -- or early morning
25 hours of November 1, '01; be asked if he can identify the

1 defendant in court; and also view, before the jury, the
2 article that he purports to have seen in April of 2004 I
3 believe it would have been.

4 THE COURT: I'll permit you to call him as -- so the
5 Court might better rule on this motion. And certainly give
6 both sides an opportunity to ask him questions. I don't know
7 if you want to do it now. It maybe is appropriate now, with
8 this motion pending.

9 MR. CRANE: Well, I don't know. You want to go to
10 something else? I guess we can go to something else.

11 THE COURT: There -- no. We -- I mean, I can take
12 it up with this motion.

13 He's not in the courtroom?

14 MR. CRANE: He's in my -- he's in the office.

15 THE COURT: Okay. I thought you said he was in the
16 courtroom.

17 MR. ROGERS: Your Honor, while you're considering
18 this, it seems to me that there would be -- and, you know, we
19 may be talking about unringing a bell or closing the barn
20 door after the horse has left, but very little would be more
21 suggestive than having him come into court now and look at
22 Mr. Ferguson, the only person in court wearing jail clothes.

23 MR. CRANE: Well, that -- you know, that's a
24 consideration, Judge.

25 MR. ROGERS: I just thought I'd point that out.

1 MR. CRANE: You know, I can hold them up.
2 Tell them to hold up.
3 THE COURT: Why don't you tell them to hold up.
4 MR. CRANE: Tell them to hold up around the corner.
5 I mean, but, you know, the way ID goes, Judge, at
6 some point -- and I recognize -- let the door get shut there.
7 I recognize that Mr. Ferguson at trial would not be dressed
8 in jail clothing. But, I mean, at some point an in-court ID
9 is what it is.
10 THE COURT: All right. I do think, since he's the
11 only one sitting here in bright orange attire, that it
12 probably would be not helpful for an in-court identification.
13 And certainly the defendant has a right to be present in the
14 courtroom when any witness is examined on these motions. So
15 I can't very well exclude Mr. Ferguson from the courtroom
16 while this witness testifies as to what he observed at the
17 time of this incident. So, with that understanding, perhaps
18 it would be better not to -- not to have him in the
19 courtroom. And I will tell you --
20 MR. ROGERS: Can we pass this for a minute, Judge?
21 THE COURT: Yes. You know --
22 MR. ROGERS: I'm sorry.
23 THE COURT: Let me just suggest, so that you
24 understand that at trial, and usually at motions this goes
25 too, when one attorney brings up the motion, that attorney

1 would be the one that would address the Court. And the same
2 goes for Mr. Crane. Because he has one of his attorneys also
3 sitting at counsel table. Only one would argue any
4 particular motion.

5 So I'll allow the attorney who first brought this to
6 the Court's attention to be heard, if he wishes to.

7 MR. WEIS: Sure. Your Honor, we were just going to
8 ask if we -- we understand the Court can't force Mr. Ferguson
9 to leave.

10 THE COURT: Absolutely not.

11 MR. WEIS: But we may -- we'd like to talk with him
12 briefly.

13 THE COURT: I'll give you time to confer with him.
14 And why don't we take this up at the end of the other
15 motions.

16 MR. CRANE: Okay.

17 THE COURT: Yeah, why don't we just take this up at
18 another --

19 MR. CRANE: Very good, Judge.

20 THE COURT: -- at another time.

21 You want to handle the next motion for the defense?

22 MR. ROGERS: Your Honor, take up at this time
23 defendant's motion in limine to exclude inadmissible
24 evidence.

25 THE COURT: All right.

1 MR. ROGERS: Base --

2 MR. CRANE: I'm sorry. I spaced out. Which one?

3 THE COURT: I have that. Yes.

4 MR. ROGERS: Catch-all.

5 MR. CRANE: Okay.

6 MR. ROGERS: Basically, Your Honor, there are three
7 types of evidence we're talking about, that I just lumped
8 together in one motion, for sake of convenience, although I
9 don't know how convenient it is.

10 First of all, has to do with uncharged misconduct.
11 Several of the people that the state has endorsed as
12 witnesses today, I think there's four who are police
13 officers, who were involved in reports of two different
14 incidents in which Mr. Ferguson was accused of being a minor
15 in possession of alcohol. He was never charged in adult
16 court with any offenses resulting from either of these
17 incidents.

18 MR. CRANE: You mean in state court.

19 MR. ROGERS: In adult court.

20 MR. CRANE: Well, there were -- oh, okay. Well, I
21 thought the muni -- okay. Go ahead.

22 MR. ROGERS: In one of the instances -- in both of
23 these instances, Charles Erickson was also present. And one
24 of those instances, Erickson had turned 17, and he was
25 charged in municipal court.

1 MR. CRANE: That's -- okay.

2 MR. ROGERS: Okay?

3 MR. CRANE: That's what I was thinking.

4 MR. ROGERS: It's clear, to me at least, Your Honor,
5 that these are acts of misconduct which did not result in
6 conviction, and that therefore they should not be admitted
7 for any purpose. Should Mr. Ferguson choose to testify, they
8 should not be admissible to impeach him, since they're not
9 convictions. And certainly they are in no way, shape, or
10 form admissible in the state's case in chief.

11 THE COURT: Does the state intend to offer
12 uncharged --

13 MR. CRANE: Yeah.

14 THE COURT: -- conduct?

15 MR. CRANE: Is it okay if we just take the things
16 one by one?

17 MR. ROGERS: That's fine, yeah.

18 THE COURT: You've finished with the uncharged
19 conduct.

20 MR. ROGERS: Yes.

21 THE COURT: All right. Do you intend to offer
22 evidence of uncharged conduct?

23 MR. CRANE: As to the April 13, '01, that's I think
24 referred to in the defense motion as the Sky Lane party,
25 unless and otherwise it becomes admissible, the state won't

1 put on evidence of that incident. We did tender it in
2 discovery as part of our ongoing obligation to do so and did
3 endorse the police officer in connection with that. But
4 unless it becomes otherwise admissible through some unknown
5 mechanism, we won't offer that incident.

6 THE COURT: All right.

7 MR. CRANE: As to the 9-28-01 incident, that was a
8 month before -- a month and a couple days before the
9 homicide. Both Ferguson and Erickson were together. They
10 were stopped by the police on that date, as described in the
11 defendant's motion. On October 1st of 2004, and I know these
12 dates are getting a little unwieldy here, but that was when
13 Erickson made his proffer, before there was any agreement
14 reached from the state in exchange for his testimony.

