

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

3 STATE OF WISCONSIN,

4 PLAINTIFF, JURY TRIAL
5 vs. TRIAL DAY - 17
Case No. 05 CF 381

6 STEVEN A. AVERY,

7 DEFENDANT.

8 **DATE:** MARCH 6, 2007

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

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

13 THOMAS J. FALLON
Special Prosecutor
14 On behalf of the State of Wisconsin.

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

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

19 JEROME F. BUTING
Attorney at Law
20 On behalf of the Defendant.

21 STEVEN A. AVERY
Defendant
22 Appeared in person.

23 **TRANSCRIPT OF PROCEEDINGS**

24 Reported by Diane Tesheneck, RPR

25 Official Court Reporter

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

I N D E X

WITNESSES PAGE

LYNN ZIGMUNT

Direct Examination by ATTORNEY FALLON	16
Cross-Examination by ATTORNEY BUTING	36
Redirect Examination by ATTORNEY FALLON	64
Recross-Examination by ATTORNEY BUTING	66

DR. MARC LEBEAU

Direct Examination by ATTORNEY GAHN	73
Cross-Examination by ATTORNEY BUTING	137
Redirect Examination by ATTORNEY GAHN	254
Recross-Examination by ATTORNEY BUTING	259

EXHIBITS MARKED OFFERED ADMITTED

433-437		137	137
447-451		35	36
452-457		35	36
464		35	36
465		103	103
466		103	261
468-469	42	72	72
470	63	72	72
471	71	72	72
472-474	71		
475-477		137	137
478	104	137	137
479	104	261	261
480	196	261	261

1 THE COURT: At this time the Court calls
2 the State of Wisconsin vs. Steven Avery, Case No. 05
3 CF 381. We're here this morning for a continuation
4 of the trial in this matter. We are outside of the
5 presence of the jury at this time. Will the parties
6 state their appearances for the record.

7 ATTORNEY KRATZ: Good morning, Judge, the
8 State appears by Special Prosecutors Ken Kratz, Tom
9 Fallon, and Norm Gahn.

10 ATTORNEY STRANG: And good morning, Steven
11 Avery in person; Jerome Buting and Dean Strang on
12 his behalf.

13 THE COURT: All right. Counsel, I
14 understand that the parties have something to take
15 up outside the presence of the jury.

16 ATTORNEY STRANG: The defense has a brief
17 motion, your Honor, in light of the Court's rulings
18 at the end of the day yesterday. The defense all
19 along has been consistent in contending that there
20 were no reliable tests that can be done that would
21 be useful to the jury on the dried bloodstains in
22 the Toyota, or the blood vial in the Clerk's Office.
23 The Court ruled as it did, yesterday, leaving
24 reliability to the jury and ruling the State's tests
25 performed during this trial otherwise admissible

1 under **Walstad**.

2 That will not allow -- It's no surprise,
3 as we said all along, that will not allow any
4 rebuttal testing or independent testing that
5 might be offered to rebut the State's testing now
6 that the State has chosen to pursue that and the
7 Court has allowed that testing, regardless of
8 it's reliability. So I have a two prong motion
9 to preserve Mr. Avery's rights and options.

10 First, I would like the Court to order
11 that all samples remaining of swabs, or the dried
12 bloodstains themselves in the Toyota RAV4, be
13 preserved indefinitely and not destroyed or
14 damaged, absent further Court order on
15 application by the State with notice to Mr. Avery
16 and whoever his counsel may be.

17 And, as well, that the blood vial from
18 the Clerk's Office be preserved, not damaged or
19 destroyed in any way, absent express further
20 Court order on application by the State with
21 notice to Mr. Avery and counsel, so that we
22 preserve the ability to test, if and when science
23 advances to the point of allowing some reliable
24 testing or just rebuttal testing by the defense.

25 Second, I would like the Court to enter

1 an order now that the defense will have access to
2 the swabs from the Toyota. And when I say swabs
3 from the Toyota, I'm referring both to swabs of
4 the dried bloodstains and the control swabs that
5 were taken for purposes of the FBI testing to
6 which Dr. LeBeau has testified, as well as the
7 dried bloodstains themselves, all the dried
8 bloodstains in the Toyota attributed to
9 Mr. Avery, and the blood vial from the Clerk's
10 Office.

11 I would like the Court to order now
12 that, without further application, the defense
13 may conduct independent testing of any or all of
14 those materials at any time, from today through
15 trial. If there's a conviction, post-conviction,
16 in the appellate process or after the appellate
17 process, I would like the ability to do that
18 testing when it reasonably becomes available to
19 Mr. Avery to do it, as a matter of science and
20 finances, regardless of when that may happen; it
21 won't happen during the trial, so I'm just
22 looking ahead.

23 Of course, if he's acquitted, everyone
24 will lose interest in testing. But if he's
25 convicted of any of the charges, this evidence

1 that the State contends is so material to guilt
2 or innocence, will retain its materiality to
3 guilt or innocence. And I would like the Court
4 to order that Mr. Avery, or his counsel, have
5 access to that, without further order of the
6 Court, for testing, at any time.

7 THE COURT: Who will be speaking for the
8 State?

9 ATTORNEY GAHN: I will, your Honor.

10 THE COURT: Mr. Gahn.

11 ATTORNEY GAHN: I have no objection to
12 anything that Mr. Strang has stated.

13 THE COURT: All right. Just as a practical
14 matter, and I'm testing my memory here a bit, I
15 thought that the samples from the RAV4 were already
16 split, such that in order to enable both parties to
17 conduct testing if they wished.

18 I'm wondering, if the Court is going to
19 issue an order that samples be preserved, I guess
20 rather than leave it that broad, I would like to
21 know where they are now, and perhaps the order
22 should reflect how they should be preserved or
23 where they should be preserved.

24 ATTORNEY GAHN: My understanding is that
25 the samples from the RAV4 that were submitted to

1 EDTA testing, which would have been, A-8, the swab
2 from the dashboard; A-10, the swab from the CD case
3 in Teresa Halbach's car; and, A-12, which was the
4 bloodstain swab from the metal on the rear passenger
5 door entry, that Mr. Buting requested that the FBI
6 preserve one half of each of those samples for
7 independent testing.

8 That has been done. One half of those
9 swabs are preserved. Also, Mr. Buting requested
10 that the controls that were taken also be -- that
11 the FBI only consume one half of those, and that
12 is the case. So one half of the controls are
13 available.

14 As far as the other swabs which were
15 taken by Sherry Culhane, those are in the control
16 now of the Calumet County Sheriff's Department.
17 And those also are available to the defense. And
18 one half of the A-10, A-12, and A-8 have been
19 returned by the FBI and they are in the control
20 of the Calumet County Sheriff's Department.

21 THE COURT: All right. So the
22 understanding is that these items are going to be
23 retained at the Calumet County Sheriff's Department,
24 that's where they are going to be if they are
25 needed?

1 ATTORNEY GAHN: Yes.

2 ATTORNEY STRANG: That's very helpful.
3 What it leaves uncovered, or that we haven't covered
4 here, are the dried bloodstains themselves, as there
5 were stain areas for which swabs were not sent to
6 the FBI, if I understood Mr. LeBeau's testimony
7 correctly, and then the blood vial. And so we just
8 need to know what arm of the State, what agency of
9 the State is preserving all of those.

10 THE COURT: All right. So, Mr. Gahn, when
11 you say swabs, you mean samples taken from these
12 areas.

13 ATTORNEY GAHN: Correct.

14 THE COURT: Was the part of the vehicle
15 with the stain on the dash removed from the vehicle,
16 or is the dash still intact with the vehicle,
17 wherever it is?

18 ATTORNEY GAHN: The dash is still intact
19 with the vehicle, and the vehicle is here on the
20 Calumet County grounds.

21 THE COURT: Is that going to be saved or?

22 ATTORNEY GAHN: Under --

23 THE COURT: Let me ask first, what has the
24 defense requested; are the swabs enough?

25 ATTORNEY STRANG: No, I think the stains

1 have to be preserved. And I suppose the issue,
2 then, is other -- other control areas for testing.
3 So it would be, I guess, useful to know what the
4 plans are with the Toyota.

5 THE COURT: Well, let's do this, there's no
6 dispute between the parties that the swabs should be
7 saved. As far as the details of the Court's order,
8 that could be addressed, if there is a conviction in
9 this case. And perhaps between this time and that
10 time, should the need arise, the parties could
11 discuss whether or not they might come to a joint
12 agreement on how to preserve samples.

13 I mean, the CD case is small enough,
14 that can be preserved. The dash and the door
15 frame, I don't know if the vehicle will be
16 preserved forever, but perhaps the parts could be
17 removed if it would be determined to be
18 necessary. I'm not sure.

19 ATTORNEY GAHN: I think what the Court is
20 suggesting is a prudent course. Let's wait until
21 these proceedings are over, because Wisconsin does
22 have a mandatory preservation statute that would be
23 applicable in this case. And it would make more
24 sense to address this under that statute, after the
25 proceedings are completed.

1 THE COURT: I think any order should
2 probably include, not only the fact that the samples
3 would be preserved, but a bit more specificity as to
4 how they would be preserved. And both parties may
5 want to be heard on that or you may come to an
6 agreement with a joint recommendation to the Court.

7 ATTORNEY STRANG: I'm only in partial
8 agreement with Mr. Gahn. I do want an order now, at
9 least all the control swabs and the swabs of
10 bloodstains be preserved, and the blood vial. And I
11 have not heard yet where the blood vial is, or the
12 remaining part of the blood vial is.

13 ATTORNEY GAHN: The blood vial will be in
14 the control of the Calumet County Sheriff's
15 Department.

16 THE COURT: Is that where it is now?

17 ATTORNEY GAHN: Well, that will also become
18 an exhibit very shortly.

19 THE COURT: Oh.

20 ATTORNEY GAHN: And let me also say that
21 some of the stains that Ms Culhane, from the Crime
22 Lab, tested, those stains and swabs are in the court
23 record here as exhibits.

24 THE COURT: What if we handle it this way,
25 the defense can prepare an order to order that all

1 these items be preserved now. I understand that to
2 be not in dispute with the State. And the order can
3 provide that the manner of preservation will be
4 determined following the conclusion of the trial.
5 Does that work for both parties?

6 ATTORNEY STRANG: Sure, I think so. And
7 we'll have no objection to things like the blood
8 vial and the swabs being withdrawn from evidence for
9 purposes of preservation by the State.

10 THE COURT: All right. Is that sufficient
11 detail for you to prepare a proposed order,
12 Mr. Strang?

13 ATTORNEY STRANG: Yes.

14 THE COURT: Okay. In terms of -- I try to
15 keep an inventory of matters that arise during the
16 trial that have not been resolved. One of those
17 items is the fair testing motion which the defense
18 renewed back on February 27th. If there's time,
19 after the last witness today, I would suggest that
20 the Court hear argument on that today.

21 Mr. Buting gave some argument at the
22 time of the motion. Mr. Gahn requested time to
23 respond. I could hear argument from the State,
24 any rebuttal from Mr. Buting, and, hopefully,
25 resolve that matter today.

1 I also took under advisement, also
2 Mr. Buting's request, to introduce evidence
3 concerning the voice mails and whether or not
4 they were accessed on November 2nd, or that the
5 details of them being accessed. I believe at the
6 time I reserved ruling. The parties were going
7 to conduct some discussions with each other to
8 see if the matter could be resolved or if
9 additional evidence was necessary. What is the
10 status of that motion at this time?

11 ATTORNEY KRATZ: Additional evidence, your
12 Honor, is going to be necessary. Mr. Strang and
13 Mr. Buting have agreed to telephone testimony from a
14 Cingular technician. We anticipate that to be
15 sometime tomorrow, probably tomorrow morning. That
16 will be supplemented with the State recalling Mike
17 Halbach. But that combination of witnesses should
18 resolve that matter. And, again, the defense has
19 been kind enough to allow telephone rather than live
20 testimony in that matter.

21 ATTORNEY STRANG: That's right. And I have
22 also, at least suggested in an email last night to
23 Mr. Fallon -- and I can't remember if I copied
24 Mr. Kratz and Mr. Gahn or not -- but suggested that
25 a stipulation as to one or both of the Cingular

1 witness and Mike Halbach, stipulation as to one or
2 both of those witnesses is conceivable. And at
3 least we could try, at least take a stab at that. I
4 don't know whether either side in the end would
5 stipulate, but it's worth a discussion.

6 If we go forward with testimony and not
7 a stipulation from the Cingular person, we're, of
8 course, working on the assumption that the
9 Cingular person at the other end of the telephone
10 would have the same documents in front of him or
11 her that we have here, so that the person can be
12 questioned about the documents and I'm quite
13 certain that the State shares that.

14 ATTORNEY KRATZ: We actually copied three
15 Court exhibits this morning and faxed them to that
16 person as well.

17 ATTORNEY STRANG: Great.

18 ATTORNEY KRATZ: So we're working all from
19 the same pages, Judge.

20 THE COURT: Very well.

21 ATTORNEY STRANG: And the remaining --
22 While the Court is taking inventory, the remaining
23 issue of which I'm aware was my renewed motion to
24 suppress the results of searches of the Avery
25 trailer and the garage and the area behind the

1 garage. I think we settled on after the November 5
2 search that began at about 7:30 p.m. and ended about
3 10:05 p.m.

4 I had renewed that, oh, several days
5 ago. I think the State, again, reserved response
6 for wanting to be heard on that. And that's my
7 recollection of the issue that remains ripe for
8 decision, or at least further argument and
9 decision.

10 ATTORNEY FALLON: I was under the
11 impression that we did argue it and the Court
12 decided you would rule later, after hearing the
13 argument that Mr. Strang and I made last week.

14 ATTORNEY STRANG: Well, actually, that's --
15 that is right, because now that I hear Mr. Fallon, I
16 recall his eloquence in responding. And the Court
17 at the time I think, if memory serves, said it would
18 not hear reply from me now or at that point, but we
19 would address the issue in some fashion later.

20 THE COURT: All right. I will -- do the
21 parties remember what day that was? I would like --
22 I'm going to review the transcript.

23 ATTORNEY STRANG: It may have been
24 February 22, but I can't promise.

25 ATTORNEY FALLON: I would have to look at a

1 calendar.

2 THE COURT: I do recall that as well.

3 ATTORNEY FALLON: I'm trying to remember
4 who the witness was, right before a particular
5 witness. Right now, for the life of me, I can't
6 think of that.

7 THE COURT: All right. Well, we'll attempt
8 to recreate that a bit later. Are the parties ready
9 for the jury to come in?

10 ATTORNEY STRANG: Yes.

11 ATTORNEY KRATZ: Yes.

12 THE COURT: All right. We'll bring in the
13 jurors at this time.

14 (Jury present.)

15 THE COURT: You may be seated. Welcome
16 back members of the jury. At this time we are ready
17 to proceed with the testimony. Who will be
18 questioning? Mr. Fallon, you may call your first
19 witness.

20 ATTORNEY FALLON: Thank you. The State
21 would call Lynn Zigmunt to the stand.

22 THE CLERK: Please raise your right hand.

23 **LYNN ZIGMUNT**, called as a witness
24 herein, having been first duly sworn, was
25 examined and testified as follows:

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

3 THE WITNESS: Lynn Zigmunt, Z-i-g-m-u-n-t.

4 **DIRECT EXAMINATION**

5 BY ATTORNEY FALLON:

6 Q. How are you employed?

7 A. I'm the Clerk of Court for Manitowoc County.

8 Q. And how long have you been the Clerk of Court for
9 Manitowoc County?

10 A. Since January of 2005.

11 Q. Tell us, if you would, what are the duties of the
12 Clerk of the Circuit Court for Manitowoc County?

13 A. I administer the Clerk of Court Office, oversee
14 the staff to ensure that there is appropriate
15 coverage for all court proceedings, record
16 keeping, oversee all the record keeping in the
17 office. Create policies for the record keeping
18 and oversee the budget for our office.

19 Q. What kinds of records does the Clerk of Court's
20 maintain?

21 A. All the records for the three circuit courts. So
22 any of the case files that are started, any of
23 the filings that are made within the files,
24 correspondence, pleadings, and exhibits that
25 would be filed with the court as a result of a

1 trial or hearing.

2 Q. And does that include maintaining files and
3 exhibits from files from cases in the past?

4 A. Yes.

5 Q. In your capacity as Clerk of the Circuit Court
6 for Manitowoc County, are you familiar with a
7 case entitled State of Wisconsin vs. Steven A.
8 Avery, Case No. 85 FE 118?

9 A. Yes.

10 Q. And how are you familiar with that particular
11 case file?

12 A. I guess from the large interest of the media in
13 that case after Mr. Avery was exonerated in 2003.
14 We maintain the file in our office so, when there
15 are public requests to view the file, we provide
16 it for inspection. And that file was in our
17 office for said purposes.

18 Q. All right. Now, in your capacity as the Clerk of
19 Circuit Court, do you supervise the other clerks
20 which are employed in that office?

21 A. Yes.

22 Q. And as the Clerk of the Circuit Court are you
23 generally familiar with their duties and
24 responsibilities?

25 A. Yes.

1 Q. And in terms of your familiarity with the 1985
2 case, can you tell us, based upon your
3 understanding, of where that file had been kept
4 while in the custody of the Clerk of the Circuit
5 Court?

6 A. From the time I took office, the file was
7 maintained in a large like rectangular shaped
8 cardboard box. And it was in our inner office,
9 in a central location, meaning on top of a filing
10 cabinet. And the reason that it was there, I
11 think it was brought up after Mr. Avery was
12 exonerated in 2003, after there was a high
13 interest by the media to look through the file.
14 It was a very big and cumbersome box to have to
15 bring up from the basement where it was normally
16 stored before, in a lower level filing area.

17 Q. I'm going to have some exhibits shown to you, if
18 I may, beginning with a series of exhibits marked
19 452. Let opposing counsel examine them for a
20 moment or two. While counsel is examining the
21 exhibits, were you asked to bring certified
22 copies of certain documents from case file 85 FE
23 118?

24 A. Yes, I was.

25 Q. And were you able to obtain copies of the

1 requested documents?

2 A. Yes.

3 Q. And you have received the documents?

4 A. I have received them? Oh, right now.

5 Q. The exhibits.

6 A. Yes.

7 Q. Okay. If you would, directing your attention to
8 Exhibit 452, I believe it is, can you tell us
9 what that is.

10 A. It's a stipulation filed in the case of State vs.
11 Steven Avery, Case No. 85 FE 118. I think -- I
12 believe it was a stipulation signed by District
13 Attorney E. James FitzGerald and Mr. Avery's then
14 attorney, Robert Henak. I believe they entered
15 into a stipulation regarding providing a DNA
16 sample.

17 Q. All right. And with respect to the last page of
18 that document, is there any marking or seal from
19 the Clerk of the Circuit Court which is affixed
20 thereto?

21 A. Yes.

22 Q. Tell us what that is.

23 A. It's a seal stating that this is a full certified
24 copy of the original, which is on file in the
25 Office of Clerk of Circuit Court in Manitowoc

1 County, and signed by me and dated 3/5/07.

2 Q. All right. And what is Exhibit 453?

3 A. An order in the case State vs. Steven A. Avery 85
4 FE 118. And it's in conjunction with the
5 stipulation wherein the Court ordered that
6 Mr. Avery submit to a DNA sample. It's dated
7 November 29th, 1995.

8 Q. Similarly, is there a certification affixed to
9 that document?

10 A. Yes, there is.

11 Q. And whose certification is it?

12 A. My certification dated 3/5/07.

13 Q. All right. And what is Exhibit 454?

14 A. A letter dated December 6, 1995, from Attorney
15 Robert R. Henak addressed to the Clerk of Circuit
16 Court for Manitowoc County, addressed to Ms
17 Wilda, our criminal clerk, just confirming a
18 telephone conversation where a request was made
19 for a conformed copy of Judge Hazlewood's order
20 to be sent to Elaine Wheeler, Health Service Unit
21 Manager with Fox Lake Correctional Facility.

22 Q. All right. And Exhibit 455?

23 A. A letter dated December 12th, 1995, from Shirley
24 Wilda, Deputy Clerk with the Clerk of Court
25 Office for Manitowoc County addressed to Elaine

1 Wheeler, Health Service Unit Manager with Fox
2 Lake Correctional Facility, enclosing a certified
3 copy of the stipulation and order regarding the
4 DNA sample ordered by Judge Hazlewood.

5 Q. Do the documents to this point indicate the
6 nature of the sample to be submitted for DNA
7 analysis?

8 A. What do you mean by the nature of the sample?

9 Q. Does it say -- specify the form of which the DNA
10 sample would be obtained?

11 A. Enclosed please find a certified copy of the
12 stipulation and order in the above referenced
13 referred to case, which orders that a Health
14 Services Unit at Fox Lake Correctional
15 Institution obtain a DNA sample from the
16 defendant as requested by a Laboratory
17 Corporation of America and forward that sample,
18 as directed, to Laboratory Corporation of
19 America.

20 Q. All right. What is Exhibit 456?

21 A. A letter dated December 12th, 1995, from Shirley
22 Wilda of the Manitowoc County Clerk of Court
23 Office to Attorney Robert R. Henak, enclosing a
24 copy of the stipulation and order which was filed
25 in the above matter. And just confirming that on

1 this date a certified copy of the stipulation and
2 order was mailed to Elaine Wheeler, Health
3 Service Unit Manager at Fox Lake Correctional
4 Facility, per his request.

5 Q. And what's the next -- is there one more or two?

6 A. One more.

7 Q. The last one?

8 A. Exhibit 457, it is -- it's not dated, it's got a
9 file date where it was received in our office,
10 filed June 6, 1996. It is from Lab Corp
11 Molecular Biology and Pathology, addressed to
12 whom it may concern: Enclosing -- Enclosed you
13 will find evidence that your agency submitted to
14 the Forensic Identity Unit at Roche Biomedical
15 Laboratories for analysis. And then in
16 parenthesis, RBL Case No. F95-624. Please
17 reference your agency file, Wisconsin vs. Avery.
18 So it must be -- looks like it's a return of the
19 evidence which was submitted through a DNA
20 sample. I would think returning it to our
21 office.

22 Q. All right. Now, the 454, 455, 456, and 457,
23 those exhibits, do they all have certifications
24 affixed to them?

25 A. Yes, they do.

1 Q. All right. And you are the one who certified --

2 A. I certified --

3 Q. -- those documents?

4 A. -- them and they are all dated 3/5/07.

5 Q. Okay. And so that they are official copies of
6 the records which are maintained in Manitowoc
7 County Circuit Court file 85 FE 118?

8 A. Yes, they are.

9 Q. All right. I would like to show you -- I would
10 like to show you some photographs now, if we may.
11 If you would examine, your attention is directed
12 to Exhibit 464?

13 A. Okay.

14 Q. All right. And do you recognize that?

15 A. Yes.

16 Q. And what is Exhibit 464, please?

17 A. It's a photograph of the two plastic tote storage
18 cases where the case of State vs. Steven Avery,
19 Case No. 85 FE 118 was stored in my office.

20 Q. All right. If I may publish that now. Thank
21 you. Is this a copy of Exhibit 464?

22 A. Yes.

23 Q. It's being displayed on the screen?

24 A. Yes.

25 Q. All right. Tell us, specifically, what is

1 Exhibit 464, what are we looking at here?

2 A. That is the entire case file of the 85 FE 118
3 case for Steven Avery. The case contains the
4 case file, the paper part of the case file, as
5 well as all the exhibits that were presented in
6 that file.

7 Q. What is the location of that particular exhibit?
8 In other words --

9 A. Of the storage cases?

10 Q. Yes, where are those -- Where was that picture
11 taken?

12 A. In my office.

13 Q. All right. And I believe earlier you talked
14 about the file originally having been contained
15 in some cardboard boxes?

16 A. Right, it was in one large rectangular shaped
17 cardboard box, which was very cumbersome to move
18 and carry. It was quite heavy with all the
19 exhibits in one box.

20 Q. When did the file find it's way into the plastic
21 containers which are depicted in Exhibit 464?

22 A. I had originally thought, like the end of 2005,
23 possibly the beginning of 2006. And I had made a
24 call to my assistant to confirm the exact --
25 because I bought those storage totes out of -- I

1 was reimbursed out of our petty cash, so she
2 could track down the exact date. And she did
3 call and confirm that it was July of '06 when the
4 purchase was made.

5 Q. Okay.

6 A. So that's when it actually got transferred from
7 that box to these storage totes.

8 Q. And where was the cardboard box before that?

9 A. When it was in our office?

10 Q. Yes.

11 A. It was -- when you walk into the secured area,
12 like, the secured door to our office, it would
13 be, like, straight ahead against the west wall of
14 our office, in kind of like a general walkway.
15 It was -- Our office is kind of partitioned off
16 into sections and that's kind of like a -- just
17 an open like walkway.