15 In that proffer, which has been tendered in
16 discovery to the defense, it's supplement 332, there's two
17 references by Erickson to that 9-28-01 incident. He ind --
18 Erickson says that Ferguson was extremely upset with the
19 police for arresting him. And further, Erickson stated that
20 after the murder, one month later, Erickson says that while
21 the defendant was driving he and Erickson home, the defendant
22 stated he would not have committed the instant crime, the
23 homicide, if he had not been arrested by the police on
24 9-28-01, wherein he was a minor in possession of marijuana
25 and minor in possession of alcohol.

1 I recognize that this incident is one -- at a time
2 in which the defendant was a juvenile. He was age 16. I
3 recognize that these were municipal ordinance charges.
4 However, it is evidence that tends to establish motivation on
5 the part of the defendant to engage in the charged offense,
6 based on the statements made by Erickson. Motive is an
7 exception to the collateral crimes exclusion. And it also
8 provides a complete story for the jury. There is case law
9 obviously reference the motive exception. I don't think the
10 defense will argue with the -- I don't know if you covered
11 that in deposition, but the report is what I have. If
12 there's any question about the contents of that report, I'd
13 be happy to offer it for the Court's consideration.

14 THE COURT: And that is how the state would intend
15 to offer, in conjunction with Erickson's testimony, relating
16 this conversation that the defendant had, supposedly. To
17 show motive.

18 MR. CRANE: Correct.

19 THE COURT: All right. Is there -- are there any
20 other uncharged conduct? And I only see two in the motion.
21 Is that correct?

22 MR. ROGERS: Those are the only ones that I'm aware
23 that the state has referred to.

24 THE COURT: All right. Then you may respond to the
25 one that the state feels is relevant to show motive.

1 MR. ROGERS: Thank you, Your Honor.

2 It boggles the mind to argue that evidence of being
3 a minor in possession of alcohol a month earlier is a motive
4 to kill someone. And I agree that motive is, in fact, an
5 exception to the uncharged misconduct ban, but in this case,
6 according to the overwhelming bulk of Mr. Erickson's
7 statement, the motive for the death of Heitholt is alleged to
8 have been robbery. It is only after he has been questioned
9 by police three or four times over one day and been
10 incarcerated and charged and then provided copies of the
11 discovery and is in the process of plea negotiations with the
12 state that he even mentions this alleged motive. It is, I
13 think on its face, laughable. But I think that it does have
14 the effect of throwing mud at Mr. Ferguson. And so that's
15 why we don't think it should be admissible.

16 I don't think it has any probative value with regard
17 to motive, when you compare it in the light of the whole
18 case, where he has said over and over and over again, "We
19 killed the guy and robbed him." And I think that its
20 probative value, whatever probative value it may have with
21 regard to the statement made by Erickson during his proffer,
22 I think that might be a negative probative value. But even
23 that I think is so greatly outweighed by its prejudicial
24 impact that I don't think it's even a close question.

25 THE COURT: Let's go on then to the hearsay

1 objection that you have relating to hearsay testimony that
2 might bolster Erickson's testimony.

3 MR. ROGERS: And once again, Your Honor, I don't
4 know that this is actually going to be a contested issue.

5 I think the law is real clear that out-of-court
6 statements made by Erickson are not admissible unless, A, he
7 testifies, B, they're inconsistent, and -- or unless he's
8 impeached with inconsistent statements. Then he can be
9 rehabilitated with consistent statements earlier in time.

10 But that's -- I think what we're talking about here
11 are not detailed statements. I think the evidence would be,
12 if it were admitted, that prior to his arrest, Erickson had
13 been at two or three or four different parties, where he
14 would get drunk and start talking about, "Well, I think I did
15 something really bad. I think Ryan Ferguson and I killed
16 this guy." Or words to that effect. I don't see how that's
17 admissible against Mr. Ferguson. He was not there; did not
18 have an opportunity to confront or cross-examine these
19 people. And --

20 THE COURT: Are you objecting to testimony that the
21 state would call witnesses who heard Erickson say this at
22 other times outside of court?

23 MR. ROGERS: That's exactly right.

24 THE COURT: All right. And does the state intend to
25 call those witnesses to present that?

1 MR. CRANE: Yes. And here's the scenario, Judge.
2 Just briefly let me set this up for you.

3 Before Mr. Erickson was arrested on March 10th, '04,
4 he had talked to two individuals and actually started to talk
5 to another individual about his involvement in this offense.

6 In February of '04 he talked to a man named -- a
7 friend of his named Nick Gilpin and told him that -- you
8 know, gave him the rendition of the offense. He also spoke
9 to another friend of his, named Art Figuraro. I
10 keep forgetting -- Figuro or something.

11 MR. ROGERS: Figueroa.

12 MR. CRANE: Who says -- and both those individuals
13 have talked to the police, and they said, "Yeah, he talked to
14 me about this before."

15 And then what happened was is the police found out
16 about these conversations through another kid to whom Gilpin
17 told it to, and they get on to Erickson. Erickson is then
18 brought in and interviewed by the police and eventually
19 arrested on this case.

20 So that all occurred before he made any statements
21 to the police.

22 Now, what we anticipate doing in this case is: Once
23 Mr. Erickson -- as the case progresses, eventually we call
24 Chuck Erickson. He's going to testify. And I am confident
25 that he will be vigorously cross-examined. After such

1 cross-examination, the state will ask to call, we anticipate,
2 at least, call these witnesses.

3 Now the law on this is, and I've got some case law
4 for you, prior consistent statements are admissible to
5 rehabilitate a witness who has been impeached by a prior
6 inconsistent statement or whose credibility has been attacked
7 by an express or implied claim of recent fabrication of trial
8 testimony. And I -- I would think that, in some measure,
9 that's going to occur, that attack will occur in this case.

10 The -- a prior -- we've got several cases here,
11 Judge. I'll try to give them to you without taking -- one of
12 these I want to bring your attention to is State versus Bell.
13 And Bell says that -- in that case, the victim was
14 cross-examined and impeached on the inconsistencies between
15 her trial testimony and statements to the -- there's Bell
16 (Mr. Crane handing document to the Court) -- to the police
17 and at her deposition. In response to the cross-examination,
18 the state introduced the testimony of a police officer who
19 had interviewed the victim at the hospital and at police
20 headquarters when she made a statement. That statement was
21 introduced during his testimony.