18 There's a desk on one side where
19 sometimes when people, like attorneys, want to
20 come in and review a file or something, we would
21 let them do it on the desk that's in that area.
22 And where this file was was just a little further
23 past that desk, right in front of like the
24 windows on the side of the building there.

25 Q. All right. What is the next exhibit you have in

1 front of you?

2 A. 447.

3 Q. 447?

4 A. And that is a picture of the entrance door to our
5 inner office.

6 Q. All right. 447 is now displayed on the screen.
7 Could you describe for us what we are looking at
8 here with respect to that?

9 A. Well, there's a key code pad that's above the
10 latch and that's -- there's an access code that
11 our staff and -- I think it's just court
12 personnel pretty much that has that access code
13 and you need that code to gain entrance into the
14 inside of our office.

15 Q. So if -- there's a counter I see to the immediate
16 right of the door, under what appears to be a
17 doorbell, what is that counter for?

18 A. The counter is -- that's part of -- like in our
19 lobby area, there's a counter that surrounds our
20 -- the area where we wait on people over the
21 counter. It's kind of an L-shaped area, that's
22 the short part of the L-shape.

23 Q. Would it be fair to say that's where the general
24 public comes to do business in the Clerk of
25 Court's Office?

1 A. Yes.

2 Q. What are the hours of the Clerk of Court's office
3 in Manitowoc County?

4 A. On Mondays, 8:30 to 5 and Tuesday through Friday,
5 8:30 to 4:30.

6 Q. What is the next exhibit that you are holding,
7 please?

8 A. Exhibit 448.

9 Q. And tell us what is Exhibit 448?

10 A. It is a package, Airborne Express Package. And
11 it was an exhibit and I believe it's the exhibit
12 that contained the box, the blood vial container.

13 Q. All right. If we could pull this up. Exhibit
14 448 is now being displayed on the screen. Is
15 that the package that the Clerk's Office received
16 from the testing entity, Lab Corp of America?

17 A. Yes, that's what it appears to be.

18 Q. All right. And what is the next exhibit?

19 A. Exhibit 449. It looks like it's the label that
20 is on that shipping package, telling what is
21 enclosed as the exhibit. It says enclosed
22 evidence return from Forensic Identity Unit at
23 Roche Biomedical Laboratory that has been
24 submitted for analysis. Do you want me to read
25 the whole thing?

1 Q. No, I think we have it here. What is being
2 depicted on the screen here as exhibit -- is that
3 449 that you are holding in your hand?

4 A. Yes.

5 Q. That is the labeling of the package in 448?

6 A. Right.

7 Q. All right. And next exhibit, please.

8 A. Exhibit 450. And this appears to be probably the
9 backside of the square container that held the
10 blood vial.

11 Q. All right.

12 A. The styrofoam container. It has markings on,
13 looks like the date it was opened and it was
14 initialed by the people that were present and
15 witnessed the opening.

16 Q. Very well. And this box was contained within
17 Exhibit 448?

18 A. Correct.

19 Q. Exhibit 451?

20 A. 451 is just the other side of the styrofoam
21 container that held the blood vial. It shows the
22 taped end, where the evidence tape had been and
23 where it was opened.

24 Q. All right. So Exhibits, I think we began with
25 464, and then we went 447 through 451. Are those

1 exhibits, based upon your knowledge and your
2 responsibilities as a Clerk of the Circuit Court,
3 officially part of the record in the case of
4 State of Wisconsin vs. Steven Avery, 85 FE 118?

5 A. Yes.

6 Q. Your best recollection, Ms Zigmunt, when did the
7 file take up residence, as it were, in your
8 private office?

9 A. Probably my best guess would be this July of '06
10 when the storage -- those plastic storage tote
11 containers were purchased.

12 Q. All right. And what was the general procedure
13 for allowing access to this particular file by
14 members of the general public?

15 A. We have a sign in logbook that anybody who wants
16 to view a public and open record, they sign in
17 it, that would include the date, the case number,
18 their signature. And if their signature would be
19 illegible, we have them print their signature,
20 print their name.

21 Q. And when did that logbook get created?

22 A. I started that in April of 2005. Before that
23 there was nothing in effect at all to document
24 when files were being reviewed.

25 Q. And who would -- First of all, before we get to

1 that point, let me ask, why did you decide to
2 create such a log?

3 A. I just thought it was important. And going to
4 the Clerk's meetings, being a new Clerk of Court,
5 I gained a lot of information at all the
6 different conferences that we have -- that I have
7 gone to. And that was one of the things that we
8 had discussed.

9 And, well, and one of the other reasons
10 I thought would be a good idea to have a record
11 like this was because with identity theft being
12 such a big issue, I thought if we had some kind
13 of tracking device, if there was ever a case of
14 identity theft, we would have something to kind
15 of go back and at least see who was accessing
16 certain files.

17 Q. All right. And who would be required to sign
18 such a log?

19 A. In the beginning, I think I had originally wanted
20 the policy to include everyone; the public, and
21 attorneys, and anybody who accessed any file.
22 But some of the staff thought, you know, maybe
23 some of the attorneys that come, if they knew who
24 they are, they thought maybe we didn't have to
25 get their signature.

1 Or like for title insurance companies
2 too, because when they came in to look at files
3 too, there would be such a long list. We let it
4 kind of go a little lax on it in the beginning.
5 But I'm not sure exactly what the trigger date
6 was, but probably a few months into it, maybe by
7 October of that year for sure, that we got more
8 strict and wanted it to be inclusive of
9 everybody, every single person who viewed any
10 file.

11 Because I just thought we need a
12 consistent practice. I don't think we can
13 require one person and not another. You know, if
14 we're doing it for a purpose, it's got to be
15 straight forward or it's not serving the purpose.

16 Q. So your best recollection is is that by October
17 of 2005 anyone who was looking at a particular
18 file would be required to sign in?

19 A. Right.

20 Q. All right. And that include -- attorneys and
21 everyone, I take it?

22 A. Right. It was supposed to include everyone.

23 Q. Okay. I believe you have now been presented
24 Exhibit 45 -- or 467, is it?

25 A. Yes.

1 Q. All right. And can you tell us what Exhibit 467
2 is?

3 A. It looks like it's a book called -- entitled
4 Evidence Room Case Entry Log.

5 Q. All right.

6 A. And it says evidence room and then at the top it
7 says journal so must be some...

8 Q. And is that the case entry log that people would
9 be required to sign into?

10 A. No.

11 Q. What is that?

12 A. I have never --

13 Q. What is that particular?

14 A. I have never seen this before, this must be...

15 Q. All right. Do we have a picture of -- is there a
16 picture of your particular log?

17 A. Here, no.

18 Q. Okay. All right. I just wanted to make sure
19 that we're clear on what that is. Thank you.
20 All right. I would like to direct your attention
21 to the time frame 2005, particularly that year,
22 and begin with this question. Do you know an
23 individual by the name of Andrew Colborn?

24 A. Yes, I do.

25 Q. And who is he?

1 A. He's, I believe, a sergeant with the Manitowoc
2 County Sheriff's Department.

3 Q. And did you recall, or do you recall, ever seeing
4 Sergeant Colborn in the Clerk of Court's Office
5 during the year 2005, your first year in office?

6 A. No, I don't think I have ever really seen him
7 ever in -- especially in the inner part of our
8 office, ever.

9 Q. All right. Are you familiar with an individual
10 by the name of James Lenk?

11 A. Yes, I am.

12 Q. And who is James Lenk, that you know?

13 A. I believe he's a lieutenant with the Manitowoc
14 County Sheriff's Department.

15 Q. And, again, with respect to the year 2005, your
16 first year in office, do you recall ever seeing
17 Lieutenant Lenk in your office that year?

18 A. There was one occasion, in the very beginning of
19 my term, I had contacted the Sheriff's Department
20 regarding questions I had on evidence storage.
21 Because we have a safe that's in my office, where
22 we do maintain various kinds of evidence.
23 There's some drugs and I'm not sure, I think
24 there might be a weapon in there.

25 And going -- after one of the

1 conferences that I had attended, this was an item
2 of discussion regarding maintaining custody of
3 those types of evidence in our possession. And
4 it was suggested that any time those types of
5 evidence came into play that they should be
6 stored at, like a Sheriff's Department or other
7 issuing agency where there's more -- a more
8 secure facility.

9 And I had called Mr. Lenk, or he was the
10 person I was put in touch with because he must
11 take care of evidence and things over at the
12 Sheriff's Department. And he had come over to
13 see what was at issue. We discussed it and we
14 discussed a procedure. And I'm working -- I
15 mean, I have been working on a policy and
16 procedure for our evidence retention and we
17 discussed how we were going to handle
18 transferring that to the Manitowoc County
19 Sheriff's Department.

20 Q. And approximately when did that discussion occur?

21 A. I would say it was early spring. It was
22 probably, you know, very early into that year.
23 So for sure, maybe March or April. I don't think
24 I have anything that really actually documents
25 exactly the date, but it was pretty early in the

1 year.

2 Q. Other than that one occasion where you had some
3 discussions about the evidence storage policies,
4 other than that, had you ever seen him in the
5 inner office area of the Clerk of Courts?

6 A. Never. I don't think -- Besides that one
7 incident, I don't think he's ever been inside of
8 our office.

9 ATTORNEY BUTING: Objection to that form of
10 that answer, if she's never seen him inside the
11 office, she can't say he's never been in the office.

12 ATTORNEY FALLON: That's for
13 cross-examination. She answered the question as
14 best she could.

15 THE COURT: Well, I'm going to sustain the
16 objection, because of lack of foundation, for the
17 opinion about when she was not in the office.

18 ATTORNEY FALLON: That's fine. One minute.
19 Your Honor, we will pass the witness for
20 cross-examination; however, we would move into
21 evidence Exhibits 452 through 457, as well as
22 Exhibit 464 and 447 through 451.

23 THE COURT: All right. I take it that
24 excludes the item that the witness could not
25 identify that was on the screen.

1 ATTORNEY FALLON: That's right.

2 THE COURT: But all other exhibits that she
3 testified to, you are asking to be admitted?

4 ATTORNEY FALLON: Yes.

5 THE COURT: Mr. Buting.

6 ATTORNEY BUTING: No objection to those,
7 452 is the only one that's not --

8 ATTORNEY FALLON: 467 is not offered.

9 ATTORNEY BUTING: 467, I'm sorry.

10 THE COURT: All right. Then all the items
11 this witness testified to, other than 467, I
12 understand to be offered and if no objection, they
13 are admitted. Mr. Buting, will you be doing the
14 cross?

15 ATTORNEY BUTING: Yes, I will, Judge.
16 Thank you.

17 **CROSS-EXAMINATION**

18 BY ATTORNEY BUTING:

19 Q. Good morning, Ms Zigmunt.

20 A. Good morning.

21 Q. The -- You became the clerk, elected clerk, in
22 January of '05, is when you took office?

23 A. Yes.

24 Q. So about 10, 11 months before the Teresa Halbach
25 disappearance?

1 A. Correct.

2 Q. Correct. Okay. And would it be fair to state
3 that when you first took office, part of your
4 time was getting used to what the security
5 procedures were and were not --

6 A. That's correct.

7 Q. -- in existence. And you had some concerns that
8 maybe some of the security and some of the
9 procedures were a little bit -- I don't know if
10 lax is the right word -- but not as secure as you
11 would ultimately wish they would be -- them to
12 be, right?

13 A. I think that's a pretty good assumption.

14 Q. Okay. Did you bring the log, evidence log, with
15 you, or the case review log with you?

16 A. No, I didn't.

17 Q. Have you reviewed it before today?

18 A. In detail you mean, or I mean, I guess I haven't
19 paged through and looked, for any reason.

20 Q. Okay. Well, for instance, do you know that every
21 person who has come to that office since October
22 of 2005 and asked to look at any file, has
23 absolutely, positively, been required to sign in
24 on a log?

25 A. Since October of 2005, you are saying?

1 Q. Yes.

2 A. That was the directive I had given and I don't
3 know that it was completely being followed. I
4 think --

5 Q. Okay.

6 A. -- you know, there were people that were making
7 exceptions for people, but we have tightened up
8 on that --

9 Q. Sure.

10 A. -- to make it ...

11 Q. And as of -- Really, you tightened up as of
12 August of '06 is when you really made sure that
13 everybody, all the staff required that people
14 sign in?

15 A. I don't have an exact date, I didn't document it
16 for any reason, so I guess I can't say with
17 certainty.

18 Q. But would it be fair to say that until -- or
19 around that time July or August of '06, until
20 that time you would -- or I should say at that
21 time, you became concerned after talking to some
22 of the staff, that maybe some people weren't
23 requiring everybody to sign in and that this was
24 mandatory at this point forward?

25 A. Yes, I think my concern was, too, that they were

1 allowing like attorneys who -- if they knew them
2 personally, or like I said, the title insurance
3 companies, things like that, those are pretty --
4 the ones that were allowed not to sign, but I
5 wanted to make it consistent for everyone to have
6 to sign.

7 Q. Okay. Now, you were first interviewed by law
8 enforcement officers in this case at the end of
9 December or early January of this -- just a
10 couple months ago, right?

11 A. I don't know exactly the dates.

12 Q. Well, were you -- did you ever speak to Agent
13 Fassbender or Mr. Wiegert?

14 A. Right, they were in on several occasions.

15 Q. And that was all in the last couple of months or
16 so?

17 A. Yeah, pretty much.

18 Q. So no law enforcement officer came to you in
19 November of 2005 and said, you know, Mr. Avery
20 has been telling everybody that if that blood --
21 if his blood is found inside Teresa Halbach's
22 vehicle, it must have been planted. Nobody came
23 to you and talked to you about that particular
24 statement, did they?

25 A. No.

1 Q. And between November of 2005 and this past summer
2 of 2006, none of the law enforcement officers
3 came to look at Mr. Avery's 1985 file, none of
4 the investigating law enforcement officers in
5 this case, right?

6 A. I can't say that for certainty. I mean, other
7 people wait on people when they are looking --

8 Q. Okay.

9 A. -- at the file, so.

10 Q. So it's possible that somebody from Manitowoc
11 Sheriff's Department even, may have, after
12 Mr. Avery made the public statements that
13 somebody is framing me, somebody has planted my
14 blood, it's possible that somebody from Manitowoc
15 may have come and looked at his file, to see if
16 there was any blood in it?

17 ATTORNEY FALLON: Objection, two grounds,
18 speculation, and more importantly, it seems to me we
19 have a limited focus of who may have come and looked
20 from Manitowoc County?

21 ATTORNEY BUTING: I'm talking about the
22 investigation, after the disappearance.

23 ATTORNEY FALLON: Then I say relevance.

24 THE COURT: What is the relevance
25 Mr. Buting?

1 ATTORNEY BUTING: Let me lay some more
2 foundation questions.

3 THE COURT: Go ahead.

4 ATTORNEY BUTING: Let's do it that way.

5 Q. (By Attorney Buting)~ Let me go back a little bit
6 first. As of October of 2005, the 1985 case
7 against Mr. Avery that was in your office was a
8 closed file, right?

9 A. Yes.

10 Q. In fact, it had been not only a closed file, but
11 it was a dismissed closed file, right?

12 A. Yes.

13 Q. So there were no ongoing post-conviction
14 proceedings, right?

15 A. Not that I'm aware of.

16 Q. Or appellate proceedings, right?

17 A. I mean, I guess I can't really testify to that.
18 I wasn't really that familiar with the file at
19 that time, so I guess...

20 Q. Okay. You weren't that familiar with the file.
21 But you do know that the media was asking and
22 other, you know, freelance writers, or general
23 public was asking about this file quite a bit?

24 A. Yes.

25 Q. And --

1 ATTORNEY BUTING: Let me mark a couple of
2 exhibits here.

3 (Exhibit No. 468 & 469 marked for identification.)

4 Q. (By Attorney Buting)~ Would it be fair to say
5 that until it was discovered publicly that there
6 was a vial of Mr. Avery's blood in that case
7 file, you weren't aware of it?

8 A. That's correct.

9 Q. And you didn't have any particular concern about
10 the security of that file because you didn't know
11 there was a blood vial in it, for instance,
12 right?

13 A. You mean to take any extra security on it?

14 Q. Right.

15 A. Correct.

16 Q. Okay. And if anything, because there were so
17 many requests to see this file, this file was
18 really kept in a less secure spot within the
19 Clerk's Office than other old case files would
20 be?

21 A. In my office, less secure?

22 Q. No, the Clerk's Office, not your office.

23 A. Not real -- I don't know. I mean, I don't know
24 that it's any less secure; it's a pretty secure
25 -- it's not just open to the general public.

1 Q. Sure.

2 A. There are very few people who have access.

3 Q. But you mentioned how it was cumbersome to have
4 to move this big box up and down the stairs,
5 right?

6 A. Correct.

7 Q. Normally you have -- is there a vault downstairs
8 or just a room?

9 A. Just a room. It's in the basement.

10 Q. Okay. You have a storage room in the basement
11 where your old files are kept?

12 A. Correct.

13 Q. And Mr. Avery's file, being a 1985 file, would be
14 normally down there in that sort of archive area?

15 A. Correct.

16 Q. But for the fact that once he was exonerated,
17 there were so many demands for it, that you left
18 it upstairs in the main area, right?

19 A. Correct. And, actually, I'm not the one that
20 brought it up originally, because I wasn't in
21 office at that time.

22 Q. Okay. So it was actually upstairs before you
23 even came into office?

24 A. Correct, for probably two years.

25 ATTORNEY FALLON: Counsel, can we see those

1 exhibits?

2 ATTORNEY BUTING: Okay. I'm sorry.

3 Q. (By Attorney Buting)~ I'm showing you Exhibit 468
4 and 469. See if you can identify, first, 468?

5 A. Yes, this was the original cardboard box that the
6 file was maintained in.

7 Q. The file being the Steven Avery file?

8 A. Correct.

9 Q. 1985 file?

10 A. Right.

11 Q. And the one next to it is?

12 A. The same file.

13 Q. Same file from a little bit farther back, right?

14 A. Right.

15 Q. So, it was one of your deputy clerks -- I'm
16 sorry. One of these -- Well, let's publish this
17 so we can talk about it for a minute. This is a
18 picture that shows the file in the Clerk's
19 Office, this is No. 469?

20 A. Correct. It was put on the desk that was used
21 for the viewing area, like when attorneys would
22 come in and view files.

23 Q. Okay. And you mentioned that it was stored kind
24 of on a filing cabinet next to a window?

25 A. Right. Which is kind of behind where that

1 divider is.

2 Q. Let me point to it. Right here, it's right back
3 there, right?

4 A. Yeah.

5 Q. Just over the shoulder of one of your deputies
6 right?

7 A. Correct.

8 Q. And over here is an old vault, like an actual
9 safe with a whole door?

10 A. Right.

11 THE COURT: We're going to take a break at
12 this time. Let's -- We'll resume at 10:15.

13 (Juror needs a break.)

14 (Jury not present.)

15 THE COURT: You may be seated. And we'll
16 resume at 10:15.

17 (Recess taken.)

18 (Jury present.)

19 THE COURT: And, Mr. Buting, you may resume
20 your cross-examination.

21 ATTORNEY BUTING: Thank you, Judge.

22 **CROSS-EXAMINATION, CONTD.**

23 Q. (By Attorney Buting)~ Ms Zigmunt, I found a
24 digital version of what we were looking at
25 before. I'm going to use that so it will be

1 easier to see, okay?

2 A. Okay.

3 Q. Now, I put up Exhibit 469. And the vault that we
4 were talking about, that's the vault door right
5 there, isn't it?

6 A. Yes.

7 Q. I can't read that, it says something safe
8 company. It's very old, hundred years old
9 probably, put in when the building was first
10 built, right?

11 A. I would believe so.

12 Q. But it's not something that you use as a locked
13 location any more?

14 A. No.

15 Q. Wasn't used that way long before you came here,
16 right?

17 A. Correct.

18 Q. Okay. And then over on the other side of Janet's
19 left shoulder is the window that you were
20 referring to where that box was normally kept,
21 until somebody would ask to look at it, right?

22 A. Right.

23 Q. There's a filing cabinet right there, heater,
24 things of that nature?

25 A. Right.

1 Q. Now, the box is -- That is the cardboard box the
2 way it looked until you had it put into plastic
3 tubs sometime in, you think, July, right?

4 A. July of 2006, right.

5 Q. Okay. Well, after this photograph was taken any
6 way, right?

7 A. Right.

8 Q. Okay. Is that the table that you are referring
9 to, there's like a desk or a table that it can be
10 put on when someone asks to see it, if they can
11 go through?

12 A. Correct. That is where they originally used to
13 look at files. I mean, and that one, too, but
14 just with that file being so cumbersome and so
15 many exhibits involved, there's really not a
16 place to spread it out. And it just wasn't a
17 real good location. There's a lot of traffic
18 through that area, from the back room, off into
19 the section where you see the other clerk sitting
20 there. People traveling back and forth all the
21 time, it just didn't seem a real secure place
22 for -- with all the exhibits and all that paper
23 out.

24 Q. Sure. And the file actually has the exhibits in
25 it as well as the paper documents, right?

1 A. Correct. All the exhibits are underneath all of
2 it. I think all the paper was pretty much at the
3 top.

4 Q. Right. And this one has -- this particular file
5 has things like clothing, and whatever was
6 introduced as exhibits just kind of like what we
7 have in this case today?

8 A. Correct.

9 Q. But I want to draw your attention to -- there's a
10 partition right here on the far right side of the
11 picture, right? Some, like, notices posted?

12 A. Right behind the box.

13 Q. Right behind the box, yeah. And so the way it's
14 set -- it's not a partition that goes all the way
15 to the ceiling, but it's not the same height as
16 that -- the partition in the background there?

17 A. Correct.

18 Q. They're all -- There's a number of partitions
19 like that in the Clerk's Office, within the
20 interior part of the Clerk's Office?

21 A. Yes.

22 Q. And so when one is standing there like Janet is,
23 by this box, the people on the other side of the
24 partition don't see the box?

25 A. Correct.

1 Q. And other than this one woman in the background
2 here with the long blond hair, there is no other
3 clerk desk in that back area.

4 A. Correct.

5 Q. So I don't have a schematic of the layout, but
6 the way this works is, this is sort of a narrow
7 hallway that leads to this area right from one of
8 doors that goes to the public area, right?

9 A. Right.

10 Q. And, then, behind the partition, over here is
11 where the main area where all the clerks work?

12 A. Right. There's like a separate area over there.
13 There's I think five including the one with the
14 blonde hair, you know, different work stations
15 that are set up.

16 Q. Okay. So if the clerk who works in that
17 particular workstation is not sitting there right
18 then, when someone is going through this file,
19 you could go through this file without the rest
20 of the clerks directly seeing you moving around
21 things in the box, right?

22 A. Correct.

23 Q. And your deputy clerks, like both of the
24 individuals in this picture, have a lot of
25 duties, they move to and fro during the day,

1 right?

2 A. Correct.

3 Q. So the woman in the back, I suppose we could give
4 her a name, but the woman in the background of
5 this photo is not sitting in that chair all day
6 long while she works?

7 A. Correct.

8 Q. Okay. Now, the cardboard box that we were
9 looking at, Exhibit 468, has the pleadings and
10 the docket minutes, at least in this instance
11 they are sitting right on top, right?

12 A. Right.

13 Q. So it wouldn't be very difficult for someone to
14 know that this particular file or box is the
15 Steven Avery case, would it?

16 A. I guess if you looked at it, I mean, you would
17 have to -- in that condition of the box that one
18 day, I mean, and when people go through it, it
19 doesn't necessarily end up back in that same
20 condition. And I think when it was kept over on
21 the side filing cabinet, I tried to level things
22 out to, so the cover -- the flaps could come
23 over, because I didn't think that was a very
24 secure ...

25 Q. Sure. But there is that -- see that foam board

1 exhibit in the background?

2 A. Right. And that would probably stick out no
3 matter where --

4 Q. Yes.

5 A. -- because it was too big for the box.

6 Q. So the box wouldn't close?

7 A. Right.

8 Q. Okay. No matter what you did. All right. Now,
9 would it be fair to say that the presence of
10 sheriffs deputies inside the interior part of
11 that Clerk's Office, it's not that unusual an
12 event, right? In the normal course of your
13 business?

14 A. To have sheriffs deputies in our office?

15 ATTORNEY FALLON: Objection, relevance as
16 asked.

17 ATTORNEY BUTING: Well, it's entirely
18 relevant.

19 THE COURT: What is the objection?

20 ATTORNEY FALLON: Relevance as to the
21 phrasing of that particular question, vis-a-vis the
22 pre-trial court rules.

23 THE COURT: Well, it could be laid as a
24 foundational question, so I will allow it for that
25 purpose.

1 ATTORNEY BUTING: Thank you.

2 Q. (By Attorney Buting)~ Do you understand my
3 question?

4 A. If you would like to just repeat it.

5 Q. Sure. Okay. You know that door that you showed
6 us, the photograph that has the little, you know,
7 lock combination?

8 A. Yes.

9 Q. When you go through that door, you go into the
10 inner office of the Clerk's Office, right?

11 A. Yes.

12 Q. And in that area, it's not unusual to see
13 sheriffs deputies during the normal course of
14 business, is it?

15 A. The only sheriffs deputies that would be normally
16 in our office would be probably the sheriffs
17 bailiffs that are posted in the courthouse for
18 security reasons. And they --

19 Q. Right.

20 A. -- go occasionally.

21 Q. In fact, they are in there every day picking up
22 files or returning files from court, right?

23 A. Yeah, they are in there frequently.

24 Q. Okay. And, similarly, drug unit -- officers who
25 are assigned to drug units, at various times, are

1 back in that area because they are dealing with
2 search warrants and filing and returns and all
3 that as well, right?

4 A. They could have access -- I mean, they don't have
5 access -- they don't have the code to get in.
6 They would have to be buzzed in.

7 Q. I'm sorry. My question is, whether it's unusual
8 to see them in that area. Wouldn't be an unusual
9 event to take note of --

10 A. Correct.

11 Q. -- in your mind, right?

12 A. Correct.

13 Q. And that would be true of your deputy clerks as
14 well, right? Maybe more so than you, even?

15 A. True of the deputy clerks, what do you mean --

16 Q. Seeing a --

17 A. -- that they would see them?

18 Q. Seeing a sheriffs department employee in that
19 area was not such an unusual event that it would
20 make someone take note in their mind, hey, what's
21 going on here, would it?

22 A. Correct.

23 ATTORNEY FALLON: Speculation, foundation
24 for this witness, ask the answer be stricken.

25 THE COURT: No, I will allow it.

1 Q. (By Attorney Buting)~ And on occasion even,
2 sheriff's employees may be coming into the
3 interior of the office, like attorneys, going
4 through files, while they are investigating an
5 old file. I'm sorry, looking at an old file in
6 the course of their investigation in a new case,
7 right?

8 A. So your question is, an attorney?

9 Q. No. Badly phrased. Let me retry it. Sheriff's
10 employees, sheriff's deputies, also on occasion
11 are in that back area, the inner area of your
12 Clerk's Office, looking at one case file perhaps
13 as part of their investigation on somebody in
14 another case, right?

15 A. I guess I can't really say. I don't know that
16 they would be looking at a file there. I mean,
17 if anybody requests to look at a file, it's
18 usually done over the counter. I don't know that
19 it's ...

20 Q. All right. But you don't --

21 A. I mean, right, I can't say with 100 percent
22 certainty, what they are doing, because you're
23 usually dealing with the deputy clerks like of a
24 specific unit.

25 Q. That's right. And you are usually back in your

1 office and they are dealing with a number of
2 different clerks, deputy clerks?

3 A. Correct.

4 Q. Now, in addition, the Sheriff's Department has
5 access to the Clerk's Office with master keys;
6 isn't that right?

7 A. The security bailiffs would.

8 Q. Okay. Do you know a list, do you know every --
9 Well, let me go back for a second. Do you know
10 that the Sheriff's Department is responsible for
11 the security of the whole courthouse facility?

12 A. Yes.

13 Q. And that if there's a fire or something, after
14 hours, they have to have access, right?

15 A. Yes.

16 Q. Both to the courthouse and to all of the rooms
17 within the courthouse, right?

18 A. Yes.

19 Q. And there are a number of master keys that are
20 issued by somebody from Manitowoc County to give
21 to people who are allowed to have this kind of
22 access right?

23 A. I would imagine, I don't know specifically.

24 Q. Sure. You don't know who, but you know generally
25 that's the case, right?

1 A. Yes.

2 Q. If you have a master key to get through that
3 doorway, you don't need the separate combination
4 lock, right?

5 A. I wasn't aware of that before, but during the
6 investigation when the keys were, you know, when
7 it was being questioned, it did come to my
8 knowledge that the key could be used to gain
9 access to that door.

10 Q. Sure. The whole idea of a master key, it
11 wouldn't do much good if they turned the lock,
12 but then you couldn't get past because you have
13 got to have the combination, right?

14 A. Correct.

15 Q. So, the way it is set up -- at least the way it
16 was set up in the fall of 2005 was, a master key
17 would allow entry to the inner part of the
18 Clerk's Office.

19 A. I guess so.

20 Q. Okay. And that would include after hours, on
21 weekends, or in the evenings, right?

22 A. Correct.

23 Q. Okay. Now, Mr. -- Mr. Fallon asked you on direct
24 if you recalled seeing Sergeant Colborn or
25 Lieutenant Lenk in that inner area of the Clerk's

1 Office; do you recall that question?

2 A. Yes.

3 Q. That question was never put to you until some
4 time in late December or early January, 2006 and
5 2007, correct?

6 A. I believe that's probably correct.

7 Q. Okay. So nobody asked you about whether you
8 could recall seeing Lieutenant Lenk or Sergeant
9 Colborn until about 14 or 15 months after the
10 Teresa Halbach disappearance, right?

11 A. I guess. Yes.

12 Q. Okay. So between November of 2005 and December
13 of 2006, no investigating officers in this case
14 came to you and said, hey, has anybody come to
15 look at the 1985 court file, right?

16 A. I don't think so, I think it was pretty much just
17 when all the investigation was going on, like you
18 said, late November, December.

19 Q. Well, let's get clear here, because your answer
20 isn't, I'm sorry. All the investigation going on
21 you are talking about, is all the investigation
22 that started once the blood vial was discovered
23 there, right?

24 A. Right, I believe when the special investigator
25 that was assigned.

1 Q. Mr. Fassbender?

2 A. Right.

3 Q. Okay.

4 A. I guess I don't have a specific date, though. I
5 mean, I didn't mark it down for any reason, so.

6 Q. We're talking generally here, okay. I'm going to
7 get to some pictures with you in just a minute.
8 But after we, the defense, filed a motion in
9 December, someone in your office took that white
10 box that we looked at, from the exhibit, out of
11 the court file and locked it in the safe for
12 security, right?

13 A. I believe it was done pursuant to an order of the
14 Court.

15 Q. And that was in December of 2006, right?

16 A. Okay.

17 Q. Okay. Do you agree?

18 A. I agree. I don't have certainty. I mean, I
19 don't -- I mean, to the time frame, it would be
20 the approximate time.

21 Q. Okay.

22 A. But I don't have anything to verify that.

23 Q. Sure. And shortly thereafter, a week or so
24 later, the attorneys all came to your office and
25 we, with the Court's permission, opened that safe

1 and opened the box; do you recall that?

2 A. Correct.

3 Q. And we -- Do you recall we videotaped it and took
4 photographs?

5 A. Yes.

6 Q. Sort of at various stages, right?

7 A. Yes.

8 Q. Okay. Bear with me just one second, I'm going to
9 play an excerpt of that videotape. I think
10 counsel has no objection?

11 ATTORNEY FALLON: Not as long as it's
12 played as represented --

13 ATTORNEY BUTING: Sure, no audio.

14 (Court reporter couldn't hear.)

15 ATTORNEY FALLON: As represented, no audio.
16 We'll stipulate to the fact that counsel indicated
17 that it's a 10 minute version of a 33 minute event.
18 Is it marked as an exhibit?

19 ATTORNEY BUTING: We'll mark it right after
20 this. I'm going to have it marked as an exhibit.

21 ATTORNEY FALLON: Very well.

22 ATTORNEY BUTING: If you want to reserve
23 the next number, this will be a DVD of excerpts of.

24 Q. Just so we're clear, you recall the date was
25 December 14 of 2006?

1 A. Yes.

2 Q. Okay. And what I would like you to do is to
3 watch this and then just tell us afterwards if
4 this, in fact, comports with your recollection of
5 what this box and it's contents looked like at
6 various stages as it's opened. Okay.

7 (DVD playing.)

8 Q. Now, stop for one second. At this point this is
9 a closer up version of one of the exhibits that
10 you have in front of you, Exhibit 451. This
11 shows the end of the box secured as it was when
12 we looked at it on December 14th, right?

13 A. Correct.

14 Q. And from this you can tell -- I mean you are
15 familiar with the way the exhibits are typically
16 sealed with red evidence tape, or white evidence
17 tape or whatever, right?

18 A. Correct.

19 Q. And it's pretty clear to you even at this stage
20 that that evidence tape seal had been opened and
21 the box reclosed just with that little piece of
22 scotch tape, correct?

23 A. Correct.

24 (DVD playing.)

25 Q. All right. Let's go on. We're looking at the

1 handwriting that was on the outside of the box
2 that you referred to earlier?

3 A. Correct.

4 Q. And this is actually taking place in your
5 personal office, right?

6 A. Right.

7 Q. There's a label with a date of January 4, 1996?

8 A. Yes.

9 Q. Is that Mr. Wiegert there, putting on some
10 gloves?

11 A. Yes.

12 Q. And just so the jury is clear, you earlier
13 referred to this whole container as a styrofoam
14 box, but there's actually -- it's a cardboard box
15 that contains a styrofoam box within it, correct?

16 A. That's correct.

17 Q. And as we see it right now, that evidence seal on
18 the card -- on the inner styrofoam box appears to
19 be secure from this angle, right?

20 A. Yes.

21 Q. Now, Mr. Wiegert is removing the styrofoam box
22 and we're getting a closeup view of the other
23 side of the styrofoam box and that seal appears
24 to be open, does it not?

25 A. I believe so.

1 ATTORNEY FALLON: Could I make an
2 observation, it might be best to let the exhibit
3 speak for itself. I think further viewing will
4 establish several points.

5 THE COURT: The Court agrees, I don't
6 believe the witness has any specialized knowledge in
7 this regard.

8 (DVD playing.)

9 THE COURT: Mr. Buting, if at any point you
10 want to stop the tape and point out something to the
11 jury that's on there, you may.

12 ATTORNEY BUTING: Okay. Thank you, Judge.

13 Q. (By Attorney Buting)~ Now, just so we're clear,
14 you were actually in your office as we were doing
15 this as well, right?

16 A. Yes.

17 Q. So you saw us videotaping this?

18 A. Yes.

19 Q. Okay. Keep going.

20 (DVD playing.)

21 Q. The parties are sort of rocking this gently, this
22 tube of blood back and forth, gently; were you
23 able to determine if it looked liquid inside
24 there, from where you were at.

25 A. I couldn't see it from where I was.

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(DVD playing).

Q. (By Attorney Buting)~ Just so the record is clear, there is no kind of evidence seal or tape around the top, the lavender top to that tube, is there?

A. It didn't look like there was.

Q. Okay. All right. So does that video excerpt of the events on December 14, 2006, purport with your recollection of what happened when we opened that box?

A. Yes.

ATTORNEY BUTING: Thank you. I have no further questions. We'll mark this as an exhibit now.

THE COURT: And the number of that exhibit is?

(Exhibit 470 marked for identification.)

THE CLERK: 470.

THE COURT: 470.

ATTORNEY BUTING: And that's a DVD of what we just viewed in court.

THE COURT: Correct. Mr. Fallon, any redirect?

ATTORNEY FALLON: Just one moment, I might have a question or two.

1 REDIRECT EXAMINATION

2 BY ATTORNEY FALLON:

3 Q. To your knowledge, Ms Zigmunt, the only sheriff's
4 deputies that have a key that permits access to
5 the inner office of the Clerk of Courts are the
6 two bailiffs?

7 ATTORNEY BUTING: Objection, calls for
8 speculation, unless she knows.

9 THE COURT: The question should be preceded
10 with a foundational question to determine if she
11 knows.

12 Q. (By Attorney Fallon)~ Let's go about it this way.
13 You -- In your cross-examination, you were asked,
14 it was not usual to have the sheriff deputies in
15 the inner office area and you responded, yes,
16 just the bailiffs, explain why you answered it in
17 that regard.

18 A. Because the bailiffs are pretty commonly seen in
19 the office. They come and go with different
20 reports or different things during the day.
21 Sometimes they are in the office before I get
22 there in the morning. I'm usually one of the
23 first people in the office and one of them might
24 be in the office delivering or picking up. They
25 have a pickup place for papers everyday. So it's

1 not uncommon to see them at any time, really.

2 Q. All right. And do they have a key that permits
3 access to the inner office?

4 A. They must have a key. I mean, I guess I really
5 never looked to see if they were using the code.
6 And they would have to have a key, because if
7 they get there before I do, you would need a key
8 to get in the outside door of the office.

9 Q. Are they permitted the cipher lock code as well?

10 A. I know when we changed the codes, because I
11 changed it like January of '06. We changed to a
12 new code from the previous Clerk of Court, just
13 for some security measures. And I did provide
14 them with that access code at that time.

15 Q. Now, to your knowledge, did you provide that
16 access code to any other member of the sheriff's
17 department, other than the bailiffs?

18 A. No.

19 Q. And I believe you also answered a question on
20 cross-examination, that perhaps on occasion other
21 deputies are in the inner office area, from time
22 to time; did I understand that correctly?

23 A. There could be someone that had business with one
24 of the clerks. They would have to be buzzed in.
25 They wouldn't have automatic access, someone

1 would have to allow them. Like that doorbell
2 little device thing, we have some of those under
3 the desks at the -- the counter clerks have those
4 and they press that to open the door for ...

5 Q. So do I understand it correctly, then, that they
6 would be buzzed in and they would be attended to
7 by one of your clerks?

8 A. Right. If they had -- I mean, a lot of times,
9 too, if they come in, I mean, we take care of
10 them over the counter. I mean, I don't really
11 know what the different business is that they
12 would have to come in for, but occasionally they
13 would ask -- like if they asked to see Janet or
14 something and then if someone determined that she
15 is there, they would buzz her -- buzz them in and
16 they could just go to her desk.

17 ATTORNEY FALLON: That's all we have.
18 Thank you.

19 THE COURT: Anything else Mr. Buting?

20 ATTORNEY BUTING: Just very quick.

21 RECROSS-EXAMINATION

22 BY ATTORNEY BUTING:

23 Q. You mentioned how if they would ask to see Janet
24 or some other deputy, they would be buzzed in and
25 then the sheriff's department employee would then

1 be in the inner area, right?

2 A. Right. I mean, I don't know specifically that
3 any sheriff's department...

4 Q. I understand that. I'm just saying, just general
5 common practice, would be if one of the sheriff's
6 officers, employees, lieutenants, whoever, asked
7 to see somebody, they would be buzzed in and they
8 could go in back and talk to the clerk or deputy
9 clerk, or whomever, correct?

10 A. Correct.

11 Q. And, then, once back in that area, they would
12 have -- would have had in, let's say October,
13 November, 2005, they would have been in the area
14 where Mr. Avery's file could be accessed, right?

15 A. Well, going to Janet's area would not. I mean,
16 they would be turning the corner right away,
17 where his file was kept was straight ahead and a
18 little out of the way. So I don't think that
19 they would have --

20 Q. Well, there's no --

21 A. -- come in contact with that file at all.

22 Q. There was no other door in between where they
23 would be and where Mr. Avery's file was kept,
24 right?

25 A. There was quite a distance from it. I don't ...

1 Q. Well, we saw on the photograph, approximately?

2 A. Well, that was when it was on the desk, though,
3 in the desk for the viewing area. That isn't
4 where it was normally kept. It was kept on a
5 filing cabinet, although, further away yet. So
6 it was really --

7 Q. 10 feet from the door maybe, 15 feet?

8 A. Maybe 20 feet from the door.

9 Q. Okay. All right.

10 A. 25, I don't know.

11 Q. Sure. The point being, though, once you get past
12 that door, where you are buzzed in, it's all open
13 with partitions in the inner area of the Clerk's
14 Office?

15 A. Right.

16 Q. And I'm not trying to put blame on you, ma'am.
17 But I understand that in November of 2005, it was
18 not on your radar, you were not worried about an
19 officer from the sheriff's department coming in
20 and removing a court exhibit to plant evidence
21 and frame somebody, was it?

22 ATTORNEY FALLON: Objection, beyond the
23 scope.

24 THE COURT: Sustained.

25 ATTORNEY BUTING: That's all.

1 THE COURT: All right. The witness is
2 excused. And, members of the jury, we'll take a
3 stretch break before the State calls its next
4 witness. All right. We'll take a short break, five
5 minutes, and then come back.

6 (Jury not present.)

7 THE COURT: You may be seated.

8 ATTORNEY KRATZ: Thank you, Judge. As we
9 alerted the Court before the start of today's
10 proceeding, the State does anticipate calling
11 Dr. Marc LeBeau to testify. Mr. Buting was kind
12 enough on cross-examination to have showed the jury
13 the blood vial, purple-topped blood vial tube, which
14 the State believes entitles us to call Dr. LeBeau at
15 this time.

16 We had assured the defense that
17 Investigator Wiegert was going to testify, and he
18 is, but that's just as to the packaging of the
19 purple-topped blood vial and sending it to
20 Dr. LeBeau. We would prefer to call Dr. LeBeau
21 so that his direct examination and his cross
22 examination can be completed before he goes back
23 to Virginia today.

24 If the defense still wishes us to call
25 Investigator Wiegert at this time, we had also

1 assured the defense and the Court that we would
2 recall him neither for cross-examination or
3 continued cross on matters outside of the limited
4 purpose of packaging the blood.

5 So we're just looking for direction from
6 the Court. We would prefer, since the vial has
7 already been showed to the jury, to start with
8 the Dr. LeBeau and complete his testimony and
9 then call Investigator Wiegert. And if there's
10 other foundational witnesses, that may be
11 necessary. If there's an issue, or if the Court
12 believes that somehow to be an inappropriate use
13 of resources, or the presentation of evidence,
14 then we can certainly do it the other way as
15 well.

16 THE COURT: Mr. Buting.

17 ATTORNEY BUTING: Could I have just one
18 moment with counsel, please.

19 THE COURT: Go ahead.

20 ATTORNEY BUTING: Judge, I'm going to -- We
21 can defer Investigator Wiegert's testimony until
22 after Mr. LeBeau, but I am marking four other
23 exhibits which are essentially hard copies of what
24 we just saw. And by stipulation -- I was going to
25 use Investigator Wiegert to introduce those, but we

1 can just, by stipulation, introduce them and proceed
2 with Mr. LeBeau, if that's what counsel prefers.

3 ATTORNEY KRATZ: That's fine. 471, start
4 with, Janet?

5 THE CLERK: Yes.

6 ATTORNEY BUTING: And then I will be moving
7 all the exhibits that I introduced which is 466 --
8 468. Well, let's let her mark them first.

9 (Exhibit Nos. 471-474 marked for identification.)

10 ATTORNEY BUTING: Okay. So it will be 468
11 through 474. Is that all right, counsel?

12 ATTORNEY KRATZ: Just so I can see them.

13 ATTORNEY BUTING: Okay. So then I would
14 move 468 through 474.

15 ATTORNEY KRATZ: Is that a different photo
16 than 451? Janet, can you look at 451 and see if 474
17 is different.

18 THE COURT: Let's go off the record for a
19 couple minutes here. Counsel, are you ready to go
20 back?

21 ATTORNEY BUTING: I am, Mr. Gahn is still
22 checking for something.

23 THE COURT: All right. I believe that --
24 We'll go back on the record at this time.
25 Additional exhibits have been marked, those are

1 numbers what?

2 THE CLERK: 471 through 474.

3 THE COURT: 471 through 474. Are the
4 parties asking that they be admitted at this time?

5 ATTORNEY BUTING: 468 through 471,
6 actually, is what I'm asking to be moved.

7 THE COURT: 468 through 471.

8 ATTORNEY BUTING: Yes.

9 THE COURT: Any objection from State?

10 ATTORNEY KRATZ: They are eventually going
11 to get in, Judge, we have no objection at this time.

12 THE COURT: All right. Those are admitted.
13 Anything else before we bring the jurors back in?

14 ATTORNEY BUTING: No.

15 THE COURT: If not, we'll bring the jury in
16 at this time.

17 (Jury present.)

18 THE COURT: You may be seated. At this
19 time the State may call it's next witness.

20 ATTORNEY GAHN: Yes, your Honor, the State
21 would call Dr. Marc LeBeau to the stand.

22 THE COURT: Very well.

23 **DR. MARC LEBEAU**, called as a witness
24 herein, having been first duly sworn, was
25 examined and testified as follows:

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

3 THE WITNESS: My name is Marc, M-a-r-c
4 LeBeau, L-e-B-e-a-u.

5 **DIRECT EXAMINATION**

6 BY ATTORNEY GAHN:

7 Q. And what is your occupation?

8 A. I'm the unit chief of the Chemistry Unit at the
9 FBI Laboratory.

10 Q. And where is the FBI Laboratory located?

11 A. In Quantico, Virginia.

12 Q. And how long have you been so employed?

13 A. I have worked as the unit chief since September
14 of 2000. And prior to that I was within the same
15 unit at the FBI Laboratory, the Chemistry Unit,
16 since 1994.

17 Q. And what are your duties at the FBI Laboratory in
18 the Chemistry Division?

19 A. Well, as the unit chief, I oversee the day-to-day
20 operation of that unit. That entails making
21 decisions about the types of cases that we accept
22 into our unit for analysis. And then assign
23 those cases to the most experienced or the
24 appropriate personnel that work under me.

25 When we receive evidence into our unit,

1 we're typically asked to analyze for the presence
2 of a chemical, whether or not it is in or on a
3 piece of evidence. Then we compile our results
4 and prepare a report. And before that report is
5 released to the contributing agency, another duty
6 of mine is to review the result and the report to
7 make sure that it meets all of the quality
8 requirements that are set forth by our Quality
9 Assurance Department in our laboratory.

10 Q. And what is your educational background, Doctor?

11 A. Well, I have a bachelor's degree in chemistry, as
12 well as criminal justice from Central Missouri
13 State University in Warrensburg, Missouri. I
14 also have a master's degree in forensic science
15 from the University of New Haven and that's in
16 West Haven, Connecticut. And a doctorate in
17 toxicology from St. Louis University, in St. --
18 I'm sorry, from the University of Maryland in
19 Baltimore. I took an additional four years of
20 graduate level course work at St. Louis
21 University in the early '90s.

22 Q. Now, when you say you have a doctorate, is that
23 what is commonly referred to as having a Ph.D.?

24 A. Yes, it is.

25 Q. And thus the title, Dr. Marc LeBeau.

1 A. That's correct.

2 Q. Would you describe any experience or any special
3 training you had in your field?

4 A. Yes, well, when I started with the FBI
5 Laboratory, I was thoroughly trained in the types
6 of examinations that we typically do in our
7 laboratory. These are examinations specifically
8 in the area of forensic chemistry as well as
9 forensic toxicology.

10 Before I started with the FBI, I worked
11 as the laboratory manager of the St. Louis County
12 Medical Examiner's Office in St. Louis. And I
13 did that for about four years. I have also
14 worked as a chemistry instructor at the
15 University of New Haven, as well as a laboratory
16 intern at a private toxicology laboratory in
17 Willow Grove, Pennsylvania, called National
18 Medical Services. And I have also worked as a
19 laboratory technician for Monsanto Chemical
20 Company.

21 Q. Do you belong to any professional or scientific
22 organizations pertaining to your field?

23 A. Yes, I do.

24 Q. And would you describe for the jurors what those
25 are?

1 A. Yes, I'm an active member of the Society of
2 Forensic Toxicologists and I serve on their Board
3 of Directors, as well as I chair one of their
4 committees. I'm also involved with and a member
5 of the International Association of Forensic
6 Toxicologists. And, again, I serve on two
7 committees within that organization. And I'm an
8 active member of the American Academy of Forensic
9 Sciences. And I hold a membership level of
10 fellow within that organization, which is one of
11 highest membership levels you can have.

12 Q. And do you attend conferences within your field
13 for forensic purposes?

14 A. Yes, I do.

15 Q. And how often and why?

16 A. Well, I attend the conferences of those three
17 organizations pretty much annually, specifically
18 to stay on top of current trends within our field
19 of forensic chemistry and forensic toxicology.
20 But also I'm often invited to put on workshops
21 and be a guest speaker at a number of
22 conferences.

23 Q. Is your lab at the FBI an accredited lab?

24 A. Yes, it is.

25 Q. And what does that mean to be accredited?

1 A. An accredited laboratory simply means that a body
2 of experts that will, from time to time, come
3 into the laboratory and check your practices to
4 ensure that you are following a set of standards
5 that this body has set down to those that they
6 accredit. So it's simply a quality measure so
7 that we have consistency from one laboratory to
8 the next.