22 The state is not seeking to engage in bolstering.
23 This is a circumstance where the state would be putting on
24 evidence of prior consistent statements to rebut the defense
25 cross-examination.

1 As Mr. -- I couldn't agree with him more.
2 Mr. Rogers indicated a very strange set of facts. I haven't
3 been practicing as long as he has, but I've seen some weird
4 ones.

5 The defense, as I am told, and I realize it could
6 change at any point, in this case is going to be that the
7 codefendant, Charles Erickson, thinks he did it, but he
8 didn't. He thinks he did it with Ryan Ferguson, but he
9 didn't, is the defense in this case. And again, they can
10 ride several horses if they want to.

11 So basically cross-examination, in some measure,
12 will be along those lines. And these consistent statements
13 would be without any police intervention at that juncture, to
14 respond to the cross-examination that we know will be coming
15 in this case.

16 I'm going to cite also Johnson and Ramsey to you,
17 which are cases that have upheld the admission of consistent
18 statements. This would be done in our case in chief, after
19 such time as Mr. Erickson has testified. This would be
20 rebuttal, but in our case in chief.

21 THE COURT: All right.

22 MR. ROGERS: I don't know that we're at much
23 disagreement, Judge. The Bell case is the one that we rely
24 heavily on, in paragraph -- or page 8, in paragraphs 18 and
25 19 of our pleading. And it says: "The use of the prior

1 consistent statement is limited, however, to the extent
2 necessary to counter the subject on which the witness was
3 impeached," citing the Cole case. "Improper bolstering
4 occurs when the out-of-court statement of a witness is
5 offered solely to be duplicative or corroborative of trial
6 testimony," citing the Ramsey case. "If the use of a prior
7 consistent statement exceeds the scope of the impeachment, it
8 is inadmissible."

9 So that's -- that's what I think the law is. That's
10 what I'm asking you to enforce. And so I guess maybe this is
11 something that you don't need to rule on until you hear the
12 cross-examination.

13 THE COURT: Well, maybe you'll have just a terribly
14 weak cross-examination, and there won't be --

15 MR. CRANE: I don't think that's going to happen.

16 MR. ROGERS: What I'm anticipating --

17 THE COURT: I'm not -- I'm serious, though. I
18 understand I can't hear what's going to happen at trial right
19 now. I don't know what the evidence is going to be.

20 MR. ROGERS: I'm not anticipating impeachment on
21 inconsistent statements of "I didn't do it" or "I wasn't with
22 Ryan Ferguson." I'm anticipating inconsistent statements
23 about details which were not part of the prearrest hearsay.

24 THE COURT: Well, I'll have to hear that, clearly.
25 I'll have to hear it to --

1 MR. CRANE: All right. Well, we'll -- I guess we'll
2 know where we're at when it comes up at trial.

3 THE COURT: I -- yes. I certainly would have to, at
4 the very least, take that one with the case.

5 There was, in addition, the testimony of Mark
6 Kempton?

7 MR. ROGERS: That is correct, Your Honor.

8 THE COURT: There was a motion to prohibit that
9 testimony.

10 MR. ROGERS: That's the third part of this motion.

11 THE COURT: Yes.

12 MR. ROGERS: And Your Honor, it's -- they've
13 endorsed Mr. Kempton now as a witness. Mr. Kempton is the
14 attorney who represents Charles Erickson. It's my
15 understanding, based upon telephone conversations with
16 Mr. Crane, that they are intending to use Mr. Kempton as a
17 witness to support an inference that he wouldn't have let
18 Erickson plead guilty, in anticipation of a 25-year sentence,
19 if he didn't think Erickson was probably guilty. And I think
20 that's totally improper, and I've cited some case law about
21 it.

22 There's no question that Mark Kempton is a
23 well-respected criminal defense attorney in Central Missouri.
24 I've always had a very high regard for his abilities myself.
25 But I don't think it's -- I don't think he should be invading

1 the province of the jury about whether Charles Erickson is,
2 in fact, guilty or is not guilty or whether he believes
3 Charles Erickson's account that he and Ryan Ferguson did it
4 or not. And I don't see anything that Mr. Kempton can say
5 which should be admissible in this trial against
6 Mr. Ferguson.

7 Moreover, if Mr. Kempton's testifying, there is
8 absolutely no attorney-client privilege remaining between him
9 and Mr. Erickson, and we would certainly request disclosure
10 of his entire files.

11 THE COURT: You may tell me what it is, if you
12 intend to call him -- I do see he was endorsed today.

13 MR. CRANE: As -- as we've talked about, the defense
14 intention may well be that Chuck Erickson has pled guilty and
15 accepted, assuming this -- he executes on the plea agreement,
16 a sentence of 25 years for a crime he did not commit. The
17 state would not be able to ask his attorney if he believed he
18 did it. We understand that that would invade the province of
19 the jury.

20 In phone conv -- we've made a lot of informal
21 statements back and forth. I did not mean to lead defense
22 counsel to think that I would ask that ultimate question. I
23 would keep the questioning of Mr. Kempton limited to
24 questions that are much as the Court asks a defense attorney
25 at the time of a guilty plea: Whether or not he reviewed the

1 discovery in the case; whether or not he consulted with his
2 client; and whether or not, based on that, the defendant --
3 his client pled guilty.

4 I don't think -- I think the issue here is going to
5 be one of: The codefendant was -- you know, the perception
6 would be he's railroaded into this thing, without any
7 consideration, and runs in and pleads guilty for a crime he
8 didn't commit. And Mr. Kempton, in his representation of
9 Mr. Erickson, would -- at a minimum should be able to
10 indicate: "Yeah, I represented this guy. We talked about
11 it," without going into any details, I don't think I can get
12 into the details, and he entered a plea of guilty after the
13 -- this representation was done.

14 THE COURT: Are you intending to disclose
15 Mr. Kempton's file relating to his representation?

16 MR. CRANE: I would not ask -- I don't think I would
17 be able to ask -- conduct an inquiry that was in that kind of
18 depth. And it would be not particularly greater than what
19 the Court asks at the time of a guilty plea of the defense
20 attorney.

21 THE COURT: You may reply.

22 MR. ROGERS: Your Honor, I don't know that it
23 matters whether the state asks what we call the ultimate
24 question or whether he seeks to have the jury draw that
25 inference. It's still not relevant at all to this case

1 whether -- I mean, it may be relevant to cross-examination of
2 Charles Erickson, did he have access to discovery before he
3 changed his story for the fourth time? But it's certainly
4 not relevant to Mr. Ferguson's trial whether Mr. Erickson's
5 attorney advised him to plead guilty, advised him to plead
6 not guilty, or whatever advice he may have given. Or what
7 they may have talked about in the course of that
8 representation, or what the ultimate decision made by
9 Erickson was. That's relevant coming from Mr. Erickson, to
10 explain his presence here testifying perhaps, but certainly
11 his lawyer's testimony would not be relevant.

12 And, you know, the voluntariness of Mr. Erickson's
13 plea is not an issue in our case. And so I don't think that
14 there's any reason -- I guess -- I mean, any relevance to
15 showing that this was a voluntarily entered guilty plea, if,
16 in fact, it was.

17 With regard to the disclosure issue, I don't think a
18 lawyer can testify about steps taken in representation
19 without, to large extent, waiving privilege with regard to
20 the information gained from the client which was the basis
21 for taking those steps or with regard to which -- and I think
22 it also would go on to other information learned during the
23 representation, which might be not privileged, but
24 confidential, which would tie -- which would tend to explain
25 or place in context the steps taken in the representation.

1 THE COURT: What is the next motion that defense
2 counsel wishes to present?

3 MR. WEIS: Your Honor, I -- the next to the last
4 one. Defendant's motion in limine prohibiting the state from
5 speculating on the source of the hairs found on the body of
6 Kent Heitholt.

7 THE COURT: Just a minute here. Well, there were
8 others. Certainly there's one regarding truthful testimony.

9 MR. CRANE: That's the last one, right.

10 THE COURT: Yeah. I thought you said this was the
11 last one.

12 MR. WEIS: Next to the last one.

13 THE COURT: Okay. I'm sorry. All right. I have
14 this one.

15 MR. WEIS: All right.

16 This has sort of been touched on a little bit in
17 terms of arguing the source of the evidence that was
18 present -- physical evidence that was present at the scene of
19 the crime.

20 There's no question that there were hairs found in
21 the hands of the victim that -- and it's continuing on the
22 unusual theme of this case -- exclude Mr. Erickson, who's
23 entered a plea of guilty, exclude the victim, and certainly
24 exclude Mr. Ferguson from being the source of the hairs found
25 in the victim -- found in the victim's hands after -- after

1 the beating.

2 What we're asking is and what we speculate that the
3 state is going to do is attempt to explain that these hairs,
4 although they don't point to the person they have on trial
5 and they don't point to the person who pled guilty, that they
6 could have been deposited by one of the law enforcement
7 personnel or emergency services personnel who were present at
8 the scene, and that those could have easily been explained
9 through some noncriminal act, or just hairs falling out of
10 the individual's head.

11 The defense doesn't have access to the specific
12 information relating to police officers or emergency services
13 personnel.

14 What we're suggesting is that, rather than the state
15 be able to sort of say, "Well, we understand that there was
16 no DNA, you know, implicating, you know, Mr. Ferguson in this
17 crime, but these could have easily come from somebody else,
18 one of the treating professionals who were there on the
19 scene," as opposed to what we believe to be hairs found --
20 hairs from the actual perpetrator in the case. Or
21 perpetrators.

22 What we're suggesting is: The state should be
23 precluded, without -- they shouldn't be able to rely on
24 their, you know, lack of investigatory techniques by not
25 testing the known individuals who were present; people they

1 know who were there and can verify that were present at the
2 scene, who had access to the body, who could have deposited
3 the hairs; by failing to test those, and then using that to
4 thereby somehow still implicate Mr. Ferguson. Or take --
5 certainly take away a substantial evidence of his innocence.

6 And we're asking the Court, rather than them being
7 able to speculate, that they be forced to test those hairs,
8 prior to speculating on that. And if it comes back that it's
9 one of them, fine. If it comes back that it's one of the
10 emergency services personnel. If it comes back as not any
11 one of the known individuals, nor the individual that they
12 have on trial, then we believe it to be someone else. But
13 they shouldn't be able to rely on their lack of work or their
14 lack of investigating the matter to the substantial detriment
15 of Mr. Ferguson, when he doesn't have access to the same
16 information that the state does.

17 So we would ask they not be able to speculate on
18 that, short of them actually testing that material and
19 providing it to defense counsel.

20 THE COURT: You may reply.

21 MR. CRANE: Your Honor, just to make sure we're
22 factually clear on the scenario here, in Mr. Heitholt's hands
23 there were hairs. Among those were eight head hairs and one
24 limb hair. Unless I'm off a hair.

25 The head hair was looked at microscopically at the

1 FBI lab. Under a microscope. And they found that one of the
2 eight head hair was not consistent with the victim's, and
3 they couldn't be sure about the two suspects. The known hair
4 that we submitted. The remaining hair was eight head hair.
5 And those were found to be consistent with the victim's hair.
6 Okay?

7 Now, there's a limb hair. I found this out kind of
8 late in the game. Limb hair in the hand. And we've sent
9 that to the FBI. But the head hair was tested back in --
10 actually it got tested; we got the results right at the turn
11 of the year. Discovery went to the defense on February 7,
12 1995. So we're talking about one hair at this point. One
13 hair.

14 Now, the defense is obviously interested, based on
15 the mitochondrial FBI results, in that hair, because its DNA
16 in that one hair doesn't check to any of the three. And so
17 the inference that the defense is planning on drawing is:
18 There's your killer right there. In that one head hair.

19 Now, the FBI and the highway patrol lab, I've talked
20 to the experts in trace; I've talked to the experts in the
21 mitochondrial arena. The nature of hair is such that its
22 sources are very voluminous. The defense has indicated that
23 they didn't have access to the people who were at the crime
24 scene. We've got a list of 12 in discovery we've tendered to
25 the defense in the very first report in this case. And that

1 is on discovery page number 10. A lot of officers, EMTs.

2 And Judge, based on my understanding of hair, it
3 could be the waitress at the restaurant the victim may have
4 eaten at a month ago if he didn't wash his sweater. It could
5 be hair that was on the -- in the car. It could be somebody
6 in the office.

7 And so based on my discussions with the people at
8 the labs, they didn't feel like that, even if it were not one
9 of these individuals that may have been near the victim at
10 the time they were checking him out, employees and et cetera,
11 that it still wouldn't be conclusive. It's a never-ending
12 proposition. This mitochondrial DNA thing has opened up a
13 whole new ball game, particularly in hair.