9 When you are dealing with an accredited
10 laboratory under the body that accredits the FBI
11 Laboratory, which is known as the American
12 Society of Crime Laboratory Directors, Laboratory
13 Accreditation Board, or ASCLD lab, all
14 laboratories that are accredited by that agency,
15 we follow their same standards.

16 Q. Do you undergo proficiency testing?

17 A. Yes, we're required to as part of our
18 accreditation.

19 Q. And what is that proficiency testing?

20 A. Proficiency testing is simply, we're provided
21 test cases, from time to time, where we're
22 asked -- where we don't know the results, some
23 outside entity knows the results, and we analyze
24 these test cases as if they were real cases and
25 then provide those results to the referee, if you

1 will, of those results. And they grade our
2 results and then report back, not to just to us,
3 but they report our result back to our
4 accrediting body as well.

5 Q. And how have you done on your proficiency tests?

6 A. I have passed all of the proficiencies I have
7 taken in the 16 years I've been employed in this
8 business.

9 Q. Have you ever testified as an expert before in
10 court?

11 A. Yes, I have.

12 Q. How many times?

13 A. Well, approximately 40 to 50 times.

14 Q. Have you ever been rejected as an expert in your
15 field?

16 A. No. No, I have not.

17 Q. Have you authored or co-authored any peer
18 reviewed journal articles?

19 A. Yes, I have.

20 Q. And could you describe some of those to the
21 jurors?

22 A. Well, I have authored or co-authored about 15 to
23 20 peer reviewed journal articles, professional
24 articles, scientific articles, that are published
25 in professional publications.

1 Q. And I have had placed in front of you an exhibit
2 that was marked as Exhibit 433; could you tell
3 the jurors what that is.

4 A. Yes, this is a copy of my curriculum vitae,
5 essentially my resume that describes my
6 experience.

7 Q. Now, did you analyze samples that were sent to
8 you in this case?

9 A. Yes, I did.

10 Q. Describe how you, in your lab, became involved in
11 this case?

12 A. Well, following the normal course of business at
13 our laboratory, as the unit chief, as I
14 indicated, I am the gatekeeper, if you will, of
15 cases that we accept to work. And I was
16 contacted by the local District Attorney's Office
17 to make a determination whether or not we could
18 provide assistance in analysis of specific
19 evidence in this particular case.

20 Q. And did you know that this was a case that
21 involved an allegation of police planting
22 evidence?

23 A. Yes, I did.

24 Q. Why would a case such as that, an allegation of
25 law enforcement officers planting evidence, be of

1 a concern to the FBI?

2 A. Well, one of the areas that the FBI is
3 responsible for investigating in this country is
4 crimes of public corruption. This is where a
5 politician or another public official, such as a
6 police officer, is accused or believed to be
7 involved in doing something illegal.

8 So that is an area that we are strongly
9 involved in in our investigations at our agency.
10 And, of course, that's a very serious allegation.
11 If an individual is truly in that political
12 position or in a law enforcement position and
13 they are doing something illegal that erodes the
14 public's trust in that agency or that individual,
15 and we would want that, certainly, that
16 individual, out of that office or off the street.

17 But, additionally, if they are being
18 wrongly accused, we want to be involved in that
19 investigation to help set the record straight and
20 hopefully clear their name, if they are wrongly
21 accused so, again, the trust can be restored.

22 Q. And did the testing that you performed in this
23 case determine that issue?

24 A. I believe it did, yes.

25 Q. Before we get to your conclusions, I would ask

1 you to describe for the jurors basically what
2 type of instrumentation did you use to perform
3 the testing in this case?

4 A. Well, we used an instrument that's called a
5 liquid chromatograph mass spectrometer. And we
6 abbreviate that LC/MS. And then we also took
7 that one step farther and did additional
8 experiments with the mass spectrometer that the
9 entire technique is what is known as LC/MS/MS.
10 It's essentially three different instruments, if
11 you will, that are all linked together and hand
12 shaking with each other so that they work in
13 tandem.

14 Q. Would you describe for the jurors exactly what
15 analytical chemistry is?

16 A. Well, analytical chemistry is a subset of the
17 whole field of chemistry that, in a nutshell,
18 just is trying to determine the chemical
19 properties or identity of matter. Little simpler
20 put, analytical chemistry involves trying to
21 either identify the present -- or the chemical
22 characteristics or the identity of an unknown
23 substance, trying to figure out what it is. Or
24 if there's an idea that there's a specific
25 chemical in some material, then we will target

1 that analysis in trying to figure out if a
2 specific chemical is present in that substance.

3 Q. And this instrumentation that you just referred
4 to, the LC/MS/MS, is that what is used in
5 analytical chemistry to determine these chemical
6 compounds?

7 A. Yeah, it's one of the tools that we use in order
8 to do just that, identify what a substance is, or
9 to target a particular analysis to see if
10 specific chemicals are in a material.

11 Q. Could you very briefly, and as simply as
12 possible, tell the jurors how this instrument
13 works?

14 A. I will try. It's -- Again, it's three
15 instruments that we're really talking about. The
16 most simple form is to talk about it as two, the
17 LC portion and the mass spec portion. The liquid
18 chromatograph, or LC, it's job is simply to take
19 a mixture of chemicals and separate them so that
20 they are delivered to the next instrument, the
21 mass spectrometer, one at a time.

22 And a good analogy to think of is, if we
23 had a bag full of marbles and we knew that some
24 marbles were real small, other marbles were of a
25 medium size, and the remaining marbles were very

1 large. And we can even complicate it a little
2 more by saying that the large marbles are of two
3 colors, some are blue and some are green.

4 If we were to put these marbles,
5 thinking that they are chemicals, into our liquid
6 chromatograph, the LC portion, it would take that
7 mixture and separate them so that when they came
8 out of the instrument, the small marbles would
9 come out first, say one minute after they were
10 introduced; the medium marbles would come out
11 maybe at two minutes after they were introduced;
12 the large marbles would come out -- or I should
13 say the large blue marbles, perhaps, would come
14 out at three minutes; and the green marbles would
15 come out perhaps 15 seconds later.

16 So it allows that mixture to be
17 separated into the individual components so that
18 the next instrument only sees essentially one
19 chemical at a time. And that's important because
20 the next instrument is that mass spectrometer.
21 And what that does is, it gives us the
22 fingerprint of that chemical, breaks it apart
23 into small pieces using a very large amount of
24 energy, breaks it apart, and presents us a
25 fingerprint that we can then compare.

1 And, essentially, all chemicals give you
2 a different fingerprint. That's the value of a
3 mass spectrometer, is it gives us information
4 about the weight of the chemical as well as its
5 fragmentation pattern that, then, we will
6 interpret using a set of guidelines in order to
7 determine if it matches the specific chemical
8 we're looking for, or if we're trying to figure
9 out what unknown chemical it is, we can match it
10 against the data base to see what it matches.

11 Q. And how long has this technology been around?

12 A. Well, LC/MS has been around for decades in
13 analytical chemistry laboratories.

14 Q. So is this a standard instrument used in
15 analytical chemistry?

16 A. It is. We used it in our laboratory since the
17 early 90s.

18 Q. Is this technology used in other fields besides
19 analytical chemistry?

20 A. Yes, it is.

21 Q. Could you describe a few of those for the jurors.

22 A. Well, LC/MS is very widely used in the
23 pharmaceutical industry where they are developing
24 new drugs, they are looking for new metabolites
25 of drugs and trying to identify what those are.

1 It's also used in looking at explosives,
2 explosive residues. If a bomb is discharged, it
3 can look for the residues of the explosive
4 portion that caused that.

5 It's used to test athletes for steroids.
6 It's used to test workers for whether or not they
7 are smoking marijuana on the weekends.

8 It's also used in the food industry to
9 look at various components in foods. It is used
10 in agricultural chemistry as well.

11 Q. I would like to switch topics a little bit now
12 and ask you, would you explain to the jurors what
13 EDTA is?

14 A. Yes, EDTA stands for ethylenediaminetetraacetic
15 acid, and EDTA is a chemical, simply a chemical
16 that is known as a chelating agent. And what
17 that means is, it simply will take metals that
18 are in the environment of this chemical and latch
19 on to them, bind to it, and remove them from that
20 environment that it's in.

21 Q. Where is EDTA found?

22 A. EDTA is found in a lot of commercial products
23 that we all use. It's found in your shampoo.
24 It's found in your laundry detergent. It's found
25 in a number of foods such as sodas. And it's

1 found in fertilizers, just to name some.

2 And the reason that they are in things
3 like detergents and shampoos is that it, again,
4 it attaches to the metals. And I don't know if
5 you have hard water here in this part of
6 Wisconsin but, you know, generally hard water has
7 a whole lot of metal in it, that's what makes it
8 hard.

9 So what that shampoo will do with the
10 EDTA in it is latch on to those metals so that it
11 actually does a better job of cleaning, same with
12 your detergent. So that's what EDTA is found in,
13 a whole lot of different commercial products.

14 Q. And what's its purpose, again, what is it used
15 for?

16 A. To bind metals, specifically, what it is used for
17 is a chelating agent. And, then, as I indicated
18 it, because of that binding of metals and
19 different uses, it helps stabilize certain food
20 products, for example. So that's why it's used.
21 In that instance, it might be used in a
22 laboratory setting to serve as a buffer in a
23 reagent.

24 Q. You use the word it's used to stabilize
25 something, could you explain a little more to the

1 jurors what you mean by a stable chemical.

2 A. Well, a stable chemical is one that doesn't
3 easily break apart. That's a very simple way of
4 explaining it. It's very rugged. It's not
5 fragile.

6 Q. Are there studies in the scientific literature,
7 or articles about the stability of EDTA?

8 A. Yes, there are, there are numerous studies in the
9 scientific literature that talk about the
10 stability of EDTA.

11 Q. And why would these studies be made?

12 A. Well, most of the studies that have been done in
13 the past few decades are studies that are
14 concerned with the prevalence of EDTA in the
15 environment. As I mentioned, it's stable and it
16 attaches to metals. And over the years, as the
17 use of EDTA continues to be used in more and more
18 products, what we're seeing in the environment is
19 that it continues to build up because EDTA is so
20 stable.

21 So we're finding it in wastewater and
22 river water, find it in your soil. And what the
23 concern is, of course, is it's taking metals out
24 of your water, taking metals out of the soil,
25 that are normally supposed to be there for the

1 normal process of biology, and latching on to
2 them, making them unusable in their normal form.

3 So that's what most of the studies are
4 talking about, the stability of EDTA in the
5 environment and the concern of it building up
6 over time. And the difficulties of actually
7 removing it from the environment, out of your
8 water before you drink it, and out of soil,
9 etcetera.

10 Q. These articles or other studies, these were
11 studies that were developed by other scientists;
12 is that correct?

13 A. Yes, scientists from all over the world. These
14 publications are from the Netherlands, from South
15 America, from the United States, all over Europe,
16 yeah, essentially all over the world.

17 Q. Would you tell the jury a little bit about your
18 experience with the stability of EDTA?

19 A. Well, as part of work that we did around this
20 case is we were interested to see whether or not
21 blood that was in an EDTA tube and put onto a
22 spot card, which is simply a card that you put a
23 spot of blood on, if that were stored at normal
24 room temperature environment for a number of
25 years, would that EDTA remain in that bloodstain.

1 And we did find that a stain that was made in May
2 of 2004, today still were able to detect the
3 presence of EDTA in.

4 Q. So this chemical is not easily broken apart under
5 normal environmental conditions; is that fair to
6 say?

7 A. That is absolutely a correct statement.

8 Q. And why not?

9 A. Well, again, it is not a fragile chemical. It is
10 not fragile at all. It takes very severe
11 conditions to break it down. For example it can
12 withstand temperatures up to 300 degrees
13 Fahrenheit before it will break apart.

14 Q. And this chemical, EDTA, is this a chemical that
15 you could test for its presence in substances in
16 this instrument that you talked about at the FBI?

17 A. Yes, absolutely.

18 Q. Now, I would like to ask you, Doctor, what is a
19 blood collection tube?

20 A. Well, a blood collection tube is simply the glass
21 test tube, if you will, that when you have blood
22 drawn at a doctor's office it is the tube that
23 they put your blood in.

24 Q. And are there different kinds of blood collection
25 tubes?

1 A. Yes, there are.

2 Q. And would you be able to describe those for the
3 jurors?

4 A. Yes, I could.

5 Q. We have prepared a -- you have prepared a
6 PowerPoint presentation to give this description;
7 would that be helpful to the jurors while
8 testifying?

9 A. Yes, it would.

10 Q. Can you -- Do you have a mechanism to back this
11 up, I think we want a different slide initially
12 to start with the collection tubes. And, again,
13 I'm going to ask you to -- could you describe a
14 little more about these different types before we
15 get the slide set up, these different types of
16 collection tubes and why they have different
17 types.

18 A. Well, there are a number of different types of
19 tubes. One type of tube has nothing in it; it's
20 simply your blood goes into the tube and it's
21 there with nothing added to it. But the majority
22 of collection tubes that we deal with, the
23 majority of collection tubes that we deal with
24 have some form of a preservative or an
25 anticoagulant in that tube. And the reason being

1 is you want to allow this blood to be stored for
2 some time, so it's still usable to the
3 laboratory.

4 As I indicated, there are multiple types
5 of tubes. And the way we can tell what is in the
6 tube is simply by the color of the stopper on
7 that tube. The color indicates what's inside the
8 tube when it's empty -- when it's-- before it's
9 filled with blood.

10 So the red-stoppered tube, as you can
11 see on the screen, has nothing in it, where as
12 the yellow-stoppered tube has citric acid or
13 citrate in it. The gray-stoppered tube has
14 potassium fluoride -- I'm sorry -- sodium
15 fluoride and potassium oxalate in that one. And
16 then the lavender or purple-stoppered tube has
17 this chemical EDTA.

18 Now, when the blood is put into these
19 tubes, you shake them up so that the chemical
20 additive is well mixed within the tube. And then
21 it does its thing.

22 Now, if we start by looking simply at
23 the red-stoppered tube with nothing in it, what
24 happens is, within our blood we have blood cells,
25 red blood cells, which you I'm sure heard of, but

1 we also have calcium in our blood. And that's
2 important because the calcium plays a very key
3 role in those red blood cells staying apart from
4 one another.

5 After awhile, if we don't have a
6 preservative or an anticoagulant in that tube,
7 what happens is those red blood cells clot. They
8 come together and form clots within that tube,
9 which of course makes it very difficult for
10 laboratories to do testing on the blood.

11 So that's why we use these
12 anticoagulants and preservatives in these tubes.
13 If we look at the purple-stoppered tube, which is
14 your EDTA tube, the EDTA is in with the blood,
15 mixed in, with the calcium and the red blood
16 cells. And as I said earlier, the role that EDTA
17 plays is to bind metals, such as calcium. But it
18 binds any metals that are present in our blood.
19 And a lot of those metals come from our diet,
20 from our normal metabolic processes that occur in
21 our body.

22 So the EDTA is going to bind with those
23 calcium -- the calcium, the iron, and other
24 metals and, again, latch onto it and make it
25 unavailable for its normal use. So that's going

1 to prevent your blood from clotting. And that's
2 why EDTA is in the purple-stoppered tube. What
3 this does, as I said, we have iron floating
4 around in our blood and we have calcium, which is
5 the CA, iron is FE. The EDTA comes along and it
6 complexes with those metals, complexes with the
7 calcium and it complexes with the iron. And
8 that's simply what the different blood collection
9 tubes are and why EDTA, in particular, is present
10 in these purple-stoppered tubes.

11 Q. And when you did your personal stability test for
12 EDTA, was it bloodstains from purple-topped
13 tubes?

14 A. That's what was reported to us. I'm sorry, what
15 was your question?

16 Q. When you did your stability study and degradation
17 study, was it bloodstains from purple-topped
18 tubes?

19 A. Yes. Yes, they were. They were all stains that
20 were generated from purple-stoppered tubes.
21 Those were generated, again, in May of 2004, and
22 we analyzed them just last week.

23 Q. And the chemical that you would be looking for,
24 just so it's clear for the jurors, in the
25 instrumentation that you have described, again,

1 according to this slide, what can you identify
2 with your instrumentation?

3 A. Well, we specifically focused on EDTA bound to
4 iron, as well as free EDTA. There's so much EDTA
5 in that tube, that not all of it is used. In
6 fact, the majority of it is not used, so there's
7 a lot of the original EDTA still floating around,
8 unbound to anything.

9 So we focused on both the unbound EDTA,
10 the original form, as well as the EDTA that was
11 bound to iron. And we chose the iron over
12 calcium, simply because iron is about 10 to 30
13 times more abundant in our blood than is calcium,
14 so it would make it easier to answer the question
15 that was put before us.

16 Q. And did you receive samples to test in this case?

17 A. Yes, we did.

18 Q. And do you recall, what did you receive?

19 A. We received a number of swabs that were reported
20 to us as having been taken from bloodstains out
21 of a Toyota RAV4, as well as control swabs that
22 were collected in the areas near where those
23 bloodstains were. And we also received a tube of
24 blood in a purple-stop -- stoppered tube, a EDTA
25 tube, that was collected from Mr. Steven Avery.

1 Q. I'm going to ask Agent Fassbender to bring you
2 what have previously been marked as Exhibits 332,
3 334, and 336. Dr. LeBeau, would you look at
4 Exhibit 332, which has been already entered into
5 evidence and testified to by Sherry Culhane as
6 being a blood swab that she took from the
7 dashboard of Teresa Halbach's RAV4 and she
8 identified that as her laboratory number A-8; did
9 you receive that?

10 A. I'm sorry, could you repeat the exhibit number?

11 Q. Exhibit No. 332?

12 A. And A?

13 Q. It was previously identified by Sherry Culhane
14 from the State Crime Lab.

15 ATTORNEY BUTING: Why don't we just read
16 what's on the exhibit?

17 A. This says A-10.

18 Q. I'm sorry. Then, I'm asking you to look at --
19 look for the one that is for A-8?

20 A. A-8 has exhibit 336 on it.

21 Q. And that was previously identified by Sherry
22 Culhane as a bloodstain taken from the dashboard
23 of Teresa Halbach's RAV4; did you receive that?

24 A. Yes, I did.

25 Q. And how can you tell?

1 A. I can recognize our laboratory number that we
2 placed on this packaging, as well as the initials
3 of the technician that did perform the analysis,
4 and my own initials.

5 Q. Okay. And did you test the swabs from that
6 bloodstain using the technology you have
7 described to the jurors?

8 A. Yes, we did.

9 Q. Now, I would ask you to identify for us, if you
10 can, what would have been marked as A-12, a
11 bloodstain from the rear passenger door of Teresa
12 Halbach's car?

13 A. That's correct.

14 Q. What exhibit number is that, please?

15 A. Exhibit 334, yes.

16 Q. And, again, that has been already entered into
17 evidence and identified by Sherry Culhane as a
18 bloodstain--

19 ATTORNEY BUTING: Your Honor, I would
20 object to counsel telling this witness what has --
21 describing these exhibits as something other than
22 what this witness knows. This witness should
23 testify to what he saw, what he was advised. But
24 what was testified to, he has no knowledge of.

25 THE COURT: I agree that I don't know that

1 this witness was in a position to say what a
2 previous witness said, but if these exhibits have
3 been admitted on that basis previously, I think it
4 is help for the identification. If there's a
5 dispute about that, then I think we should be heard.
6 Is there a question?

7 ATTORNEY BUTING: Not at this time, you can
8 proceed.

9 THE COURT: All right.

10 Q. (By Attorney Gahn)~ And, again, Exhibit 334, did
11 you receive that for testing in your lab?

12 A. Yes, we did.

13 Q. And how can you tell, Doctor?

14 A. Again, our laboratory number and the initials of
15 both the technician that did the work, as well as
16 myself.

17 Q. And would you -- would you have Exhibit 336
18 there?

19 A. Yes, I do.

20 Q. And that is an exhibit that has been previously
21 identified by Sherry Culhane from the State Crime
22 Lab as a bloodstain that she took from a CD case
23 from Teresa Halbach's RAV4; is that correct?

24 A. No, sir.

25 Q. I'm sorry? I'm sorry, 332; is that correct?

1 A. Exhibit 332 is identified by the label on the
2 packaging as being collected from the CD case on
3 the front passenger seat.

4 Q. And -- And did you receive that for testing?

5 A. Yes, we did.

6 Q. And how can you the tell?

7 A. Again, our laboratory number written on the
8 packaging, as well as the initials of the
9 technician that did the work, and myself.

10 Q. I'm going to ask Agent Fassbender to bring you
11 three additional envelopes which were control
12 swabs taken in this case. And, again,
13 Dr. LeBeau, just the last exhibit, 332; is that
14 marked as exhibit -- have the identifying Crime
15 Lab No. A-10?

16 A. That's correct.

17 Q. Dr. LeBeau, would you look at Exhibit 476?

18 A. Yes.

19 Q. And can you identify that exhibit?

20 A. This is a -- reported to be a control swab, or
21 two control swabs that were collected from the
22 rear passenger door area in the RAV4.

23 Q. And how can you -- Did you examine those?

24 A. Yes, we did.

25 Q. And how can you tell?

1 A. Again, our laboratory number is placed on there
2 as well as our initials.

3 Q. And would you look at Exhibit 475; can you
4 identify that exhibit?

5 A. Yes, I can.

6 Q. Will you tell the jurors what that is?

7 A. This is reported to be control swabs that were
8 collected from the RAV4, off of a CD case.

9 Q. And did you receive that for testing?

10 A. Yes, we did.

11 Q. And how can you tell?

12 A. Again, the laboratory number that we assigned to
13 this case as well as our initials are on it.

14 Q. And do you have Exhibit 477 in front of you, sir?

15 A. Yes, I do.

16 Q. And can you tell the jurors what that is?

17 A. Again, this is reported to be control swabs that
18 were collected from the RAV4, in the ignition
19 switch area of the vehicle.

20 Q. And did you test that with the technology you
21 have described?

22 A. Yes, I did.

23 ATTORNEY BUTING: Objection, your Honor, I
24 think we need, for foundation purposes, when he says
25 did you test, counsel is asking did you test this,

1 did you test that, and he is repeatedly answering we
2 tested, yes, we did. So I think there needs to be
3 some clarification as to what this witness did.

4 THE COURT: The Court agrees, that should
5 be clarified.

6 Q. (By Attorney Gahn)~ Would you explain to the --
7 when I say, did you test this, I'm talking about
8 the FBI. Would you explain to the jurors when
9 you receive evidence, how the testing process
10 proceeds?

11 A. Typically, the way we're set up is, certainly the
12 manager of the unit isn't -- doesn't have a lot
13 of time to spend performing the actual analyses.
14 So, we have two levels of scientists within our
15 unit.

16 We have what are called chemists, which
17 are essentially technicians, but they are well
18 educated technicians, many with Ph.D.s. And,
19 then, we have examiners. And I'm -- In this role
20 I serve as an examiner. The examiner is assigned
21 the case and oversees the analytical work that's
22 done on the case.

23 So they're the supervisor. They are in
24 close contact with the technician that worked on
25 the case, often times in the lab with him,

1 helping out. But most of the analytical work is
2 actually done by a qualified chemist.

3 When the work is finished, the
4 analytical product, the results, are handed off
5 to the examiner, who compiles the results, forms
6 the opinion that is then put into the report, as
7 I indicated earlier, and is sent out to the
8 contributing agency. So it's simply an
9 efficiency thing so that work can always be done
10 while the examiners are out testifying on their
11 cases.

12 Q. Would you also describe to the jurors the roles
13 that you have played yourself in the processing
14 of this case and the analysis that was done.

15 A. Well, again, I supervised the entire process of
16 this case as far as the method development, the
17 receipt of the evidence, the decisions that were
18 made on what was analyzed, when it was analyzed,
19 how it was analyzed. And then took the results
20 and compiled them, formed an opinion, my opinion,
21 as to what they meant, wrote the report myself,
22 issued the report after it had been reviewed by
23 an independent scientist that works within my
24 unit and, of course, here today to testify.

25 Q. And these items of evidence that you testified to

1 just now in front of the jury, did you personally
2 examine these items?

3 A. Yes, I did.

4 Q. And, thus, that's why your initials are on each
5 of the bags?

6 A. Yes.

7 ATTORNEY GAHN: May I proceed?

8 THE COURT: Actually, I think you are not
9 going to finish before lunch, so I think I'm going
10 to take a break at this time.

11 Members of the jury, we'll take our
12 lunch break at this time, I will remind you not
13 to discuss the case among yourselves until we
14 resume. And we'll see you after lunch.

15 (Jury not present.)

16 THE COURT: You may be seated. Counsel, I
17 would like to see you briefly in chambers before we
18 break for lunch.

19 (Recess taken.)

20 (Jury present.)

21 THE COURT: At this time we're back on the
22 record and Mr. Gahn you may resume.

23 ATTORNEY GAHN: Thank you, your Honor.
24 Before resuming the testimony I would like to inform
25 the Court that we have marked as exhibits,

1 Exhibit 465, and Exhibit 466; 466 is the PowerPoint
2 demonstration that Dr. LeBeau was using to explain
3 his testimony for the jurors. We have probably gone
4 through about half of it. There will be some more
5 coming. And Exhibit 465 is a CD Rom of that
6 PowerPoint demonstration. I would move those into
7 evidence at this time.

8 ATTORNEY BUTING: No objection.

9 THE COURT: Very well, they are admitted.

10 **DIRECT EXAMINATION CONTD.**

11 BY ATTORNEY GAHN:

12 Q. Now, Dr. LeBeau, you just finished testifying
13 about some of the samples that you received for
14 testing at your laboratory, namely the three
15 blood swabs that came are from the RAV4 and three
16 controlled swabs, correct, that came from the
17 RAV4?

18 A. Actually six control swabs, there were two of
19 each.

20 Q. Two of each. Thank you, Doctor. And did you
21 also receive a blood sample from Steven Avery in
22 this case?

23 A. I did receive a blood sample that was reported to
24 have been taken from Steven Avery, yes.

25 Q. And I'm going to ask that that be marked as an

1 exhibit at this time and I'm going to have that
2 brought to you for your examination.

3 (Exhibit No. 478 marked for identification.)

4 Q. (By Attorney Gahn)~ First, could you state what
5 exhibit number is that?

6 A. This is Exhibit 478.

7 Q. And do you recognize that?

8 A. Yes, I do.

9 Q. And how do you recognize that, sir?

10 A. Again, I recognize it by the initials of the
11 technician who opened this. Some of the markings
12 that we did place on it, unfortunately our lab
13 number has been covered up by crime scene tape,
14 or evidence tampering tape, rather, from the
15 Wisconsin State Crime Lab in Madison apparently.

16 Q. And if you were to open that container, would you
17 be able to make further identifications of the
18 blood vial that you tested in this case?

19 A. Yes, I would be.

20 Q. Would you do so at this time, sir.

21 A. Yes.

22 THE COURT: Before that happens, I recall
23 there was some discussion about fingerprint evidence
24 on the vial, is that -- has that matter been
25 resolved?

1 ATTORNEY GAHN: It's been completed.

2 THE COURT: Defense is satisfied?

3 ATTORNEY BUTING: Let's go to side bar for
4 just a minute.

5 THE COURT: All right. Don't open it any
6 further, please.

7 (Side bar taken.)

8 THE COURT: I should indicate for the
9 record that during the side bar a question was
10 raised about the evidence tape on the vial, which
11 the parties are free to go in their examination.

12 It was also pointed out to the Court,
13 that witness, in fact, does have latex gloves on,
14 something, unfortunately, in this courtroom, I
15 can't really see from the bench, so. But go
16 ahead, you may proceed.

17 ATTORNEY GAHN: All right. Thank you, your
18 Honor.

19 (Witness opens exhibit.)

20 A. I'm going to try to open it. Oh, okay, it's
21 reversed. I'm a little concerned that I'm going
22 to throw a vial of blood when I open this. There
23 we go.

24 Q. And would you explain to the jurors why a vial of
25 blood is packaged as it is?

1 A. Well, this container is a shipping container to
2 ensure that the tube inside doesn't break. It's
3 very high density plastic material and packed on
4 the inside with cotton and then further packaged
5 on the inside with yet another tube that is heavy
6 duty, like a plastic material so that the tube,
7 if it were to break on the inside, the blood
8 would remain, actually, in this secondary
9 container here. It's just a safety precaution.

10 Opening and being able now to see the
11 tube, I can recognize our laboratory number, as
12 well as the initials of myself and the technician
13 that performed the actual analyses on this blood.

14 ATTORNEY BUTING: May I see the tube,
15 counsel?

16 ATTORNEY GAHN: Certainly.

17 ATTORNEY BUTING: I will let you hold it.

18 THE WITNESS: Okay.

19 Q. (By Attorney Gahn)~ And does that blood tube
20 that's contained in that container have the name
21 Steven Avery written on it?

22 A. Yes, it does.

23 Q. Now, you may put that aside for the moment. And
24 I would like you to explain to the jurors what
25 you mean by, what are control samples as it

1 pertains to the control samples that were taken
2 in this case and sent to you?

3 A. Well, a control sample is simply a replicate swab
4 of the area near the stain that was collected to
5 look for any contamination that would count for
6 positive findings you actually find in the item
7 that you are analyzing. So in this case, the
8 bloodstain itself, it was a swabbing of the area
9 around it to ensure that there wasn't any
10 contaminants that would interfere with our
11 particular analysis.

12 Q. And why would they be particularly helpful in
13 this case for your analysis?

14 A. Well, for this particular case because, in part,
15 as I indicated, EDTA is widely used in a number
16 of commercial products. So, you would be
17 concerned that the inside of the car, for
18 example, may be processed with a cleaning agent
19 that may leave a residual amount of EDTA behind.
20 So you want to make sure that that isn't there in
21 case you have a positive finding in the
22 bloodstain because that could confuse the
23 interpretation of the results.

24 Q. When you receive a case submitted to you for an
25 analysis, do you routinely take photographs of

1 the items that are sent to you?

2 A. Yes, I do, as well as my staff routinely does
3 that.

4 Q. And that is something that is in the protocol of
5 the FBI in your Chemistry Unit?

6 A. It is within the protocol of the whole FBI
7 Laboratory to document -- to every extent that we
8 can, document the evidence as it is received into
9 the laboratory and into the unit.

10 Q. And was that done in this case?

11 A. Yes, it was.

12 Q. I'm going to ask Mr. Fallon to bring you six
13 photographs. I would like you to look at those.
14 And if you were to take the top photograph, turn
15 it over and identify the exhibit number, please.

16 A. This is Exhibit 458.

17 Q. And how -- Do you recognize that photograph?

18 A. Yes, I do.

19 Q. How do you do that, sir?

20 A. I recognize our laboratory number and the item
21 designation we gave to this particular item of
22 evidence.

23 Q. And how does that photograph -- would you explain
24 to the jurors how that corresponds to the
25 evidentiary items that you have in front of you?

1 A. Yes, this is a photograph of the blood swab that
2 was reported to have been taken from the ignition
3 area in the RAV4.

4 Q. And is that photograph now being displayed on the
5 large screen?

6 A. Yes, it is.

7 Q. And could you just explain to the jurors the
8 condition of this swab when you first saw it?

9 A. When -- It looks exactly like you can see in the
10 photograph, that's how we received it.

11 ATTORNEY BUTING: Objection, again, he's
12 got to testify, it's not clear whether he saw it, or
13 whether he reviewed it, or whether he is talking
14 about his lab staff.

15 THE COURT: The objection is sustained.

16 Q. (By Attorney Gahn)~ Did you review this
17 photograph? I mean, have you seen this
18 photograph before?

19 A. Yes.

20 Q. And did you yourself look at the swabs that were
21 submitted to you for analysis?

22 A. Yes, I did.

23 Q. And could you describe for the jurors the
24 condition of this swab that you actually saw?

25 A. Again, exactly as you see on the screen, this is

1 the condition of the swab when it was received in
2 our laboratory and when we opened it for the
3 first time, this is a photograph of it.

4 It was obvious to us that this swab had
5 been analyzed, or at least cut at one point,
6 previously, because it wasn't the typical rounded
7 shape you would expect on a cotton tipped
8 applicator. It appeared as if a portion of it
9 had been removed and that was consistent with
10 what we had been told had occurred with this
11 particular swab, prior to our analysis with it.

12 Q. Would a laser pointer be helpful to you --

13 A. Yes, it would.

14 Q. -- in pointing this out to the jurors?

15 A. So specifically this area here, the top portion
16 appeared to have -- that the top had been cut
17 off.

18 Q. And does this photograph in Exhibit 458
19 accurately depict this swab, from the dashboard
20 of Teresa Halbach's car, as you observed it?

21 A. Yes, it does.

22 Q. Would you go to the next photograph and identify
23 which exhibit that is?

24 A. This is Exhibit 459.

25 Q. And how does that correspond to the evidentiary

1 items in front of you that you have already
2 testified about?

3 A. This is a photograph of a swab that was reported
4 to have been collected from the rear passenger
5 door area from the RAV4.

6 Q. And did you personally look at the swabs that
7 were submitted in this case from the rear
8 passenger door area of the RAV4?

9 A. I did, yes.

10 Q. And does the photograph, the photograph that you
11 have, is that being displayed now on the large
12 screen?

13 A. Yes, it is.

14 Q. And, again, could you point out to the jurors
15 what you observed about this swab?

16 A. Again, this swab had what appeared to be blood on
17 it. And, again, it was obvious that a portion of
18 it had been cut or removed, prior to it arriving
19 to our laboratory.

20 Q. And does the photograph that you have in
21 Exhibit 459 accurately depict the condition of
22 this swab from the rear passenger door area as
23 you observed it?

24 A. Yes.

25 Q. And would you go to the next exhibit, please, and

1 identify it.

2 A. This is Exhibit 460.

3 Q. And how does that correspond to the evidence
4 samples that you examined in this case?

5 A. This is a swab that was reported to us as having
6 been collected from the CD case that was found in
7 the RAV4.

8 Q. And does that photograph -- is that being
9 depicted now on the large screen?

10 A. Yes, it is.

11 Q. And did you personally examine this swab?

12 A. Yes, I did.

13 Q. And please describe for the jurors the conditions
14 that you observed?

15 A. Again, this swab appeared to have been sampled
16 previously. There did not appear to be a great
17 deal of blood on this particular swab suggesting
18 that there was little to begin with in the
19 previous analysis, perhaps took the portion that
20 would have been useful for our particular
21 examination.

22 Q. I would ask you to take the next exhibit, which
23 would be Exhibit 461, I believe, next photograph,
24 please, and identify that exhibit number.

25 A. Exhibit 461.

1 Q. Yes.

2 A. This is -- These are two control swabs, reported
3 to us as control swabs.

4 Q. And can you correspond those swabs with the
5 evidence samples that you received for analysis?

6 A. Yes, these were control swabs that were collected
7 from the area near the ignition switch.

8 Q. And are those swabs that are in that photograph
9 now being shown on the large screen?

10 A. Yes, they are.

11 Q. Could you take the next exhibit, please, and
12 identify it.

13 A. Exhibit 462.

14 Q. And what is that a photograph of?

15 A. These are control swabs that were reported to us
16 as having been collected from the area near the
17 staining on the rear passenger door of the RAV4.

18 Q. And the next exhibit, next photograph, please.

19 A. Exhibit 463.

20 Q. Yes. Would you identify that and tell us what
21 that -- which evidentiary item that photograph
22 corresponds to?

23 A. These are control swabs that were reported to us
24 as having been collected off the CD case that was
25 found in the RAV4 pickup.

1 Q. And all of these swabs, the controls as well as
2 the bloodstains, did you test these samples for
3 the presence of what you described to the jurors
4 as EDTA?

5 A. Yes, I did, or we did.

6 ATTORNEY BUTING: I'm sorry, which is it,
7 you said I did, we did?

8 A. Collectively we did it within my unit, my staff
9 and I did, yes.

10 Q. Would you explain, again, to the jurors, just how
11 the process works at the FBI Laboratory, what
12 your role is and the role of your technicians and
13 what is the typical way that a case is processed?

14 A. Throughout the FBI laboratory we have, again,
15 technicians that do a vast majority of the actual
16 hands on analytical work, saving the staff that
17 is responsible for compiling the result,
18 reviewing the results, ensuring that all the
19 quality standards are correctly documented in the
20 results, preparing the report, testifying,
21 etcetera; assuring that they are available to do
22 their job, we have technicians that do the vast
23 majority of the analytical work.

24 Q. And, again, what were you looking for when you
25 tested these swabs?

1 A. We were looking for the presence of EDTA,
2 specifically, as well as the iron complex of
3 EDTA. And if I could go back to the presentation
4 I had used earlier?

5 Q. Would this be helpful to the jurors?

6 A. I believe it would be.

7 Q. Please, do.

8 A. So, specifically, we were looking for the free
9 form of EDTA, this was the EDTA that was in
10 excess and never bound to any metals in the blood
11 sample, as well as the presence of the EDTA that
12 actually bound to iron. And, again, we chose
13 iron over calcium because iron tends to be
14 present at about a 10 to 30 times higher amount
15 in a blood sample than you would expect calcium
16 to be there.

17 Q. When was the last time your laboratory at the FBI
18 tested for the presence of EDTA in a bloodstain?

19 A. The last time we, within the FBI Laboratory,
20 analyzed a bloodstain for EDTA was in the O.J.
21 Simpson trial in the mid 1990's.

22 Q. Why is that so long ago, why is that the case,
23 that it's been such a long time?

24 A. Well, simply, because we haven't had any request
25 to do the analysis since then. We -- As I

1 indicated earlier, we don't go in search of work
2 to do. The investigators call us and ask us if
3 we can provide analytical assistance. We have
4 never had a request, that I can recall, since the
5 O.J. Simpson trial, in which prosecution was
6 interested, or an investigation was interested in
7 determining whether or not EDTA was in a
8 bloodstain.

9 Q. Are there routine cases and non-routine cases
10 that are submitted to the FBI Laboratory?

11 A. Yes, there are routine and non-routine cases.

12 Q. Could you explain the difference to the jurors,
13 please.

14 A. Well, we -- we do many examinations that we
15 consider routine. And by that I mean, these
16 we're doing, maybe not weekly, but at least
17 monthly. Examples of this might be something
18 like, in a bank robbery, where a individual
19 robbing a bank is given a die pack. And that die
20 pack goes off and leaves a stain on the clothing
21 or on the money of that individual.

22 We'll analyze that stain to determine
23 whether or not a very unique die is present
24 that's associated with die packs. That's a very
25 routine examination for us. We're one of the few

1 labs in this country that do that analysis and
2 those types of cases tend to be federal cases.

3 Another routine examination we do is
4 looking at unknown powders that are mailed in
5 threat letters. We have a whole lot of these
6 happening throughout the country. Our laboratory
7 tends to get these unknown powders and tries to
8 identify what those powders actually are and
9 assess whether or not they are a true threat.
10 Again, that's a very routine thing.

11 DNA in our laboratory is as routine,
12 essentially, as you can get it, as well as latent
13 fingerprints. You can't get much more routine.

14 On the other hand, we do a whole lot of
15 non-routine examinations. These are examinations
16 that the state labs would not typically put
17 together a procedure to do, because they may get
18 this request once in their lifetime.

19 So we're often called upon, especially
20 in my unit we're called upon, to develop a
21 technique to analyze for a specific chemical, a
22 unique chemical. And we may not do that again
23 for a decade. It is not uncommon at all. So
24 that would be an example of a non-routine
25 examination.

1 An example of some ones that come to
2 mind recently is looking for insulin in a
3 syringe. Most state labs wouldn't do that. We
4 get that request maybe every three years to do
5 something like that.

6 Looking for a new drug that just
7 recently came on the market, that cannot be a
8 routine examination, so we would develop that as
9 a non-routine procedure and then perform analysis
10 on the evidence. So it's very common in our unit
11 and it does take up a considerable amount of our
12 time to do.

13 Q. Are you familiar with the crime that has been
14 referred to as a drug facilitated sexual assault?

15 A. Yes, I am.

16 Q. Do you have any expertise in this area?

17 A. Yes, I do.

18 Q. Please describe for the jurors your expertise in
19 this area?

20 A. Well, I'm considered one of the country's experts
21 on this particular topic. I do a considerable
22 amount of training, not just in the United States
23 but throughout the world, on drug facilitated
24 sexual assault and drug facilitated crimes.

25 I have written a number of scientific

1 articles that have been published in peer review
2 journals. I have also co-authored a book on drug
3 facilitated sexual assault.

4 Q. And what is a drug facilitated sexual assault?

5 A. These are crimes that people typically think of
6 as when someone is slipped a drug secretly and
7 that drug knocks them out, incapacitates them so
8 that a perpetrator can potentially assault them,
9 sexually assault them without them resisting the
10 attack.

11 Q. And what are these drugs that are used to
12 accomplish that?

13 ATTORNEY BUTING: Objection, to relevance
14 at this point.

15 ATTORNEY GAHN: Well --

16 THE COURT: Mr. Gahn.

17 ATTORNEY GAHN: I have a few more questions
18 and then I will wrap this up, I just wanted to show
19 the chemical testing that was done on this drug.

20 ATTORNEY BUTING: And why, we test
21 chemicals every day, what's the relevance here?

22 ATTORNEY GAHN: Well, that's the point of
23 this, to show how the procedures were developed for
24 a non-routine case. It's just a few more questions.

25 THE COURT: This is a foundational question

1 for something else?

2 ATTORNEY GAHN: Yes. Yes.

3 THE COURT: All right. If you can relate
4 it, I will allow you to continue.

5 Q. (By Attorney Gahn)~ Did a time come -- These
6 drugs that are used for the drug facilitated
7 sexual assaults, did a time come when your lab
8 was requested to test for these for the first
9 time?

10 A. Yes, of course.

11 Q. And what did you do? Did you develop a procedure
12 to test for these drugs that are used in drug
13 facilitated sexual assaults?

14 A. Yes, we did.

15 Q. And why was it important to do that?

16 A. Because we didn't have a procedure that had been
17 validated and put on line, as we would call it,
18 to do the analysis for these drugs. So there's
19 always a first time for everything, of course,
20 and we had to develop a method and validate it
21 and then use it in cases. And it eventually
22 became a very routine examination that we now
23 conduct, but initially it was a first case where
24 we were asked to do this analysis.

25 Q. And how often do you get requests to test for

1 chemicals that you have never tested for before?

2 A. I would say approximately 20 percent of our case
3 load are requests to do unique non-routine types
4 of examinations.

5 Q. And in this case here, did you develop a
6 procedure or a protocol to test for the presence
7 of EDTA in bloodstains?

8 A. Yes, we did.

9 Q. And did you specifically develop those procedures
10 for this case?

11 A. Yes, we did.

12 Q. I'm going to ask Mr. Fallon to bring you what has
13 been marked as Exhibit 434 and ask you to
14 identify the document.

15 A. This is a copy of the procedure that we developed
16 and used in the evidence for this case.

17 Q. And was there anything in the scientific
18 literature that helped you develop the procedures
19 that you used in this case?

20 A. Yes, there was.

21 Q. I'm going to ask Mr. Fallon to bring you what
22 have been marked as Exhibits 436 and Exhibits 437
23 and I ask that you examine them, please. And
24 what is Exhibit 436?

25 A. 436 is a article entitled *The Analysis of EDTA in*

1 *Dried Bloodstains by Electrospray LC/MS/MS and*
2 *Ion Chromatography*, published in the *Journal of*
3 *Analytical Toxicology*, in November/December,
4 1997.

5 Q. And what is Exhibit 437?

6 A. Exhibit 437 is an article entitled *Determining*
7 *EDTA in Blood*, published in a journal entitled
8 *Analytical Chemistry*, in August, 1997.

9 Q. And what is the *Journal of Analytical Toxicology*?

10 A. This is one -- The *Journal of Analytical*
11 *Toxicology* is one of the most relied upon
12 professional journals for individuals in the
13 field of toxicology, but more specifically
14 forensic toxicology.

15 Q. And what is the *Journal of Analytical Chemistry*?

16 A. Analytical Chemistry is one of the most relied
17 upon professional journals for those that
18 practice analytical chemistry.

19 Q. And are those considered to be scholarly
20 authoritative publications in the scientific
21 community?

22 A. Absolutely.

23 Q. And do you consider those articles to be peer
24 reviewed?

25 A. Yes, they both are.

1 Q. And what do you mean by an article or publication
2 being peer reviewed?

3 A. Peer review, what that simply means is a
4 scientist that does research and then wants to
5 publish that research. What they will do is
6 write up a manuscript and submit it to the editor
7 of that particular journal.

8 Now in science, what we do, we don't
9 just publish because somebody sends us an
10 article, but the editor has the responsibility of
11 reviewing that article and finding experts in
12 that area of study to review the work that was
13 done in that particular manuscript.

14 So the editor sends that to reviewers,
15 it's done blindly so no one knows who the
16 reviewers are, except the editor. And the
17 reviewers then make comments. They critique the
18 manuscript, make suggestions for improvements in
19 the science and then send those comments back to
20 the editor who then passes those comments on to
21 the original author of the manuscript.

22 Then the author of that manuscript must
23 meet the recommendations and the suggestions of
24 the peer reviewers and send that back to the
25 editor who then makes a decision as to whether or

1 not it is suitable to be published. So it's a
2 check and balance to ensure that what is
3 published is actually scientifically valid
4 information.

5 Q. And did you develop your protocol, which you have
6 identified as Exhibit 434, that you developed for
7 this case, to test for EDTA in bloodstains, based
8 upon procedures in those two exhibits?

9 A. Yes, one of the things that we do, when we're
10 looking for a method to develop, when we're
11 deciding we need to develop a method that we
12 don't currently have a written standard operating
13 procedure for, we go to the literature, published
14 literature, and we try to find a method that's
15 been used and published by another group of
16 scientists.

17 And we basically find one that meets our
18 needs that we can apply with the instrumentation
19 that we have in our laboratory and that will meet
20 the needs for the particular analysis that we're
21 being asked to perform. And the first article I
22 referred to, Exhibit 436, from the *Journal of*
23 *Analytical Toxicology*, this article met those
24 needs.

25 We essentially based our entire method

1 on what was published in this article, with the
2 article, Exhibit 437, from Analytical Chemistry,
3 supporting the ideas that were presented in the
4 article from the *Journal of Analytical*
5 *Toxicology*.

6 Q. And did you make they improvements to the
7 procedures that you observed in the publication
8 from Analytical Chemistry and Analytical
9 Toxicology?

10 A. I believe we did make some improvements when we
11 put the method together and actually validated
12 it.

13 Q. And what were those improvements?

14 A. Well, one thing we did, we used a different type
15 of LC/MS for analysis. It was a newer technology
16 than what was used in the 1997 publication.

17 Additionally, we introduced what's
18 called an internal standard into our method. And
19 simply what this is is a -- it's a control that
20 we introduce into every sample as we're doing the
21 analysis. It's a control that tells us whether
22 or not the analysis, not for the whole batch of
23 samples that we're running at one time, but for
24 each individual sample, to show us that it
25 actually worked as it was supposed to work.

1 Additionally, we added one more
2 experiment than what they were suggesting to do
3 in this paper, that looked for the free form of
4 EDTA in not just one technique, but two
5 techniques.

6 Q. What was your thought process in approaching this
7 case that was sent to you?

8 A. If I can go to the presentation.

9 Q. Will this be helpful to the jurors?

10 A. It certainly will be.

11 Q. Then, please, do.

12 A. The thought process is simply there's going to be
13 one or two scenarios when you are dealing with
14 the notion that blood was planted from an EDTA
15 tube. First scenario is that bloodstain that is
16 found at a crime scene is either there from
17 someone bleeding, actively bleeding, such as
18 indicated here.

19 If that blood then dries and a crime
20 scene technician comes along and swabs that
21 particular bloodstain, they are going to put some
22 of the blood onto that swab. And then if that
23 swab is sent into the laboratory for doing an
24 analysis, the laboratory will look at that swab
25 and analyze it. That's scenario one.

1 Second scenario is if the blood is
2 actually planted from an EDTA tube, again, a swab
3 from a crime scene technician, that comes along
4 and samples that stain, again, that swab being
5 sent to the Crime Lab to analyze the stain. So,
6 essentially, if you look at that swab that's sent
7 to the laboratory, you have one of two potential
8 options here.

9 The first option is if you find the
10 presence of EDTA and the iron complex of EDTA on
11 that bloodstain, on the swab, and you don't find
12 any significant EDTA on your controlled swab, in
13 that area, remember I said you need to make sure
14 that a cleaning product wasn't used that would
15 confuse the interpretation of the results. If
16 that's the case, you find EDTA present on that
17 swab, then that's an indication that that blood
18 was indeed planted or came from a tube such as a
19 purple-topped tube.

20 The other scenario is that you do not
21 find EDTA, or that metal complex of EDTA, and
22 that would, then, suggest that the blood came
23 from active bleeding and not from an EDTA
24 preserved tube.

25 Q. And the blood tube that you have identified as

1 being the blood tube with the name Steven Avery,
2 is that a purple-topped tube blood?

3 A. Yes, it is.

4 Q. And in this case, did you follow the protocol
5 that you developed to test for these two
6 scenarios?

7 A. Yes, we did.

8 Q. First, would you, please, describe to the jury
9 the steps that you took to validate the
10 procedures that you used in this case.