14 Now, what the defense is arguing, though, is a
15 couple things. That they don't have an equal opportunity to
16 test. And they do. I don't believe, in my humble opinion,
17 Judge, that this Court should get involved in investigative
18 processes that the parties are to address themselves. And
19 they're basically asking you to make me go to the FBI and
20 have these -- or whatever hair tested that they think ought
21 to be. Well, Judge, they've got an equal opportunity to do
22 so.

23 If the Court would want us to facilitate the defense
24 in getting buccal swabs, then they can do the mitochondrial
25 off the buccal swabs -- you don't have to have hair; you can

1 take a swab -- from people that they want to have tested, I
2 suppose that that may be appropriate, and they could go have
3 them tested. If they are one of these people, like they say,
4 fine. But if they're not, the state is, Judge, is going to
5 have the same argument.

6 To preclude the state from arguing negative
7 evidence, if you will, about the sources of hair, the
8 possible ways that it can be there, would be the same thing
9 as arguing that the defense can't put on such evidence. In
10 fact, it's more speculative for the defense to argue or infer
11 that that one hair is the real killer's. It's more
12 speculative than for the state to argue that this source
13 could be from any number of innocent parties. The issue here
14 is not one of: They can't do it; it's not one of a failure
15 to investigate; it's one of the -- the equal arguments on
16 both sides.

17 The idea that the de -- I can't imagine that
18 possibly these defense attorneys here at counsel table
19 haven't argued other possible means by which a person's hair
20 could get on some location. They argue in their motion the
21 same thing I have in my motion in limine about other
22 suspects. You know, the only difference, though, Judge, is
23 that I'm not arguing it's another suspect. They argue the
24 same case law. And they go, "The state should be precluded
25 from putting on evidence about hair and its sources and how

1 it could be there." And they base that on the "other
2 suspect" objection. We're not arguing that. We're not
3 arguing that's the real killer's hair. That case law is not
4 relevant in that motion.

5 So if the defense wants to run some tests on people,
6 you know, I suppose that we can facilitate that. I don't
7 think this Court can order the FBI to do -- see, the highway
8 patrol, again, they don't do mitochondrial. The FBI does.
9 There is other private labs that do it.

10 So, that -- after -- you know, I've thought about
11 this situation a lot since we got that result back. That's,
12 when I've consulted with the experts, that's my decision on
13 the matter. And I think there's an equal opportunity if the
14 defense wants to run tests.

15 THE COURT: Are you telling me that disclosure
16 disclosed every individual that came in contact with the
17 body?

18 MR. CRANE: It's impossible to have done that. Oh,
19 oh, you mean at the crime scene?

20 THE COURT: Yes, at the crime scene. Before --

21 MR. CRANE: It's either that list --

22 THE COURT: -- the hands were bagged.

23 MR. CRANE: Well, I tell you what. This list of
24 people was what the -- what the officer documented after such
25 time as other witnesses went out to the body. So, no.

1 That -- this particular list, there's -- there's more people.
2 I mean, there's way more ways he could get hair on him.

3 THE COURT: I understand that. I'm talking about
4 those individuals that might have been near the body after it
5 was deceased.

6 MR. CRANE: They're either on the list and included
7 in discovery. I'm going to say we're talking 15 to 20
8 people.

9 THE COURT: But they were disclosed.

10 MR. CRANE: They've been disclosed.

11 THE COURT: By name.

12 MR. CRANE: Yeah, they know who they are, yeah.

13 THE COURT: I'm not talking about the waitress in
14 the restaurant.

15 MR. CRANE: No, no, no. I'm not talking about her
16 either. I'm sure she's a fine person. Probably wore a hair
17 net. But the other people that are in proximity that I think
18 the defense is talking about, you know, Robert Thompson and
19 Russ Baer may not be on this list, but law enforcement
20 people, et cetera.

21 THE COURT: All right. You may reply.

22 MR. WEIS: Sure.

23 Not necessarily -- I hope it wasn't -- quite clear
24 that we're not arguing that there couldn't be, you know, a
25 thousand different sources for this particular hair. And

1 that -- what we're saying is that there are known
2 individuals, that are documented in their police reports that
3 they have turned over to us, people that were documented to
4 be at the crime scene, including some civilians that were
5 there; Mr. Trump, who was at or near the body shortly after
6 he was killed, and others.

7 If we exclude those, if we take those individuals,
8 the known individuals -- we can't account for, you know, I
9 guess the thousand and one ways that hair could, you know,
10 come to be in the particular hand, the bloody hand of a
11 victim on the -- on the street. We can't do that. But what
12 we're -- what we're asking is, that the state knows who these
13 individuals are. They have unique access, in that these
14 are -- I don't think we could ask the Court and the Court
15 would have authority to force these individuals to submit to
16 a DNA sample. I don't know that the Court has that authority
17 to do that. They have this information. They are state
18 employees. They are state actors. They have obviously
19 unique access to it that the defense counsel does not have.

20 And I don't think even -- or the state's even
21 suggested that they could, you know, provide it. Provide
22 every one of those people to us. Without question.

23 The other thing is is that -- cost, in particular,
24 of a private lab. We have checked into that matter. It
25 costs between 1,000 and \$1,500. It's \$1,000 to do the

1 initial sort of exclusion. If something is close, it's an
2 extra I believe \$500 for whatever particular test. And
3 obviously you may or may not have to do all of them. You may
4 not have to do any of them in terms of the additional \$500.
5 A substantial expense obviously that would be borne by, you
6 know, I guess the FBI lab in this particular case.

7 What we're simply arguing, and this is a unique
8 case, is that -- we're not arguing -- we can't really argue
9 that this is the killer's hair. What we can argue: This is
10 a unique case, and that one piece of DNA evidence that they
11 have, the only piece of DNA evidence they have in this case,
12 or at least that's been disclosed, and I guess we'll find out
13 about the limb hair, the only piece of DNA actually excludes
14 the person they've got on trial.

15 So what we're asking is that, rather than -- if they
16 intend to speculate that this could have come from an
17 emergency services personnel person, or from a police
18 officer, that they actually do the testing. If they want to
19 speculate that it came from some other person that's unknown,
20 I don't know that we can preclude that, because we can't
21 actually limit that, but for -- with respect to the ones that
22 we do know, if that -- if they intend to speculate as to
23 those known individuals, that the state be forced to do it.
24 Now they don't have to. They can give up that line of
25 argument. Certainly. But if they want to make that

1 argument, because they have unique access, because they know
2 who they are, because they have this information, they should
3 be forced to do it.