11 A. Well, once we had ensured that all of our
12 instrument settings were correct, based, again,
13 on the paper from the *Journal of Analytical*
14 *Toxicology*, we performed the required validation
15 steps that are a requirement of our unit, based
16 upon the requirements of our laboratory, which,
17 again, are based on the requirements of our
18 accrediting body. And we performed an analysis
19 initially to determine what our detection limit
20 was for this particular analysis, basically, how
21 low could we go to find EDTA.

22 And we did that one of two ways. We did
23 it, first, by taking solutions of known
24 concentration of EDTA and continuously diluting
25 them, analyzing it, diluting it, analyzing,

1 diluting, until we got to the point that we could
2 no longer meet the requirements that we had
3 written into the protocol, as far as something
4 being a positive or a negative. When we reached
5 that lowest concentration, that's what's called
6 our detection limit.

7 Another test we did, though, is we took
8 a tube of blood that had been preserved with EDTA
9 and we put different size drops of blood on a
10 microscope glass slide and we let that dry and
11 then came along with a swab, swabbed it off, and
12 did, again, the analysis like we wrote in this
13 procedure, on those swabs, until the point that
14 we could no longer detect the presence of EDTA.

15 And as it turned out, with that
16 particular analysis, with the spot, the lowest
17 volume we can accurately measure is one
18 microliter of blood. And one microliter of blood
19 is the equivalent of about 1/50th of a drop. So
20 that's as low as we could accurately measure a
21 volume out onto the microscope slide. And we
22 were still able to find the presence of EDTA and
23 EDTA with the iron complex on that one microliter
24 drop.

25 So that, combined with the fact that our

1 decreasing concentration suggested that we could
2 go as low as 13 parts per million, with the
3 analysis, 13 parts per million, we knew where we
4 were as far as sensitivity with this particular
5 method.

6 The second thing that we did was to look
7 for the presence of interferences that would
8 cause us some confusion when we did the analysis.
9 Since we were dealing with blood, we looked at a
10 number of blood specimens that were not preserved
11 with EDTA. They had other preservatives in them
12 and blood that had no preservatives. And we ran
13 this through the same test. We put some of that
14 blood onto swabs, let it dry, and then ran
15 through the procedure.

16 That, again, was to demonstrate that
17 blood doesn't interfere with the test. None of
18 the components that are normally found in blood
19 interferes with the test.

20 The third thing we did was something
21 that's called matrix suppression, an evaluation
22 of matrix suppression. You are putting proteins
23 and all these other things into the instrument
24 when you are dealing with blood. So what we
25 wanted to also verify is that these other things,

1 not just that they didn't interfere and cause
2 signals that we shouldn't -- that would interfere
3 with our ability to detect or identify EDTA, but
4 also that the signal itself didn't drop because
5 we were dealing with blood.

6 Now, this is very important when you are
7 doing a method with LC/MS, particularly with the
8 technique, as this paper describes, electrospray
9 LC/MS. Because it's very well known that
10 electrospray LC/MS, this is one of the criticisms
11 of that particular analysis is that with some
12 analytes other things that are in the sample can
13 cause your signal in -- if it were this high, for
14 example, in water, when you run it in a
15 particular matrix, say like blood, or if you were
16 doing food, that those things, other chemicals
17 could cause that signal to drop.

18 So we had to evaluate that so we knew if
19 this was a significant drop in the signal. And
20 what we found is that at the very low
21 concentration, we had an average drop in signal
22 of about three percent. And at the very high
23 concentration, we had a drop in signal of about a
24 third. And, again, that's not very significant.

25 The next thing we did was to analyze for

1 carryover. And this is an important concept any
2 time we're doing chemistry, analytical chemistry,
3 is that when you shoot a sample that has a
4 chemical in it, you want to make sure that that
5 sample doesn't stick around, residual amounts of
6 that sample don't stick around and show up in the
7 next sample that's injected.

8 And this is a particular concern because
9 this paper, again, from the *Journal of Analytical*
10 *Toxicology*, talked about this being a problem
11 with EDTA. And their recommendation in this
12 paper, to avoid carryover to the next sample or
13 the sample that follows, was to extract blank
14 blood, unpreserved blood, and shoot that as a
15 negative in between samples that were associated
16 with the case.

17 So we evaluated carryover as part of our
18 validation. And we actually found, with the
19 system we were using today, that we had
20 essentially no carryover. We did not find any.
21 So I attribute that in part because technology
22 has changed and the tubing, etcetera, within the
23 instrument, is no longer made of metal, like it
24 was in 1997. We're using a high density plastic
25 material and that's probably why that occurred.

1 But those are the steps of the validation that we
2 undertook for this particular analysis.

3 Q. And after completing this validation, did you use
4 the LC/MS/MS technology, with the procedures that
5 you developed, to test for the presence of EDTA
6 in the samples that were sent to you in this
7 case?

8 A. Yes, we did.

9 Q. And after all these different types of analyses
10 that you performed, were you able to reach a
11 conclusion concerning the presence of EDTA in the
12 control swabs from Teresa Halbach's RAV4?

13 A. I was.

14 Q. And what was that conclusion?

15 A. We were not able to identify any presence,
16 whatsoever, of EDTA or the EDTA iron complex on
17 the controlled swabs, any of the controlled swabs
18 from the RAV4.

19 Q. After all these different types of analyses that
20 were performed, were you able to reach a
21 conclusion concerning the presence of EDTA on the
22 blood swabs that you tested from Teresa Halbach's
23 RAV4 that were sent to you in this case?

24 A. Yes, sir. Yes, I was.

25 Q. And what was that conclusion?

1 A. Again, we were not able to identify any
2 indication of the presence of EDTA or EDTA bound
3 to iron in any of the swabs that were submitted
4 to our laboratory that contained blood and were
5 reported to us as being collected from the RAV4.

6 Q. And after all these different types of analysis
7 that you performed, were you able to reach a
8 conclusion concerning the presence of EDTA in the
9 purple-topped tube that came from Steven Avery?

10 A. Yes, I was.

11 Q. And what is that conclusion?

12 A. That the tube of blood, the purple-stoppered tube
13 of blood that was reported to have come from
14 Steven Avery, did indeed contain significant
15 amounts of EDTA in it.

16 Q. Dr. LeBeau, based upon your training and
17 experience, and based upon your test results
18 using the LC/MS/MS technique, and based upon all
19 the data that you reviewed and all the
20 compilations that were done in this case, do you
21 have an opinion, to a reasonable degree of
22 scientific certainty, whether the bloodstains
23 from Teresa Halbach's RAV4, that you tested, came
24 from the vial of blood of Steven Avery that was
25 in the Manitowoc County Clerk of Court's Office?

1 A. Yes, I do.

2 Q. And what is that opinion?

3 A. It's my opinion that the bloodstains that were
4 collected from the RAV4 could not have come from
5 the EDTA tube that was provided to us in this
6 case.

7 Q. And, therefore, which scenario did your testing
8 answer in this case?

9 A. Of the scenarios on the board, I think our
10 results rule out one of those two possibilities.
11 It would be my opinion that it could not have
12 been from an EDTA tube.

13 Q. And, therefore, there was no planting of
14 evidence?

15 ATTORNEY BUTING: Objection, way over
16 broad.

17 THE COURT: Without any limitation, yes,
18 sustained. I will sustain the objection. I
19 think -- I'm sustaining the objection.

20 Q. (By Attorney Gahn)~ In accordance with the two
21 scenarios that you set out in your thought
22 process in analyzing this case, did the planting
23 scenario prove true?

24 A. No, it did not.

25 ATTORNEY GAHN: Thank you. That's all I

1 have.

2 ATTORNEY BUTING: A break?

3 THE COURT: Yeah. Members of the jury,
4 would you like a full break or a stretch break at
5 this time. Stretch, is that enough? Okay. We'll
6 take a stretch break at this time. You may be
7 seated.

8 ATTORNEY GAHN: Before I officially pass
9 the witness, I guess I would like to just introduce
10 the exhibit of the report of Dr. LeBeau from the
11 Crime lab, which has been marked as Exhibit 435.

12 Q. If you would just identify that.

13 A. Yes, Exhibit 435 is the laboratory report I
14 prepared for this case.

15 Q. And does that contain your findings and
16 conclusions in this case?

17 A. It does, yes.

18 ATTORNEY GAHN: Thank you.

19 THE COURT: Is the State moving for
20 admission of any exhibits at this time?

21 ATTORNEY GAHN: Yes, I would move for
22 admission of Exhibit 475 to 478, 434 through 437,
23 and 433.

24 ATTORNEY BUTING: No objection.

25 THE COURT: Very well, those exhibits are

1 admitted. And, Mr. Buting, you may begin.

2 ATTORNEY BUTING: This PowerPoint isn't an
3 exhibit, is it?

4 ATTORNEY KRATZ: It is.

5 THE COURT: Which number?

6 ATTORNEY BUTING: I will object to that,
7 but the others I won't.

8 THE COURT: What number is that?

9 THE CLERK: 466.

10 ATTORNEY FALLON: 465.

11 THE CLERK: 465 is the CD Rom.

12 THE COURT: All right. Do you wish to be
13 heard, later, outside the presence of the jury?

14 ATTORNEY BUTING: Later.

15 THE COURT: The other uncontested exhibits
16 are admitted at this time.

17 **CROSS-EXAMINATION**

18 BY ATTORNEY BUTING:

19 Q. Good afternoon, Doctor.

20 A. Good afternoon.

21 Q. I'm sure you're anxious to get back to Virginia
22 where it's not quite so cold.

23 A. It would be nice, yes.

24 Q. You have your curriculum vitae up there with you?

25 A. Yes, I do.

1 Q. And we had a little bit of talk about your
2 expertise in drug facilitated rape cases, right?

3 A. That's correct.

4 Q. Also sometimes called GHB drugs, one of those
5 types of drugs?

6 A. One of the 60 different drugs used, yes.

7 Q. Okay. That's the one that maybe most people have
8 heard of; it's the one I have heard of, okay.

9 A. Okay.

10 Q. When you are going through your CV you talked
11 about how you authored or coauthored 15 to 20
12 articles?

13 A. That's correct.

14 Q. How many of those articles did not involve drug
15 facilitated rape?

16 A. Seventeen.

17 Q. Okay. And how many of those involved postmortem
18 fluids, analysis of postmortem fluids; do you
19 know what I'm talking about, from deceased
20 bodies?

21 A. Yes, I know what you are talking about. I'm
22 sorry, did refer to postmortem or did not?

23 Q. Did.

24 A. Okay. I don't know that I can answer that
25 because -- If I can elaborate?

1 Q. Well, go ahead.

2 A. Well, urine can be a fluid from an autopsy, a
3 postmortem fluid, or urine can be from a living
4 person. So an article I published about urine,
5 it would be hard to say if that's meant to be for
6 postmortem or living people. The same with
7 blood. Now, obviously a liver sample or a brain
8 sample, must be from a deceased individual.

9 Q. Okay. Would you agree or disagree that the
10 majority of your presentations and the majority
11 of your publications involve either drug
12 facilitated sexual assaults or the analysis of
13 postmortem fluids?

14 A. I would disagree.

15 Q. Okay. You do have some experience in analysis of
16 postmortem fluids, right?

17 A. I certainly do.

18 Q. You certainly do, yes. And, in fact, one of your
19 more recent articles you published, holds
20 yourself out as an expert in the area of
21 postmortem fluid analysis, does it not?

22 A. I'm now sure I know --

23 Q. Are you --

24 A. -- what article you are referring to.

25 Q. Okay. Are you an expert, do you consider

1 yourself an expert in the analysis of postmortem
2 fluids?

3 A. I do, yes.

4 Q. Okay. We'll return to that in a moment. You
5 also give quite a few presentations. Just this
6 year alone, out of -- looks like out of nine --
7 just one moment, please. Out of nine times that
8 you have gone around presenting talks this year,
9 six of those involve drug facilitated sexual
10 assaults, right? In 2006, I'm sorry.

11 A. Yes, six of the presentations that I gave in 2006
12 were on the topic of drug facilitated crimes and
13 drug facilitated sexual assaults.

14 Q. Okay. So would you agree with me that that's one
15 of your real specialties?

16 A. Yes.

17 Q. And that's what you are often sought after for,
18 by conferences?

19 A. It's an area that I am asked to speak on quite
20 frequently, yes.

21 Q. Have you ever, in your life, been asked to give a
22 presentation on EDTA interpretation in
23 bloodstains?

24 A. No, I have not.

25 Q. You are not sought off -- you are not a sought

1 after presenter on that particular topic, are
2 you?

3 A. No, sir, I'm not.

4 Q. Have you ever before testified, in a court of
5 law, as an expert who is giving opinions about
6 the interpretation of EDTA and bloodstains?

7 A. No.

8 Q. This jury is privileged to be the first to hear
9 your wisdom on this topic; isn't that right?

10 ATTORNEY GAHN: Objection, your Honor, to
11 the form of the question.

12 THE COURT: I will sustain the objection.

13 Q. (By Attorney Buting)~ This jury is privileged to
14 be the first to hear any opinions you have ever
15 expressed in court on the analysis of EDTA in
16 bloodstains, correct?

17 A. I wouldn't say they are privileged, but I would
18 say that this is certainly the first time I'm
19 testifying about EDTA in a bloodstain, that's
20 correct.

21 Q. And one reason is, this is the first case you
22 have ever been asked to test -- to test for EDTA
23 in bloodstains, isn't it?

24 A. That is correct.

25 Q. But some of your colleagues at the FBI Laboratory

1 did have the pleasure of testifying on that topic
2 once before, didn't they?

3 A. Yes, they did.

4 Q. In the O.J. Simpson case you mentioned, correct?

5 A. Yes.

6 Q. And I believe you said that that, in fact, in 19
7 -- that's 10 years now, 10 years ago, right?

8 A. At least 10 years ago, yes.

9 Q. At least 10 years ago. Okay. So in the last 10
10 years, nobody has come to your lab and asked for
11 your lab to give us the benefit of your knowledge
12 and your ability to test for EDTA in bloodstains;
13 isn't that right?

14 A. It hasn't happened to me personally, not to my
15 knowledge.

16 Q. Okay. And might that be because your lab screwed
17 up in the O.J. Simpson case?

18 A. No, we did not screw up, as you say, in the O.J.
19 Simpson case.

20 Q. Well, in the O.J Simpson case, correct me if I'm
21 wrong, tests that your lab did, found EDTA in a
22 sock, right?

23 A. That is correct, yes.

24 Q. And the defense used your test to help acquit
25 Mr. Simpson, didn't they?

1 A. Could you repeat that.

2 Q. The defense used your test results in the O.J.
3 Simpson case, your lab test results, to help
4 acquit Mr. O.J. Simpson of that crime, didn't
5 they?

6 A. That I don't know. I have no idea. I wasn't the
7 one that performed any of the analysis of EDTA,
8 as I testified to --

9 Q. Sir --

10 A. -- in the O.J. Simpson case. I don't know how --
11 I don't know that the defense used the results or
12 the prosecution. I don't recall that.

13 Q. Were you working the FBI Lab during the O.J.
14 Simpson case?

15 A. Yes, I was. I had been there approximately a
16 year.

17 Q. And you would have us believe that you weren't
18 following what was going on with your lab's
19 testimony in the O.J. Simpson case?

20 A. Actually, while that examiner was testifying, I
21 was out on my own testimony at a bank robbery
22 trial in Los Angeles, myself.

23 Q. Ah, so you --

24 A. I couldn't --

25 Q. So --

1 A. I'm sorry, so I couldn't really monitor the
2 actual testimony in that case.

3 Q. Sure, you couldn't watch it while it was going
4 on, is what you are saying, right?

5 A. That's correct.

6 Q. And are you telling us that you didn't follow up
7 afterward, you didn't hear all of the discussion
8 in the news about your lab's involvement in that
9 case?

10 A. I heard what the media reported, yes. And I
11 heard what our own chemist reported.

12 Q. Sure, you talked about it in the lab, didn't you?

13 A. Yes.

14 Q. You sat around the water cooler or the lunch
15 table and you talked about it, right?

16 A. Yes, we did.

17 Q. And, more than that, shortly after the O.J.
18 Simpson case, your unit, the chemistry unit of
19 the FBI was accused of misconduct or malfeasance
20 of some sort that resulted in an audit by the
21 Inspector General of the United States of
22 America; isn't that right?

23 A. No, that's not correct.

24 ATTORNEY GAHN: Objection, your Honor, as
25 to relevancy.

1 THE COURT: Over --

2 ATTORNEY BUTING: It's foundation.

3 THE COURT: Overruled.

4 Q. (By Attorney Buting)~ Your answer was no?

5 A. No, that's incorrect.

6 Q. Okay. Have you read an inspector general's
7 report from 1999 that involved an audit of your
8 unit?

9 A. I have read a portion of the inspector general's
10 report, that was a report on their audit of the
11 FBI Laboratory.

12 Q. Okay. And part of that review involved your
13 unit, the chemistry unit, did it not?

14 A. Not to my recollection. It involved
15 investigation of one chemist within the unit,
16 same individual who worked on the FBI -- sorry --
17 on the O.J. Simpson case. He was specifically
18 targeted within that investigation; it wasn't our
19 entire unit.

20 Q. Okay.

21 A. There were units within the FBI --

22 Q. Sure.

23 A. -- laboratory, though, that do chemical analysis
24 that were looked at as a whole unit, but it was
25 not the Chemistry Unit to my recollection.

1 Q. Do you know Roger Martz?

2 A. I do, yes.

3 Q. Was he one of your colleagues at the FBI Lab in
4 1997?

5 A. Yes, he was.

6 Q. Did he testify in the O.J. Simpson case?

7 A. Yes, he did.

8 Q. Is he working in your unit any more?

9 A. No, he's retired from the FBI.

10 Q. Took early retirement, huh?

11 A. That would be personnel information that I
12 wouldn't be privy to.

13 Q. Oh, of course. Well, Mr. Martz, if you read that
14 portion of this inspector general's report, was
15 the target of complaints about the performance
16 of -- or about his performance on EDTA testing in
17 the O.J. Simpson case, was he not?

18 A. I believe that Mr. Martz was -- there were a
19 number of allegations made by the individual who
20 made allegations against Mr. Martz. And there
21 were approximately 10 individuals within the
22 whole FBI Laboratory that this Dr. Fred
23 Whitehurst made allegations against. Those
24 individuals were looked at because of these
25 allegations, the inspector general came in and

1 looked into every allegation that was made by Mr.
2 -- or Dr. Whitehurst.

3 Q. Sir, I'm going to stop you here for a second.

4 A. Yes, sir.

5 Q. Are you telling us now that you read the entire
6 report?

7 A. No, as I -- No, sir.

8 Q. Okay.

9 A. But I do know the history.

10 Q. All right. Well, we'll get into it, question by
11 answer -- question and answer, okay.

12 A. Yes.

13 Q. All right. Mr. Martz is one of the esteemed
14 authors of this Exhibit 436, isn't he?

15 A. Yes, he is.

16 Q. In this esteemed publication of the *Journal of*
17 *Analytic Toxicology*, right?

18 A. It's the *Journal of Analytical Toxicology* and he
19 is one of the authors.

20 Q. Forgive me. He is one of the authors, one of the
21 four authors of this article upon which you
22 primarily based your protocol for EDTA testing in
23 this case, right?

24 A. That's exactly right, yes, sir.

25 Q. The other three authors are all FBI employees,

1 aren't they?

2 A. Yes, they are.

3 Q. And this -- In fact, this entire article is based
4 on the protocol that was developed for the O.J.
5 Simpson case, by the FBI Lab, right?

6 A. I believe part of it is, but I don't know that
7 the entire article is based on what was done in
8 the O.J. Simpson --

9 Q. Okay.

10 A. -- case.

11 Q. Well, the article was written after the O.J. case
12 was done, right?

13 A. Approximately two years afterwards.

14 Q. And the article, in fact, is an effort to explain
15 to the rest of the scientific world how you guys
16 screwed up when you tested O.J. Simpson's --

17 ATTORNEY GAHN: Objection, your Honor, to
18 the form of the question and the relevancy of this.

19 THE COURT: It's cross-examination, I will
20 allow the question and I will allow the witness to
21 explain and answer.

22 A. Could I get the question again, please?

23 Q. This article was written by these four agents
24 from the FBI to explain to the rest of the
25 scientific world how you guys, your lab, I should

1 say, managed to screw up in the O.J. Simpson
2 case?

3 A. Well, that's incorrect, on a number of levels,
4 sir. First of all, those are not agents at the
5 FBI Laboratory. The only one that was was Roger
6 Martz. The others are Ph.D. scientists,
7 chemists, or Ph.D biologist. That article was
8 not written as any form of excuse, or
9 explanation, for what our laboratory for -- in
10 the O.J. Simpson case.

11 That was simply a group of researchers
12 who had the lead, published group lead authors.
13 Dr. Mark Miller, as well as Dr. Bruce Mccord.
14 They are not in our case working area at the
15 laboratory. They never work on cases. They are
16 in our research unit. They are the lead authors.
17 They are the ones that did the research. They
18 are the ones that published it.

19 It is quite common for those researchers
20 to give credit to individuals in the case working
21 units who had the original idea.

22 Q. Okay. So --

23 A. So that is why, I'm sure, Mr. Martz's name is on
24 that article. He had nothing to do with the
25 actual work done.

1 Q. Oh, really?

2 A. Publication.

3 Q. So these authors, you are telling us that they
4 put Mr. Martz's name on here when he didn't do
5 anything at all to do with this study or this
6 article?

7 A. I believe that to be true.

8 Q. How about Mr. Bruce Bedowle.

9 A. Dr. Bruce Bedowle, he is an expert statistician
10 and at the time was, as I recall, the ranking
11 manager within the research unit. Again, it's a
12 respect thing where you include your supervisor
13 in the list of authors.

14 Q. Okay. Let's talk for a minute about how the
15 protocol was developed for the O.J. Simpson case.
16 All right?

17 A. Yes.

18 Q. Just as in this case, a request was made or
19 efforts were started to create a new type of
20 test, mid-trial, right?

21 A. Well, again, sir, I didn't do the testing in the
22 O.J. Simpson trial. I don't have all the
23 intimate details as to what conversations
24 occurred, when the request came in. I was a
25 newly qualified examiner in the FBI Laboratory.

1 I had been there approximately a year. So I
2 don't have knowledge about the intimate details
3 that you are asking there.

4 Q. Well, I didn't realize I was asking intimate
5 details, but let's rephrase it so I'm not,
6 clearly. Was the protocol used in the O.J.
7 Simpson case in existence in the FBI Lab before
8 that trial began?

9 A. Not to my knowledge, it was not.

10 Q. It was developed in a hurry while the trial was
11 going -- ongoing, right?

12 A. I don't know when they started to develop the
13 pro --

14 Q. How long did it take to develop the --

15 A. -- protocol.

16 Q. How long did it take to develop the protocol in
17 the O.J. Simpson case?

18 A. I don't know.

19 Q. Okay. Well, Exhibit 437, *Determining EDTA in*
20 *Blood*, another scholarly article you refer to,
21 right?

22 A. Yes, it is.

23 Q. Respected in the field?

24 A. Yes, it is.

25 Q. By two authors, at that time associated with

1 Cornell University, right?

2 A. That's correct.

3 Q. And they talked about, and part of this article
4 talks about, the FBI Lab experience in developing
5 the protocol for testing EDTA in bloodstains,
6 that was used in the O.J. Simpson case, right?

7 A. I would have to review the article again to
8 answer that question.

9 Q. Are you serious, you don't know what this says?
10 You don't know if this refers to the O.J. Simpson
11 case?

12 A. Yes, I am serious. And I asked to review the
13 portion that you are referring to.

14 Q. Go right ahead. It's on the first page, Doctor.

15 A. What was your question, again?

16 Q. Does that refresh your recollection?

17 A. Yes.

18 Q. And do these authors say, quote, What was wrong
19 with the laboratory testing? First, it was not
20 clear whether the method had ever been used
21 before. Most likely the method was developed
22 quickly, under a great deal of time pressure. In
23 retrospect, FBI chemists now believe that the
24 EDTA detected may have been injection carryover
25 in the LC/MS/MS instrumentation; do you recall

1 reading that?

2 A. I do. I can't verify that that's it. You said
3 quote, I can't verify that, but it sounds like
4 the context is very much what I recall reading in
5 that --

6 Q. Okay.

7 A. -- paragraph.

8 Q. Okay. So these authors pointed out that the FBI
9 effort to develop a protocol for testing EDTA in
10 bloodstains for the O.J. Simpson case was
11 hurried?

12 A. No, sir, they said it appeared to have been
13 hurried. Those authors were not present in our
14 laboratory when that method was developed. I
15 know that to be a fact.