4 Thank you.

5 THE COURT: All right. The final motion that the
6 defense has filed is for -- to prohibit the state's reference
7 to truthful testimony clause in the plea agreement with
8 Erickson.

9 MR. WEIS: And I don't know that we have much more
10 comment with respect to that one, Your Honor. This is sort
11 of a -- I understand -- respect that the agreement made, and
12 I haven't actually seen the agreement with Mr. Erickson, that
13 one of the things that he's required to do is to give, quote,
14 unquote, truthful testimony in the case -- state's case
15 against Mr. Ferguson.

16 What we would suggest is that the state not be
17 allowed to continually bolster the testimony of Mr. Erickson
18 by saying, "Now, you're here to give truthful testimony."
19 And to repeatedly make references to that.

20 I have some -- I know a case out of -- I believe in
21 front of you, case of State of Missouri versus Earl Ringo. I
22 work on that -- I represent Mr. Ringo on habeas. I know that
23 issue came up repeatedly in that matter. And that although
24 it ultimately went against Mr. Ringo, there was a question
25 where it certainly could cross the line. We just want to

1 make sure that there's some recognition that repeated
2 references to, quote, unquote, truthful testimony can become
3 bolstering. And that, you know, we just don't want it to be
4 an issue when it comes up for trial.

5 THE COURT: What would not be repeated? Just --

6 MR. WEIS: Well --

7 THE COURT: -- saying it once?

8 MR. WEIS: I don't know. I think he's probably
9 entitled to -- state's entitled to, you know, make reference
10 to it during voir dire. And I think they're probably, you
11 know, entitled to make, you know, one reference during -- you
12 know, asking Mr. Ferg -- or Mr. Erickson specifically about
13 his agreement, which I'm sure will be introduced into
14 evidence. And then also I would imagine he'll, you know, be
15 able to make one, you know, a reference during closing
16 statements.

17 But it's the -- what we're concerned about is that,
18 you know, repeated references to the agreement. You know,
19 either during opening statements or closing arguments that,
20 you know, "And he's just here to give" -- I mean, the case
21 is -- in this case, the case is Charles Erickson against --
22 against Mr. Ferguson. That is the substantial amount of
23 their evidence against him. Almost everything they have. So
24 the believability of Mr. Erickson is of paramount importance
25 in this case. And what we're concerned about is that, you

1 know, we think he's got credibility problems, and in order to
2 bolster that, that they will repeatedly go back to his plea
3 agreement.

4 THE COURT: You may reply.

5 MR. CRANE: Well, I must admit that the way Mr. Weis
6 argued that, I was all ready to jump on this issue, thinking
7 I couldn't say it at all. Kind of took the wind out of my
8 sails. I think that the case law -- and Ringo is a big case
9 on this. And Dudley. And there's another one. Golatt.
10 That's a 2002 case. I'll give you copies of those. It's
11 somewhat eroded from Ringo. In Ringo, it looks like the main
12 focus was in voir dire.

13 But clearly in voir dire all the cases indicate that
14 you can talk to the jury about their feelings about an
15 agreement, and that the terms of the agreement are that the
16 testimony be truthful.

17 I agree that at some point, at some juncture, after
18 the end of the trial, you know, somebody would be able to go,
19 "That's too many repeated references." And that's okay. I
20 think it's going to be dependent a lot on the situation. I
21 recognize that I can't just beat the jury up, for instance,
22 as I examine Mr. Erickson with that issue, to border on
23 bolstering. Or actually it's not bolstering; it's where I'm
24 vouching for, improperly, the witness.

25 But clearly -- and Judge, I think we may have filed

1 the state's agreement with -- I gave you guys a copy --
2 agreements with Mr. Erickson. And we will be intending to do
3 that as an exhibit at trial, as I've done in other cases.
4 That exhibit would house the reference to truthful testimony,
5 because it's part of the contract. It's part of the deal.

6 The defense talks about how it's not a sweetheart
7 deal in their motion. It's still a double-edged sword. And
8 that's the thing that Ringo and Dudley and the other case
9 talk about, is that the very fact that there's an agreement
10 to testify is -- is an issue that impugns, to some degree, or
11 potentially does, the credibility of the witness. Even
12 though it's 25 years in this case. Quentin Jones, in Ringo,
13 was life without parole. It's difficult to argue that that
14 was a sweetheart deal. But in Ringo, the court said, Hey,
15 the references to truthful testimony are not improper
16 vouching, and they can bring that up in voir dire, on direct
17 examination, and in argument. I understand that at some
18 point I could get wild and crazy with it and do it too much.
19 And I will certainly work to avoid doing that.

20 THE COURT: All right. That is the last motion then
21 for the defense?

22 MR. WEIS: That's correct, Your Honor.

23 THE COURT: Would you like to have a recess so that
24 you might inquire of your -- talk to your -- confer with your
25 client before we consider whether or not there will be

1 testimony from a witness about excluding his in-court
2 identification?

3 MR. WEIS: Sure. If we could have five, ten minutes
4 then.

5 THE COURT: All right.

6 MR. CRANE: You want us to --

7 THE COURT: I don't know where you want to speak.

8 MR. CRANE: You want us to get out? We could.

9 THE COURT: Yeah, I mean, if we -- if you want to
10 have privacy in this courtroom, I'd ask that -- the clerk can
11 be excused for the day. And the reporter and I will be --
12 will leave the courtroom. And would ask anyone else in the
13 courtroom, since we're not having court now, to be excluded,
14 just to facilitate, so we don't have to find a witness room
15 with security.

16 MR. ROGERS: We appreciate that.

17 THE COURT: And I will allow security to be in the
18 courtroom. But certainly you may speak in a soft enough
19 voice so that you may not be overheard.

20 MR. WEIS: Thank you.

21 MR. ROGERS: Thank you.

22 THE COURT: We'll be in recess.

23 (Recess taken.)