16 Q. Okay. So you would like to criticize these
17 authors --

18 A. No.

19 Q. -- this publication, now?

20 A. No, sir. The portion of that article that we
21 relied upon was the scientific portion, not the
22 narrative.

23 Q. Well --

24 A. It's the science within the latter portion of the
25 article refers to the use of an instrumental

1 technique called capillary electrophoresis, mass
2 spectrometry, mass spectrometry. Again it's a
3 technique --

4 Q. Sir --

5 A. -- that analyzed for EDTA.

6 ATTORNEY BUTING: May I ask a question?
7 This is cross-examination, Judge.

8 THE WITNESS: I thought I was responding.

9 ATTORNEY BUTING: No, you're not.

10 THE COURT: Well, the answer goes a little
11 bit beyond what the question was, so.

12 Q. (By Attorney Buting)~ So --

13 THE COURT: Mr. Buting.

14 Q. (By Attorney Buting)~ Okay. So, Exhibit 437 that
15 you considered, that you offered here on direct
16 as one of only two publications that you
17 considered while developing this protocol, you
18 say that you considered the portion of science in
19 the latter part of it, but you ignored the
20 portion in the narrative at the beginning that
21 criticized the hurried nature of the development
22 of a protocol; is that right?

23 A. Yes, that's correct. It was irrelevant in my
24 opinion.

25 Q. And you know why -- Well, let me ask it this way.

1 It was irrelevant to you because, in this case,
2 you were under a time crunch, weren't you?

3 A. Yes, I was.

4 Q. Let's talk about that. Oh, and by the way, just
5 to make it absolutely clear, these two
6 publications that you referred to, Exhibit 436
7 and 437, were both published in 1997, right?

8 A. Yes, they were.

9 Q. And both of them discuss the use of an EDTA test
10 in the O.J. Simpson case, right?

11 A. Yes, they do.

12 Q. And they don't discuss the use of an EDTA test in
13 any other case, right?

14 A. No, they don't.

15 Q. Because, as a matter of fact, no one has ever
16 presented to any jury, anywhere, not just you, no
17 one has ever presented a test for EDTA in
18 bloodstains in a criminal trial before, other
19 than the O.J. Simpson case?

20 A. I don't know that that's true.

21 Q. Can you tell me another case in this country
22 where an expert has gotten up in court and
23 expressed an opinion that they are able to
24 determine the presence or lack of EDTA, in a
25 bloodstain, in a criminal jury trial?

1 A. No, I can't, but I don't know that it's true that
2 it hasn't happened. I haven't done a search of
3 the legal system to make that determination.

4 Q. Oh, really?

5 A. Really.

6 Q. So when you were asked to develop a protocol in
7 this case, are you telling us, then, that you
8 didn't search the public domain to see if maybe
9 someone else had already invented the wheel?

10 A. I searched the scientific literature, as I
11 indicated earlier, to see if there were published
12 methods in peer review journals that are
13 scientifically sound, in order to base my method
14 upon. I didn't search the so-called public
15 domain for such a method.

16 Q. Okay. But in any event, you found no other
17 reference in any other scientific journal across
18 whatever disciplines there may be, you found no
19 other reference to any other case or instance
20 where a jury had been presented an expert opinion
21 by somebody who says that they can determine
22 whether or not EDTA exists in a bloodstain,
23 correct?

24 A. Again, I did not search, like, legal proceedings.

25 Q. Perhaps my question was too long. Let's break it

1 down. You searched the entire scientific domain
2 of research articles, right?

3 A. Yes, I did.

4 Q. And in that entire search, I'm talking not just
5 chemistry, but any kind of forensic science
6 journals, right? You looked at those?

7 A. Yes, I did.

8 Q. Okay. Any kind of physics journals, or whatever?

9 A. I didn't look at physics journals.

10 Q. Whatever scientific domain you looked at, you
11 found no other case where anyone had done what
12 you are doing here today and come into court and
13 presented an opinion about whether you can
14 determine EDTA in a bloodstain other than the O.
15 J. Simpson case; correct?

16 A. That's correct.

17 Q. All right. Now, you were first contacted by
18 someone on the prosecution team in this case in
19 December, late December, of 2006, correct?

20 A. That's correct.

21 Q. Let me go back. I'm sorry, I need to clear up
22 one thing in this Exhibit 437 to 436, the FBI --
23 I will bring it back to you. Because we talked
24 about carryover, right?

25 A. Yes, we did.

1 Q. And the authors of that particular study
2 apparently believe that carryover explained why
3 they were -- why they found any kind of EDTA in
4 Mr. O.J. Simpson's sock, right?

5 A. Again, I don't recall that specific detail being
6 in this paper. I think, yes, they talked about
7 carryover as being a problem in the O.J. Simpson
8 case. I don't know if that was with a sock, or
9 if it was the bloodstain itself, or a swab, or --

10 Q. All right.

11 A. -- or what the evidentiary --

12 Q. That's fair.

13 A. -- material was.

14 Q. That's fair. I don't expect you to remember the
15 particular evidentiary item. But you understand,
16 though, that the conclusion was that carryover
17 was the result of the EDTA reading. EDTA
18 positive came from carryover, right?

19 A. There was a small signal for EDTA, as I recall,
20 that was attributed to a previous injection of
21 EDTA; again, carrying over into a future
22 injection.

23 Q. All right. So, then, if carryover explained that
24 small signal of EDTA in whatever piece of
25 evidence that was in Mr. Simpson's case, then, in

1 fact, there may not have been any EDTA in that
2 piece of evidence, right?

3 A. That's correct, yes.

4 Q. And, then, if there was not EDTA in that piece of
5 evidence, when the FBI concluded that there was,
6 then the FBI lab was wrong in that case, right?

7 A. I don't know that the FBI Laboratory concluded
8 that there was EDTA in that case. Again, I never
9 read the report that was issued in the O.J.
10 Simpson case. I didn't do the work myself. I
11 don't know what the actual report was. And I
12 don't know that they claimed there was a
13 significant amount of EDTA.

14 Q. All right. Well, let me ask it this way. Either
15 the protocol that was used in that case was
16 faulty, or the work performed was faulty, in
17 order for there to be this report of a finding of
18 EDTA on the evidence sample, right?

19 A. No, I disagree.

20 Q. Well, which is it?

21 A. Well, if I can elaborate?

22 Q. If you would like to, go right ahead.

23 A. Okay. What I believe is that the method was not
24 well validated, quite frankly.

25 Q. All right.

1 A. That's my understanding.

2 Q. Okay. I will accept that.

3 THE COURT: Mr. Buting, I think I'm going
4 to stop you there.

5 ATTORNEY BUTING: Okay. I see it's 2:30.

6 THE COURT: It is 2:30. So members of the
7 jury we'll take our break at this time. I will
8 remind you again, as usual, not to discuss the case
9 during the break.

10 (Jury not present.)

11 THE COURT: You may be seated. Counsel, I
12 will ask you to report back at quarter to three.

13 ATTORNEY BUTING: Okay.

14 (Recess taken.)

15 THE COURT: Mr. Buting, you may resume.

16 ATTORNEY BUTING: Thank you, your Honor.

17 **CROSS-EXAMINATION, CONTD.**

18 BY ATTORNEY BUTING:

19 Q. Okay. Now, sir you were first contacted by
20 somebody from the prosecution team in late
21 December of 2006, right?

22 A. If I could correct some testimony I made earlier;
23 I realized I made an error. And then I can
24 answer your question; is that all right?

25 Q. Well, we can wait for redirect, but -- what -- Is

1 it on one of the articles that you were referring
2 to?

3 A. It was in response to one of your questions.

4 Q. And what was it?

5 A. You asked me earlier, as I recall, if both these
6 articles referred to the testing in the O.J.
7 Simpson case. And during the break I reviewed
8 the article from the Journal of Analytical
9 Chem -- Toxicology and realized that I had
10 mistakenly agreed with your statement. This
11 article does not refer to the O.J. Simpson case.
12 So I wanted to set that -- the record straight.

13 Q. Oh. Okay. Well, let's -- let's just, for a
14 couple minutes, follow up on that. This article
15 is written, though, by four FBI employees, right?

16 A. Yes, it is.

17 Q. Including Mr. Martz, right?

18 A. Yes. I'm not changing my testimony on that, sir.

19 Q. Okay. Who testified in the O.J. Simpson case,
20 right?

21 A. Mr. Martz.

22 Q. And the article discusses the test on a sock; is
23 that right?

24 A. You will have to show me that, sir, I couldn't
25 find it in that article.

1 Q. Let me see if I can find it in mine. I'm going
2 to have Mr. Strang take a moment and look at it
3 and then we can move on and not bore the jury,
4 okay?

5 A. Yes, sir.

6 Q. All right. He's quicker than I am. If you would
7 take a minute and look at page 526, begin with
8 the circling of the word, but that will help
9 refresh your recollection.

10 A. Okay. The word "a sock" is circled, but there is
11 no reference to the O.J. Simpson case. And as I
12 -- I said, I agreed with your statement that it
13 referred to evidence in the O.J. Simpson case and
14 I need to withdraw that agreement because it --
15 to set the record straight.

16 Q. Well, do you know of any other case in the
17 mid-nineties when the FBI testified about EDTA on
18 some sock? Yes or no? Do you know of any other?

19 A. No.

20 Q. No, right?

21 A. No.

22 Q. Okay. And maybe just so the jury is a little bit
23 -- can understand your concerns about your
24 testimony being accurate, there's something
25 called a court testimony monitoring practice that

1 the FBI is engaged in, right?

2 A. That's correct.

3 Q. And the FBI, at least for the last number of
4 years, has a practice of following up what their
5 agents or lab people testify when they come to
6 court, right?

7 A. That's correct.

8 Q. And what you say here today, to this jury, could
9 be followed up and reviewed by your supervisor?

10 A. That's right. Our testimonies are reviewed as
11 part of our accrediting body's requirement.

12 Q. And so you want to be absolutely sure that you
13 don't say something that may be construed
14 negative about the bureau, by your supervisors,
15 unless it's true, right?

16 A. Sir, I just want to make sure I'm telling the
17 truth if I'm under oath.

18 Q. All right. If I can return, my question was,
19 that you were first contacted by somebody in the
20 prosecution team in late, very late December of
21 2006, right?

22 A. Yes, sir.

23 Q. Approximately two months ago, correct?

24 A. Approximately two and a half months ago.

25 Q. All right. And that was the first you had ever

1 heard about this case, or was it?

2 A. Yes, it was the first I had heard of this case.

3 Q. And as you thought about, well, geez, what can I
4 do here, to do this test, you thought maybe an
5 LC/MS/MS instrument might be an appropriate
6 instrument to try and run a test for this
7 particular chemical; is that fair?

8 A. Not in December of 2006.

9 Q. All right. Let me move forward, just make it a
10 little broader, then. As you later committed to
11 do a protocol or test in this case, you thought
12 about that particular instrument, right?

13 A. Yes.

14 Q. And that instrument, as you said, has been used
15 for decades, right?

16 A. Yes.

17 Q. It has commercial applications?

18 A. Yes, it does.

19 Q. So, for instance, the petroleum industry may use
20 it to determine the, you know, chemical
21 compositions of products that they are putting
22 out?

23 A. Perhaps.

24 Q. Pharmaceuticals I think you mentioned. One of
25 the things that they have to do is make sure

1 that, according to FDA regulations, that the
2 drugs that they are marketing contain the
3 chemical makeup that they represent, right?

4 A. The pharmaceutical industry does use LC/MS and
5 LC/MS/MS techniques.

6 Q. Sure. And they use it for all kinds of reasons
7 including testing how long their drugs may last,
8 right?

9 A. Generally, no, they tend to use the LC/MS and
10 LC/MS/MS for metabolite studies and looking for
11 what the body converts these drugs into to
12 monitor.

13 Q. I see. Okay.

14 A. Studies that are done.

15 Q. So they are looking -- They use the instrument to
16 see if -- how the drug breaks down into some
17 other metabolite, you say, right?

18 A. That's exactly right.

19 Q. And they want to be sure that there's not side
20 affects, that this drug breaks down into
21 something that might be toxic, for instance,
22 right?

23 A. That be might one -- one thing that they are
24 looking for, yes.

25 Q. And they are looking to see that the drugs don't

1 break down too quickly, or they are just trying
2 to find out how quickly the drug will break down,
3 for one thing, right?

4 A. That's part of it, yes.

5 Q. Expiration dates, that's what the whole point of
6 having those kinds of things on drug labels and
7 what not, right?

8 A. Well, I don't know that they are studying it for
9 expiration dates. Again, they are studying it
10 for metabolites, what the body is converting it
11 into. Shelf life, which I believe you were
12 referring to there, is a completely separate
13 issue.

14 Q. Okay. But that's an issue as well, that they
15 want to make sure that their drugs are, you know,
16 working long enough to be effective; in other
17 words, someone doesn't take a drug out of their
18 medicine cabinet five years later and it's no
19 longer -- it's way past the expiration date or
20 something?

21 A. And for some drugs they may need to do that, to
22 verify that it's -- it's stable.

23 Q. Okay. So you settled on this particular
24 instrument but, before you got there, the person
25 you spoke to was Mr. Gahn, correct?

1 A. That is correct, yes.

2 Q. And what you told him in December, when he asked
3 if you could run a test to see if there was EDTA
4 in a bloodstain, was that it would take you three
5 to four months before you would be able to get
6 him any results, right?

7 A. Yes, that's what I told him.

8 Q. Okay. And that that was, in part, because you
9 knew that you would -- it had been so long since
10 the O.J. case, the last time your lab had done
11 this kind of a test, that you would need to
12 develop or retest some protocol, right?

13 A. That we would need to validate the protocol in
14 order to use it.

15 Q. Sure. And that you would have to, in order to do
16 that, go through a number of tests and what not
17 in order to satisfy the validation process that
18 you thought was necessary, right?

19 A. That's exactly right, yes.

20 Q. And so you told them about three to four months?

21 A. That's the standard estimate I give. When we --
22 we're asked if we can develop a new method, my
23 standard response is three to four months and
24 that's what I recall responding to Mr. Gahn's
25 request.

1 Q. Okay. So when you say you get these non-routine
2 cases and you are asked to develop these
3 protocols, typically it takes three to four
4 months?

5 A. It depends, quite honestly.

6 Q. But that's the standard answer you give?

7 A. It's the standard answer.

8 Q. Okay. And he asked you -- he told you, well,
9 that was not going to work with the trial date
10 that was set in this case, right?

11 A. He relayed to me that there was an upcoming trial
12 date and indicated that they may need the results
13 faster in order for it to be used in this case.

14 Q. Okay. And yet, in that discussion with Mr. Gahn,
15 you still could not promise to do anything
16 quicker than three to four months, right?

17 A. In my recollection, at the time was, I actually
18 suggested that they try to find another
19 laboratory to do the analysis. That was my
20 initial response because we had the holidays
21 coming up, this was right before Christmas. And
22 most of my staff is gone for -- at the end of the
23 year, we lose our leave if we don't take off and
24 use it.

25 So, you know, realistically, looking at

1 the scenario we were represented with, I thought
2 three to four months was probably a fair
3 estimate. And the other thing we always have to
4 keep in mind, that we're the primary federal law
5 enforcement investigative body. So if a bomb
6 goes off, if there's a terrorist attack --

7 Q. Sir --

8 A. There's --

9 Q. Excuse me. We would like to get you back to
10 Virginia some time soon so. The question didn't
11 require that long an answer. If you would just
12 try and focus on the questions and give us some
13 answers.

14 A. I was trying to, sir, I'm sorry.

15 Q. Okay. And if you need to you, I mean, you will
16 have an opportunity with Mr. Gahn, you can
17 elaborate your answers and explain them further.
18 And if I cut you off and it's unfair, just tell
19 me, okay.

20 A. Yes, sir, I will.

21 Q. All right. Thank you. So, you gave Mr. Gahn the
22 standard response. Then, in January, you were
23 contacted again by someone else, about this case,
24 to see if you could do something a little
25 quicker, right?

1 A. I was, yes.

2 Q. And that was the FBI office or -- Who was that,
3 U.S. Attorney's Office, or what?

4 A. It was our local FBI Office.

5 Q. In Milwaukee?

6 A. Green Bay.

7 Q. Green Bay, okay. And after speaking with them
8 and learning something about the case and the
9 trial date that was starting February 5th, you
10 said, oh, well, I think we can do it faster than
11 that, right?

12 A. No, sir.

13 Q. You didn't?

14 A. No.

15 Q. Did you say you would try to do it faster; is
16 that the difference?

17 A. I told the agent that called me from our field
18 office in Green Bay, I explained to him that I
19 had had numerous conversations with Mr. Gahn and
20 I had agreed that we would accept the evidence
21 and analyze it for this case, after we had
22 developed a method and validated that method.

23 Q. Okay. But you told Mr. Gahn, or you told this
24 FBI agent in Green Bay, that you thought you
25 would be able to do all of that while the trial

1 was going on and you would be able to get results
2 by the end of the trial, right?

3 A. No, sir. I told him that we would do our best to
4 get the work completed in the time requirements
5 that were needed.

6 Q. Okay. And you knew that those time requirements
7 were that it's, what, early March now, you knew
8 that you were going to have to get something in
9 probably by around the end of February, right?

10 A. I believe the deadline we were given was,
11 essentially this week, to have the actual results
12 in.

13 Q. Okay. Actually, March 9th, I think, right?

14 A. That sounds familiar, yes.

15 Q. Okay. So you beat the deadline, right?

16 A. We did, yes.

17 Q. Because your actual report is dated
18 February 26th?

19 A. That's correct.

20 Q. Now, you testified about why the FBI would have
21 any interest in this case in the first place, do
22 you recall that, with Mr. Gahn?

23 A. Yes, I do.

24 Q. You said that, oh, the FBI has this -- has a
25 concern about public corruption, correct?

1 A. It's one of the types of investigations that we
2 have a classification for within the FBI, yes.

3 Q. Sure, you have agents that go around and do
4 investigations when there is allegations of
5 public corruption, right?

6 A. That's correct, yes.

7 Q. It's not just your chemistry unit that gets
8 involved, right?

9 A. Of course not. Of course not.

10 Q. You tell me, now you knew this case, by the way,
11 was charged against Mr. Avery in November of
12 2005, 16 months ago, approximately, okay. Are
13 you aware of that?

14 A. That the charges were made then?

15 Q. Yes.

16 A. I don't know when the charges were made, sir.

17 Q. Well, you looked at these swabs that you were
18 testing, right, and they had some dates on them?

19 A. Yes.

20 Q. Some of those dates were November of 2005, right?

21 A. That's correct.

22 Q. So you knew that Mr. Avery must have been charged
23 by that time.

24 A. No, sir, I just knew that's when the date that
25 indicated the specimens were collected. I don't

1 have any knowledge of when charges were made.

2 Q. Okay. In any event, can you tell me what
3 investigation was started by the FBI to
4 investigate allegations that Mr. Avery made, upon
5 his arrest, publicly, that the police had planted
6 his blood in Teresa Halbach's car?

7 A. I have no knowledge of an investigation.

8 Q. In fact there was none, was there?

9 A. I have no knowledge of it --

10 Q. Okay.

11 A. -- whether there was or was not.

12 Q. Can you tell me when the U.S. attorney convened a
13 grand jury investigation to investigate
14 allegations of public corruption made by
15 Mr. Avery, against police officers, in this case?

16 A. I have no knowledge of whether or not they did
17 it.

18 Q. Okay. And can you tell me when any members, any
19 agents from the FBI spoke to Lieutenant Lenk,
20 Lieutenant Colborn, or any other person involved
21 in the investigation of this case?

22 A. Sir, I'm a scientist; I'm not a law enforcement
23 officer, I have no knowledge of anything of that
24 nature.

25 Q. Now, you were trying to find out in your test

1 simply whether or not there was a corrupt,
2 dishonest, criminal cop who planted evidence to
3 frame Mr. Avery is one scenario, right?

4 ATTORNEY GAHN: I'm going to object, your
5 Honor. I don't believe that was his testimony.

6 ATTORNEY BUTING: I can rephrase it, it's a
7 little cumbersome.

8 THE COURT: Go ahead.

9 Q. (By Attorney Buting)~ You testified, one of the
10 FBI's concerns was, that if there was a corrupt
11 cop on the street and doing something illegal,
12 and certainly planting evidence to frame somebody
13 would be illegal, right? Would you agree with
14 me?

15 A. Yes, I would.

16 Q. Okay. And that one of the functions of the FBI
17 was to ferret out bad cops like that, right?

18 A. Generally, that's what I -- Yes --

19 Q. Okay.

20 A. Generally --

21 Q. Okay.

22 A. -- that's what I said, yes.

23 Q. And so what the FBI was asked to do in this case,
24 then, was to find out if there was evidence that
25 would point towards someone planting the

1 evidence, against Mr. Avery, as he has said,
2 police officers, right; that was one scenario
3 that you were looking into?

4 A. That's correct.

5 Q. Or whether or not perhaps Mr. Avery was just full
6 of hot hair and making this up, right?

7 A. No, sir, I wouldn't say that that was the other
8 scenario. The other scenario was whether that
9 blood came from active bleeding --

10 Q. All right.

11 A. -- as opposed to from that tube of EDTA preserved
12 blood.

13 Q. All right. I didn't -- Don't let me put words in
14 your mouth then, but those were the two
15 scenarios. And as far as you were concerned,
16 you're an objective chemist, you didn't care
17 which way it came down; is that your testimony?

18 A. That's absolutely my testimony.

19 Q. And that's the position of the FBI, your boss, I
20 mean, your organization that you work for, they
21 were taking an objective and independent view, in
22 this case, and didn't care which way it came
23 down, in that analysis; is that right?

24 A. Well, I can't speak for any of my bosses. I'm
25 here testifying for myself. And that is my view

1 of it, yes, I could care less as to what the
2 results are, quite frankly.

3 Q. I'm going to show you what's been marked as
4 Exhibit 479 and see if you can identify that for
5 us, please. I'm going to substitute a copy
6 later, so it's really just the first few pages
7 we're concerned about. The chain of custody
8 isn't at issue here.

9 A. Okay. The first few pages are a copy of the
10 internal communication that the FBI uses to
11 essentially write memos between field offices and
12 divisions within the FBI. And this is the
13 specific request that was sent in to me for
14 analysis in this particular case.

15 Q. Okay. And did you read the sentence on top of
16 page two that discusses the purpose of this
17 request for your services?

18 A. The purpose of this request is to establish the
19 presence of EDTA in the vial of blood, thereby
20 eliminating the allegation that this vial was
21 used to plant evidence.

22 Q. Okay. Can you show me anywhere in there where
23 that request says our purpose is also to find out
24 if there might be any evidence that there's a
25 corrupt cop in Manitowoc County.

1 A. No, I don't see anything of that nature.

2 Q. Okay.

3 A. But I can elaborate if you like.

4 Q. So, the purpose of your -- of the FBI's request
5 of your laboratory, to get involved in this case,
6 the state crime -- Let me step back for a second.
7 The FBI generally is a law enforcement branch for
8 federal crimes, correct?

9 A. That's correct.

10 Q. You don't typically get involved in run of the
11 mill state crimes, do you?

12 A. That's incorrect.

13 Q. Well, unless someone brings you in from the state
14 level, for some particular reason, it's not
15 normally the kind of a case where you take
16 jurisdiction, is it?

17 A. Forty percent of the cases that we work in my
18 unit come from state and local investigations.
19 So I would say it's a significant number.

20 Q. Is homicide of a citizen in the State of
21 Wisconsin a federal crime?

22 A. No, sir, it's not.

23 Q. Okay. Is mutilation of a corpse in the State of
24 Wisconsin a federal crime?

25 A. No.

1 Q. Okay. So, the purpose of you getting your
2 federal agency involved in this state crime was
3 to eliminate the allegation that this vial was
4 used to plant evidence; isn't that true?

5 A. No, sir. If I can elaborate, I will be happy to
6 explain.

7 Q. You can elaborate later, sir. Now, the protocol
8 that you developed for this case, this test, all
9 right, you began to develop around the beginning
10 of February, February 1st, something like that?

11 A. I believe we began the actual method validation
12 on -- at the very end of January, perhaps the
13 very last day of January.

14 Q. All right. So January 31st, let's say, okay.
15 The protocol was completed on February 14th?

16 A. That's correct.

17 Q. About two weeks, right?

18 A. Let me correct that, the protocol was issued --

19 Q. I said completed. I will get to the differences
20 in a second.

21 A. The protocol was completed and issued on
22 February 15th.

23 Q. Okay. Was issued on the 15th, but it was
24 actually completed on the 14th, other than a
25 review process still, right?

1 A. Well, it's not technically complete until it
2 passes the review process.

3 Q. Okay. And this so-called validation studies, or
4 whatever you told us was ongoing, that was done
5 by February 14, right?