24 THE COURT: Are you ready to proceed?

25 MR. WEIS: We are, Your Honor.

1 THE COURT: And you've had time to talk privately
2 with your counsel?

3 MR. WEIS: Yes.

4 THE COURT: I mean, with your client?

5 MR. WEIS: With Mr. Ferguson, yes. We've had --

6 THE COURT: Who's the lady sitting there with the
7 laptop?

8 MR. WEIS: Oh. I'm sorry. She's our paralegal.

9 MS. DORRANCE: I apologize.

10 THE COURT: You may sit behind there. Are you going
11 to be making a transcript? Is that what you're doing?

12 MS. DORRANCE: I'm just taking notes.

13 THE COURT: All right. You may sit behind the bar.

14 Are we going to have testimony from the witness that
15 -- Mr. Trump, that you seek to include/exclude from court?

16 MR. WEIS: Well, what we've worked -- Mr. Ferguson
17 is not going to waive his presence in court --

18 THE COURT: Okay.

19 MR. WEIS: -- for that. We are going to submit --
20 at least this part is by agreement. We're going to submit
21 Mr. Trump's deposition, an electronic copy of it.

22 THE COURT: Yes.

23 MR. WEIS: In lieu of testimony. I think Mr. Crane
24 is going to -- would rather the Court, you know, take live
25 testimony, over our objection that, you know, that

1 Mr. Ferguson still be present in the court, and that he not
2 be identified in -- wearing orange and in shackles. So at
3 this time we would just submit Mr. Trump's deposition.

4 With respect -- and I think he covers the issues
5 raised in our motion respecting how long he was able to view
6 it, what he viewed, and the identification that he made two
7 and a half years later. So I think it covers all the issues
8 that would be applicable to the reliability, as raised in our
9 motion.

10 THE COURT: Okay. Is that transcribed, or is it on
11 diskette?

12 MR. WEIS: It's on a diskette. And we can
13 provide -- I -- we didn't bring a hard copy. I can certainly
14 provide that to the Court tomorrow.

15 MR. CRANE: Would you rather have that, Judge? The
16 way we come up with this is: My witness is -- you know,
17 potentially -- he had to read his copy. And I've got the one
18 that -- the little one. And I've marked mine up. And so --
19 and they don't have theirs with them. And I've got that
20 thing that's got seven other depositions on it. If you want,
21 you can print out that one, or they could get you their copy.
22 However you want --

23 THE COURT: I assume that it's compatible with the
24 software that I have on my computer, to be able to read it or
25 print it, however I choose to read it on the screen or to

1 print it?

2 MR. WEIS: Absolutely. I can pull it up on
3 Microsoft Word.

4 THE COURT: I think that'll be fine.

5 MR. WEIS: Yeah.

6 THE COURT: That will be fine.

7 MR. WEIS: Okay.

8 MR. CRANE: Judge, I wanted to just, before --

9 THE COURT: Let me ask if you have an objection to
10 the admissibility of that deposition.

11 MR. CRANE: Well, here's -- I don't have any
12 objection to the deposition of Jerry Trump being offered by
13 the defense. It's not the state's position that we're
14 agreeing that it be in lieu of testimony.

15 THE COURT: I understand that.

16 MR. CRANE: We -- we understand the state -- the
17 defense concern about the defendant being in orange. But the
18 state would have wanted to call Mr. Trump to testify, not
19 only with respect to his in-court identification of the
20 defendant potentially, but also with respect to his -- you
21 know, the photos that he saw and other observations that he
22 made the night before -- or the night of the homicide, in
23 some measure to deal with some of the statements that are
24 made in the defense motion. For instance, there's a
25 reference here: "Trump's observations," at page 4, "were

1 obscured by the darkness of the surrounding parking lot."
2 Maybe I missed it, but I didn't see where that was said by
3 Mr. Trump. There was some light on the parking lot.

4 The next clause of that sentence -- and this is
5 attributed to the deposition, which you now -- which you're
6 going to get. "The individuals hiding behind the Heitholt
7 vehicle and the individuals walking in a direction that
8 obscured their identity." The witness testifies that they
9 stood up.

10 There was two sequences when this witness saw the
11 people that committed this homicide. One was when he was
12 looking at them and they were behind a vehicle and stood up
13 and one of the two made a statement. And then there's
14 another sequence where this witness went out on the parking
15 lot, and these people were walking off of the parking lot.
16 So there's two separate instances. And one -- the latter was
17 the less opportunity for observation than the former.

18 The other thing that we're not going to have, by
19 virtue of not having Mr. Trump testify, is some photographs
20 that give you the spacial orientation with where he was at
21 the back of the building and where the victim's vehicle was,
22 et cetera. So -- I mean, I'm not going to be able to do
23 that.

24 So, with those observations, the state doesn't have
25 any objection to the admission of the deposition for your

1 review on this matter.

2 THE COURT: Do you want to mark the --

3 MR. WEIS: It has been marked. And we would request
4 that Defendant's Exhibit A be admitted, Your Honor.

5 THE COURT: Defendant's Exhibit A is admitted.

6 - - -

7 Defendant's Exhibit A admitted into evidence.

8 - - -

9 THE COURT: And the defense does not have any
10 further evidence? On that motion.

11 MR. WEIS: No, Your Honor.

12 THE COURT: Is it still the state's position then
13 that you wish to call Mr. Trump?

14 MR. CRANE: You mean at trial or today?

15 THE COURT: Oh, well, you certainly have every
16 right --

17 MR. CRANE: Oh. No. With respect to this, we --

18 THE COURT: Today.

19 MR. CRANE: -- are not -- our objection is not to
20 the deposition coming in itself. We recognize the defense
21 concern with an in-court identification with the defendant in
22 jail clothing. We're not in agreement that it's in lieu of
23 testimony. We would have liked to call him. But understand
24 the defendant has a right to be in the courtroom.

25 THE COURT: Surely.

1 MR. CRANE: I guess we'll have to wait for trial.

2 THE COURT: And I will tell you, without hearing the
3 testimony in the trial, I will have to take this motion with
4 the case. Submit it with the case. And hear what the
5 witness has to say in the courtroom.

6 And I assume that there will be proper clothing for
7 Mr. Ferguson at trial. And we'll have to -- I'll have to
8 make a determination of that at that time.

9 MR. CRANE: Judge --

10 THE COURT: But I will -- I will listen to this
11 deposition, so that I have that information, in addition to
12 whatever is presented in court.

13 Are there any other matters then that we need to
14 take up this afternoon?

15 MR. ROGERS: None from the defense, Your Honor.

16 THE COURT: For the state?

17 MR. CRANE: Your Honor, I just got a letter today
18 from Mr. Rogers. There are some witnesses that they've
19 identified as people that they may call. One of them is an
20 expert witness. A mental health expert. They told me a
21 little bit about that. Another one was Ron Singer?

22 MR. ROGERS: Right.

23 Mr. Singer is a criminalist with the Tarrant County
24 criminalistics laboratory in Fort Worth, Texas, who we've had
25 review crime scene photographs and reports. And he's going

1 to give us some opinions concerning blood spatter, things
2 like that. And when we get a report, I'll give it to you.

3 MR. CRANE: Okay. When do you think that will be?

4 MR. ROGERS: It should be within the next couple of
5 weeks. I certainly hope.

6 MR. CRANE: Okay. And then --

7 THE COURT: I trust, if Mr. Crane wants to depose
8 him, you'll make him available for deposition.

9 MR. ROGERS: Sure.

10 MR. CRANE: I hope the report doesn't take too awful
11 long.

12 MR. ROGERS: I don't anticipate it being anything --

13 MR. CRANE: And then Holliday and Staub (phonetic),
14 are those people that have already seen Mr. Erickson? In the
15 -- was that in the Delaney Dean discovery or --

16 MR. ROGERS: Yeah. Those are in the discovery that
17 you gave us.

18 MR. CRANE: Okay.

19 MR. ROGERS: They were people at the -- I can't
20 remember the name of -- the drug treatment program.

21 MR. CRANE: Okay. All right. I know what you're
22 talking about.

23 Now, we have -- we're getting along fine. We're
24 stipulating to some things.

25 One thing I did want to make clear. There -- in

1 this letter, there was an indication by Mr. Rogers that this
2 mitochondrial evidence, the DNA evidence, both the highway
3 patrol and then the FBI's viewing, and I think we're talking
4 about, when we say mitochondrial, the hair, but the state
5 would not stipulate to that, you know, the appropriate
6 foundation, chain, and conclusions of those FBI experts. So
7 I'm assuming that those witnesses may also be people that you
8 would notice me up on.

9 MR. ROGERS: I will have to do that. And I have a
10 question. Are they amenable to showing up without a
11 subpoena, or do we need to --

12 MR. CRANE: I don't know. I have not consulted with
13 them on that.

14 MR. ROGERS: See, the FBI, they're a pain.

15 MR. CRANE: Now one last thing we talked about,
16 Judge. And I want to make sure that you knew our position.
17 You talked about that other trial that's set. I mean,
18 barring some unforeseen circumstance, you know, I guess
19 something could come up that we're unaware of, but we, I
20 believe, want to try this case when it's scheduled. And I
21 know that -- you know, how the Court deals with, you know,
22 other cases that are set out of this division is a matter
23 that -- it may be difficult, but this case has been pending
24 for a long time. And we're interested in bringing it to
25 resolution, if possible, as set, or very close thereafter, if

1 it has to be bumped a little bit.

2 THE COURT: Well, I am equally desirous of getting
3 this case tried. And that is why, at the time we were
4 talking about scheduling it, I did go get the calendar and
5 remark that there was a case that required a sequestered jury
6 that had already been set before Judge Conley as a special
7 judge. He is selecting a jury out of our circuit on Monday,
8 the Monday following, but then he would be bringing the jury
9 back. And of course we would need our staff to go up to that
10 county to select the jury. And we just don't have enough
11 personnel to handle two sequestered juries, where we have
12 24-hour coverage of these jurors. And that was discussed,
13 with the idea that, if his case went, this one would not go
14 at that time. And I was willing to set it at some other
15 time, but you-all felt this time was the best time for you.
16 And that's why I set it then. And I'm hopeful too. Because
17 I see -- you know, Mr. Ferguson is in custody. And he
18 certainly has a right to have his case decided as promptly as
19 is possible.

20 MR. CRANE: Okay. Well, I just wanted to make
21 sure --

22 THE COURT: You know, we'll just have to deal with
23 it.

24 MR. CRANE: I mean, I think you feel the same way I
25 do.

1 MR. ROGERS: I do. I think we all feel the same
2 way. We want to get --

3 MR. CRANE: I just wanted to make sure --

4 THE COURT: And I know that Judge Conley had some
5 motions in that case. And I didn't ask him, but the
6 secretary did, whether or not the matter either was resolved
7 or going to be continued. And as far as she knew, that was
8 not going to happen. But he knows to let us know if
9 something happens in that case.

10 MR. CRANE: Okay.

11 THE COURT: And I really can't go down to Lincoln
12 County, select a jury, and then not have anyone to look after
13 it when we bring it back here for trial the next week.

14 MR. CRANE: Yeah.

15 THE COURT: I mean, it has to be a sequestered jury.

16 MR. CRANE: Okay.

17 THE COURT: All right.

18 State appears by prosecuting attorney. Defendant
19 appears in person and by counsel. Defendant's motion for
20 dental treatment is submitted with defendant's filing of
21 letter from Dr. G. Michael Ogden. State's motion to endorse
22 is sustained. State's motion in limine is taken with the
23 case. Defendant's suggestions concerning jury selection
24 process is argued and submitted. Defendant's motion in
25 limine to prohibit use of pretrial and in-court

1 identification of the defendant by Jerry Trump is argued and
2 taken with the case.

3 With the understanding I will read his transcript
4 before trial.

5 Defendant's motion in limine to exclude inadmissible
6 evidence is argued and submitted. Defendant's motion in
7 limine prohibiting the state from speculating on source of
8 hairs found on the body of Kent Heitholt is argued and
9 submitted. Defendant's motion in limine to prohibit the
10 state's repeated reference to the truthful testimony clause
11 in the plea agreement with Charles Erickson is argued and
12 taken with the case.

13 If Mr. Crane is too repetitive, I expect counsel to
14 renew its motion.

15 If there's nothing further then, Court will be in
16 recess.

17 MR. ROGERS: Thank you, Your Honor.

18 THE COURT: If I have any trouble getting
19 Defendant's Exhibit A to come up on my computer, or my
20 secretary's computer, we will let you know, and you can
21 submit a written transcript.

22 MR. CRANE: Hey, did you get -- I forgot. Did you
23 get the copy of the defense jury -- proposed jury
24 questionnaire?

25 THE COURT: The most recent one that was just

1 submitted.

2 MR. CRANE: All right.

3 THE COURT: Yes. I did.

4 MR. CRANE: All right.

5 THE COURT: It was a -- I believe a --

6 MR. CRANE: You just didn't have the Lincoln County
7 one.

8 THE COURT: I did not have the Lincoln County one.

9 And I didn't -- I didn't see the most recent one, but I found
10 it in the file when you brought it to my attention.

11 MR. CRANE: Okay.

12 THE COURT: All right.

13 (Hearing adjourned.)

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