6 A. Can I refer to my notes?

7 Q. Sure.

8 A. I believe the last validation test was performed
9 on February 13th.

10 Q. Okay. Thank you. So February 13th. So, really,
11 14 days, then, if you started on the 31st of
12 January, right.

13 A. Yes, 14 days.

14 Q. Okay. But as you said, it's not complete unless
15 it goes through an approval process, right?

16 A. That's correct.

17 Q. And the approval process, in your instance, I
18 think you said -- I'm not sure if you did say,
19 actually. But I think you did, yes, you said you
20 had another scientist look at it?

21 A. Which part are you referring to, sir?

22 Q. Well, between February 13th and February 15th,
23 did you have somebody else look at this protocol
24 before it was issued?

25 A. Yes, I did.

1 Q. A who was that?

2 A. I had -- Well, if I can clarify things, I had
3 another scientist review all of the validation
4 data --

5 Q. Okay.

6 A. -- before the protocol was issued.

7 Q. Who was that?

8 A. Madeline Montgomery.

9 Q. And is Madeline Montgomery in some independent
10 lab?

11 A. No, she's within the FBI Laboratory, Chemistry
12 Unit.

13 Q. And she's in the very same Chemistry Unit as
14 yourself?

15 A. Yes, she is.

16 Q. Okay. Anybody else?

17 A. Reviewing the validation data, only the chemist
18 that did the actual work.

19 Q. And that wouldn't count for your approval
20 purposes, you have to have somebody else take a
21 look at this, right?

22 A. No, sir, I mean, the first person that does the
23 work has to, of course, review it and verify all
24 of the data is correct. So that's your first
25 level review. Then you follow that up with a

1 second level review by an independent person and
2 who wasn't involved in the study at all. And I
3 always assign that to a supervisory chemist
4 within the unit, someone with more experience,
5 etcetera.

6 Q. Okay. Someone in your unit, though, right?

7 A. It has to be done in the same unit in which they
8 are qualified to do the work. We couldn't get it
9 to a DNA examiner --

10 Q. Sure.

11 A. -- they are not a chemist.

12 Q. Of course. Anybody else look at this validation
13 data, besides yourself and Ms Montgomery and the
14 technician who ran it?

15 A. I don't believe so.

16 Q. Okay. Well, I believe we learned a little bit
17 earlier, before the break, that the FBI has
18 something called a forensics science research
19 division, don't they?

20 A. Yes, they do, they have a research unit.

21 Q. And, in fact, that's where you said Mr. Miller
22 and Mr. McCord were working. It's called the
23 Forensic Science Research and Training Center,
24 right?

25 A. That's correct.

1 Q. And these people don't work on cases?

2 A. No, they do not.

3 Q. They just do research, right?

4 A. They do long term research, primarily.

5 Q. And that includes developing protocols for new

6 types of tests, right.

7 A. Not in recent years, no. Most of those duties

8 fall back to the case working units. As I

9 indicated --

10 Q. Oh, really? You don't -- These are scientists

11 who are doing research, but you don't have them

12 ever look at your new protocols; you let the

13 caseworkers do that?

14 A. Yes, I mean, I think in this instance, the people

15 that work under me are more qualified to look at

16 this particular type of an analysis. The

17 research unit these days are heavily focused in

18 dealing with homeland security issues. They

19 would not have the time to review this type of

20 material.

21 Q. Well, you didn't think you had the time either,

22 initially, right?

23 A. That's correct. But I can make myself make the

24 time; I can't make them make the time.

25 Q. Just so we're clear, then, you did not have any

1 scientist researcher from the FBI Forensic
2 Science Research and Training Center review your
3 validation data or the protocol that you used in
4 this case, before using it in Mr. Avery's case,
5 right?

6 A. That's correct.

7 Q. Okay. This Madeline Montgomery, that's in your
8 unit?

9 A. Yes, she is.

10 Q. She's the one you said you had independently
11 review the validation data?

12 A. Yes.

13 Q. Does she report to you?

14 A. Yes, she does.

15 Q. Do you review her work?

16 A. Yes, I do.

17 Q. Do you decide her raises and promotions?

18 A. I do, yes.

19 Q. Okay. And that's your idea of an independent
20 scientist?

21 A. Absolutely. We train our scientists to be
22 unbiased.

23 Q. Actually, while I'm on that, you talked about how
24 peer review is done for articles that get
25 published in scientific journals, right?

1 A. Yes, that's correct.

2 Q. And that before anything gets put into some sort
3 of publication that has any reputation
4 worthwhile, the editor takes it from the author,
5 the manuscript from the author, and finds some
6 other scientist to review it?

7 A. Yes, that's correct. Qualified scientist, based
8 on the editor's opinion.

9 Q. Right. And you say that that's done blindly, so
10 that, you know, there is no bias involved by the
11 reviewers, right?

12 A. That's exactly right.

13 Q. And that's important in order to be fair and make
14 sure that you can weed out any kind of bias that
15 one individual may have, either for or against
16 another.

17 A. Yes, I believe that's true.

18 Q. But you didn't have Ms Montgomery or Mr. -- or
19 the technician who did this case, run through
20 these tests in a blind fashion, did you?

21 A. Not blind specifically for the evidence in the
22 case, but we did do some blind testing before we
23 issued the protocol.

24 Q. And the protocol, just so we're clear, it
25 wasn't -- didn't grow out of any kind of ongoing

1 research project that you were doing in your lab,
2 right?

3 A. That's correct, it was based on the publication,
4 as I indicated earlier.

5 Q. No, no, no. What I'm saying is, it didn't grow
6 out of, it didn't develop because of some ongoing
7 project separate from Mr. Avery's case?

8 A. No, no, no. It was -- The protocol was validated
9 and reviewed and put into use specifically for
10 this case.

11 Q. And only this case, so far, right?

12 A. So far, yes.

13 Q. Okay. And as you say, the data stuff was done on
14 the 13th of February and it was issued on the
15 15th, right?

16 A. Which --

17 Q. The protocol.

18 A. -- data stuff? I'm sorry?

19 Q. You said that all of the data acquisition,
20 however that was being done by these
21 validation -- what you call validation tests, was
22 completed on the 13th, right?

23 A. The validation work was completed -- the last day
24 of the validation was the 13th of February.

25 Q. And it was formally issued and adopted by your

1 laboratory on the 15th of February, right?

2 A. Yes, it was.

3 Q. Of this year, 2007?

4 A. Yes, that's correct.

5 Q. Okay. And in order to get to that point where
6 it's actually issued, that -- that constitutes an
7 approval process, right?

8 A. Absolutely, it does.

9 Q. And that approval process, by your own protocols
10 with the FBI, requires approval by the unit
11 chief, right?

12 A. That's correct.

13 Q. As well as someone else, right?

14 A. As well as the unit chief over our Quality
15 Assurance Unit, which is an independent unit that
16 oversees all quality within the laboratory.

17 Q. Now, in this case, you are the unit chief?

18 A. I'm the unit chief of the Chemistry Unit, but --

19 Q. Right.

20 A. -- not the Quality Assurance Unit.

21 Q. So in the protocol, the chain of how these things
22 are supposed to be approved -- By the way, this
23 whole approval process, is part of quality
24 assurance, right?

25 A. That's exactly right.

1 Q. And the idea is, we want to get some other eyes
2 looking at this to make sure that it's -- that
3 it's, you know, the protocols have been followed
4 and that this is valid science, right?

5 A. That's right.

6 Q. Okay.

7 A. And other scientists review the procedure before
8 it's issued.

9 Q. Right. Now, in your case, though, one of those
10 steps was really sort of skipped because you were
11 involved doing the development of the protocol,
12 right?

13 A. No, sir, not at all.

14 Q. Oh, so you just reviewed yourself?

15 A. No.

16 Q. You graded yourself?

17 A. No.

18 Q. Did you find another unit chief besides the
19 quality assurance person?

20 A. No, as I indicated, the review is done by another
21 scientist. And the scientist that did the review
22 for the protocol, that went through the stepwise
23 procedure, to verify, again, that everything was
24 written as was required by our quality assurance
25 program, that the validation study had been

1 completed, was Madeline Montgomery.

2 She did an independent review of this
3 procedure and then -- I'm not approving it in the
4 sense of I'm saying it's okay to be used, my
5 approval is simply that all the steps for the
6 quality assurance program, within my unit, have
7 been met.

8 Q. So --

9 A. That's why --

10 Q. Sir.

11 A. -- my signature is on the approval line.

12 Q. The answer to my question then is, yes, you
13 skipped a step in the usual approval process
14 because you were the unit chief who would
15 otherwise have to independently approve a new
16 protocol?

17 A. No, you're incorrect. No steps were skipped,
18 this is the same approach we take to every
19 protocol that's issued within the FBI Laboratory.
20 I have to be the final signature for approval of
21 any protocol that's issued out of my unit.

22 Q. All right. And so you graded yourself and gave
23 yourself and A+?

24 A. I did not --

25 ATTORNEY GAHN: Objection, your Honor, as

1 to the form of the question.

2 THE COURT: Sustained.

3 Q. (By Attorney Buting)~ As part of the discovery
4 request, you know, attorneys file requests and
5 ask your -- people such as yourself to produce
6 documents, right?

7 A. Yes.

8 Q. You are familiar with that process?

9 A. I am, yes.

10 Q. You are aware that I asked you, through Mr. Gahn,
11 to disclose the FBI protocol that was used in
12 1997 in the O.J. Simpson case, right?

13 A. I am aware that you asked for that, yes.

14 Q. Okay. And yet your lab refused to give that to
15 me; isn't that right?

16 A. The attorney that represents our laboratory did
17 indicate that we were not to turn over any other
18 protocol except the one that was used in this
19 particular case, as her opinion was, it was the
20 only one relevant --

21 Q. In her opinion?

22 A. -- for this report.

23 Q. So in her opinion, your lab didn't want this jury
24 to see the only other protocol, the only other
25 time you have ever tested for EDTA in a

1 bloodstain in any case in this country?

2 ATTORNEY GAHN: Objection, your Honor, that
3 was not his testimony.

4 THE COURT: Sustained.

5 Q. (By Attorney Buting)~ Well, you knew that if you
6 turned over that protocol to the defense, I would
7 use it to cross-examine you, right?

8 A. I don't know that.

9 Q. Well, wouldn't take much of a guess to figure it
10 out, that if I had your prior protocol, I could
11 point out to this jury the differences that you
12 made, or lack of differences, between that
13 protocol and this one, right?

14 ATTORNEY GAHN: Objection, your Honor, as
15 to the relevancy of the O.J. Simpson protocol.

16 ATTORNEY BUTING: Couldn't be more
17 relevant.

18 THE COURT: Well, I'm going to sustain the
19 objection, though, on that basis, if there was --
20 the witness testified it wasn't his decision, but
21 the attorney's decision, not to turn it over. If
22 there's a request for an order to turn it over, that
23 should be directed to the Court, so I don't think
24 this witness is in a position to answer. That's why
25 I'm sustaining the objection.

1 Q. (By Attorney Buting)~ All right. At any rate,
2 because we don't have, in front of us today -- I
3 assume you didn't bring it, right, or did you?

4 A. No, I did not.

5 Q. So you didn't bring it, if the Court was -- if I
6 asked the Court to order you to turn it over
7 today, you don't have it to do that, do you?

8 A. No, I do not.

9 Q. Okay. So, because you don't have it, we don't
10 have anything to compare this protocol to the one
11 you used in the OJ case?

12 A. No, you don't.

13 Q. We talked briefly about blind tests, let's
14 explain a little bit to the jury. There is --
15 There is a concept or a technique that's used in
16 science to -- it's called blind testing; are you
17 familiar with that?

18 A. Yes, I am.

19 Q. And the idea behind blind testing is that you --
20 the examiner, or the person who is testing the
21 results or the samples doesn't know what they are
22 or where they came from, right?

23 A. Sometimes that's considered blind testing, yes.
24 There are other forms of blind testing.

25 Q. Okay. And one of the reasons that you do -- or

1 that the scientists do blind testing is to remove
2 the possibility of some sort of bias in the
3 examiner's testing process, right?

4 A. Yes, that's exactly right.

5 Q. And so, for instance, when they are testing -- or
6 when you are testing drugs, they will sometimes
7 have a placebo with one person and the effective
8 drug with another. And the person who is testing
9 it doesn't know one way or the other?

10 A. That's right.

11 Q. Okay. In this case, maybe in all FBI cases, I
12 don't know, but in this case, the person who did
13 the tests didn't do a blind test, did he? Let me
14 be more specific, because I see you are already
15 trying to pick that question apart. In this
16 case, the person who tested the swabs and the
17 blood that was submitted to you, from the Avery
18 case, did not do a blind test, did he?

19 A. No, he knew that this was evidence related to a
20 case that we were working.

21 Q. And he knew more than just that it was evidence,
22 he knew exactly what evidence was which, correct?

23 A. Yes, I -- Yes, he did. I knew which specimen
24 came from which area.

25 Q. Okay. And the designations that we saw some of

1 them up there Q-46, Q-48, K-3, those
2 designations, wasn't some blind code that he
3 didn't know what they meant, right?

4 A. No, those were the designations that we gave to
5 those individual items that we would refer to
6 within our report.

7 Q. And when you say we, let's be very clear to the
8 jury you are talking about yourself and the
9 technician who did the tests?

10 A. Well, no, I'm sorry, in that instance, when I say
11 we, I mean the entire FBI laboratory, that's the
12 system that we use. Those numbers, letter number
13 designation Q-43, for example, it's actually
14 assigned by our evidence control unit. They are
15 the very first ones that receive the evidence and
16 do that initial assignment of specimen
17 designations to -- to evidence.

18 Q. Okay. But -- Well, let's name this mystery
19 person who was doing the testing in your case;
20 it's a guy named Jason Brewer, right?

21 A. That's correct.

22 Q. B-r-e-w-e-r.

23 A. That's correct.

24 Q. And he is more than just a technician, would you
25 agree?

1 A. Well, I would -- He's a Ph.D. He is recently
2 promoted to be an examiner --

3 Q. Okay.

4 A. -- in this area.

5 Q. And he's the one who actually did all the tests
6 that you then later reviewed, right?

7 A. Well, not exactly. He performed most of the
8 analyses, that part is true. But I was reviewing
9 the data all along. And I was with him a great
10 majority of the time that decisions were being
11 made about the order of things and the amount of
12 sample to use, etcetera.

13 Q. But you are a busy man, you are a manager, right?

14 A. I'm a manager, yes.

15 Q. You don't have time to sit around in the lab
16 while these machines are clicking and whirring,
17 right?

18 A. Well, I did make time for this case, I was in the
19 lab a substantial amount of time, actually.

20 Q. Okay. But is it fair to say that Mr. Brewer is
21 the guy who really, from one test to the other,
22 did all of the LS/MS/MS (sic), and the
23 extractions, and the whole protocol; he was
24 involved in every step of your protocol?

25 A. There's multiple answers to your question; could

1 you break it out?

2 Q. Yeah, that was a bad question. Is it fair to say
3 that Mr. Brewer is the one who did the actual
4 instrument analyses in this case?

5 A. Yes, that is fair to say.

6 Q. Okay. And Mr. Brewer, you have designations of
7 chemist at sort of the lower level?

8 A. That's the equivalent of a technician,
9 essentially.

10 Q. Okay. And then you get promoted to forensic
11 chemist examiner, right?

12 A. That's exactly right.

13 Q. And that allows you to do other things, including
14 expert witness testimony regarding the results of
15 chemical analysis, right?

16 A. That is true, yes.

17 Q. And you have seen Mr. Brewer's resumé, have you
18 not?

19 A. Yes, I did. I turned it over to you.

20 Q. Okay.

21 (Exhibit 480 marked for identification.)

22 Q. (By Attorney Buting)~ I'm showing you what's
23 marked now as Exhibit 480; this is Jason Brewer's
24 curriculum vitae, right?

25 A. Yes, it is.

1 Q. And would you agree with me that it says in his
2 curriculum vitae that he is qualified, by your
3 laboratory, to come to court and to explain to
4 juries what it is he does in cases?

5 A. No, sir, it does not say that on his curriculum
6 vitae that he is qualified to do so --

7 Q. Oh.

8 A. -- and he is not qualified to do so.

9 Q. Doesn't this say, under his job description here,
10 interpret data, prepare written reports and
11 provide expert witness testimony regarding the
12 results of chemical analysis?

13 A. That's correct, that's what it says. But he
14 is -- he was a chemist and qualified as a
15 chemist, as a technician. And, then, just last
16 September, he was promoted to the level of an
17 examiner, but he is still in a training mode as
18 an examiner. He still works cases as a chemist.
19 Until he is qualified, completes his training,
20 passes all the tests, he is not allowed to
21 testify until that is completed and he is
22 certified. He is not a certified examiner at
23 this time, sir.

24 Q. Well, he is a forensic chemist examiner?

25 A. That's his position, his official position title

1 within the U.S. government.

2 Q. And so, despite the fact that the curriculum
3 vitae that he has, that you turned over to us,
4 that says that he can do that, it's your
5 testimony today that he is not qualified to come
6 here like you are?

7 A. That's correct.

8 Q. Okay. So that's why we're not hearing from him?

9 A. That's correct. I supervised his work and I'm
10 the one that compiled the results and formed the
11 opinion and issued the report; that's why I'm
12 here today.

13 Q. All right. You say that Mr. Brewer is still in
14 training for courtroom testimony, right?

15 A. No, sir, I didn't say that.

16 Q. Well, you said he is not qualified to come here
17 and testify to this jury about what he did?

18 A. That's what I said, yes.

19 Q. Okay. What sort of courses or training does he
20 need to do to learn how to tell the truth to a
21 jury.

22 ATTORNEY GAHN: Objection, your Honor, as
23 to the form of the question.

24 THE COURT: Sustained.

25 Q. (By Attorney Buting)~ Let me just turn for a

1 moment to this particular instrument that you
2 use, GS -- or I'm sorry -- LC/MS/MS. All right.

3 THE COURT: Mr. Buting, just before you get
4 into that new --

5 ATTORNEY BUTING: You want to stretch?

6 THE COURT: -- topic, lets stand up and
7 stretch.

8 ATTORNEY BUTING: Okay.

9 THE COURT: All right. Mr. Buting, you may
10 resume.

11 ATTORNEY BUTING: Thank you.

12 Q. (By Attorney Buting)~ Let's talk about this --
13 this instrument, this LS/MS/MS (sic) instrument.
14 It's three instruments, you said, together,
15 right?

16 A. Yes, sir, it's the LC/MS/MS.

17 Q. I'm sorry, I'm not a chemist. I keep botching
18 that designation, I'm sorry. I want to explain,
19 make sure the jury understands, because sometimes
20 lay people, like myself, are in awe of science
21 and machines and we sometimes think that they do
22 more than they can, okay?

23 A. Yes.

24 Q. So this isn't something that you just push a few
25 buttons, run a sample through, some lights flash

1 and buzzers go off, and then spits out a result
2 at the end, paper result says this is EDTA, or
3 this is not EDTA, right?

4 A. That's correct.

5 Q. It's nowhere near that simple, right?

6 A. No, it's not that simple.

7 Q. And in fact, what the whole premise of the
8 machine is is that it's supposed to somehow
9 determine the characteristic of an ion and
10 whether or not it's consistent with one chemical
11 or another?

12 A. That's not technically correct, no.

13 Q. All right. A series of ions, is that the
14 correction you wanted?

15 A. It's fragments that are ions --

16 Q. Okay.

17 A. -- that originate from the chemical itself.

18 Q. Okay. If you turn to -- I have handed you what's
19 been marked as exhibit -- I'm sorry, what is the
20 exhibit number?

21 A. 441.

22 Q. 441, and it's entitled guidelines for comparison
23 of mass spectra, right?

24 A. That's correct.

25 Q. And this is a document that's issued by your

1 unit, the FBI Laboratory, Chemistry Unit, right?

2 A. That is correct.

3 Q. June 21st of '06 is this one, right?

4 A. Yes, it is.

5 Q. And it's signed by yourself at the end, as well
6 as the quality assurance people?

7 A. Yes, it's signed by myself and two other
8 individuals.

9 Q. Okay. And if you would turn to page three,
10 there's a section that has a heading that says
11 determination of diagnostic ions in a mass
12 spectrum, okay?

13 A. Yes, sir.

14 Q. Your guidelines state, quote, the definition of
15 what makes any given ion "characteristic" of a
16 particular chemical structure is somewhat
17 nebulous and there does not appear to be any
18 universally accepted standard in the field,
19 correct?

20 A. Yes, that's what it says.

21 Q. Okay. And it says that's why you have got to
22 have good and consistent judgment and you have to
23 employ judgment -- subjective judgment as an
24 examiner, when you look at the results of these
25 tests, right?

1 A. It does say you should apply good and consistent
2 judgment, it doesn't say subjective, as you
3 indicated there.

4 Q. Is there any such thing as objective judgment?

5 A. I don't know.

6 Q. I will take that as a no.

7 A. I don't know.

8 Q. You are going to fight me on that one too?

9 A. No.

10 Q. Okay. And, then, on the last page, page 10 of 15
11 actually, limitation section?

12 A. I'm sorry, I do want to -- I want to rethink that
13 answer. I do believe there is such a thing as
14 objective judgment.

15 Q. All right. Go ahead turn to page 10 of 15. You
16 got it?

17 A. Yes, sir.

18 Q. Okay. And this is a heading that's called
19 limitation and, again, these are the guidelines
20 on how to interpret the results of these tests,
21 right? That's what this document is?

22 A. Of the mass spec --

23 Q. Mass spectra.

24 A. -- type test?

25 Q. Yes.

1 A. Yes, this -- this is a narrative talking about
2 the general limitations in evaluating mass
3 spectral data.

4 Q. And this particular section is headed
5 limitations. It's telling you, you know, hold
6 on, there are some limits to this we have got to
7 consider, right?

8 A. That is exactly right.

9 Q. Okay. And doesn't it say, quote, the mere fact
10 that an unknown mass spectrum matches well to the
11 spectrum of a known standard will rarely, by
12 itself, be sufficient grounds to claim the
13 presence of that compound in the question sample,
14 correct?

15 A. That's correct.

16 Q. Doesn't it also say that, quote, similarly, the
17 fact that an unknown mass spectrum fails to match
18 that of a known standard generally will not, by
19 itself, constitute grounds for concluding that
20 the compound is not present in the questioned
21 spectrum, correct?

22 A. That's correct, too.

23 Q. All right. And so what you have to do with these
24 mass spectrum tests is look at a big picture,
25 consider all the data, as well as what comes out

1 of this machine or instrument, correct?

2 A. Yes, you have to look at all the data that's
3 generated and put all the pieces of the puzzle
4 together to reach your conclusion.

5 Q. All right. Your protocol, then, that was
6 developed on February -- or issued on
7 February 15th of 2007, for this case only, it's
8 important that whoever do the test, follow the
9 protocol as written, correct?

10 A. Yes.

11 Q. And that you are not supposed to just adjust one
12 procedure differently than what's in the
13 protocol?

14 A. You are allowed to do that as long as you
15 document the fact that you did make a deviation
16 to the procedure.

17 Q. Okay. And when you do that, you are actually, by
18 your lab's protocol, you are supposed to fill out
19 some kind of a form saying I want to deviate from
20 the protocol?

21 A. Well, it depends, there's two types of
22 deviations. We have what are called major
23 deviations, which are quality affecting, meaning
24 by doing this deviation you potentially are going
25 to affect the results of the test and you have to

1 get a higher level of approval. It has to go up
2 to the quality assurance unit, if you are going
3 to do a major deviation. If you're going to do a
4 minor deviation, on the other hand, it simply
5 just requires a notation in the notes with
6 approval by the examiner and myself, and in this
7 case, approval by me.

8 Q. All right. Turn to 434 exhibit, please, page 3
9 of 9, No. 9 procedure, got that?

10 A. Yes, sir.

11 Q. Sets forth five steps to follow, right?

12 A. Yes, sir.

13 Q. And the last step after you do this filtrate
14 and -- I'm not going to bore everybody with the
15 scientific jargon -- but is that you are supposed
16 to transfer this -- this solution that you come
17 up with, first, and inject it into a system
18 that's a negative ion mode, correct?

19 A. That's what the procedure says, yes.

20 Q. And then you follow that up and inject some of
21 the other samples, if they are positive, into the
22 positive ion mode, correct?

23 A. That's correct.

24 Q. And in this case, Mr. Brewer did the reverse,
25 didn't he?

1 A. Yes, he did.

2 Q. He injected it, first, into the positive ion
3 mode, right?

4 A. Yes, he did.

5 Q. And then into the negative ion?

6 A. Yes, he did, per my instructions.

7 Q. Okay. Your instructions?

8 A. Yes.

9 Q. Okay. So on the very first time you used this
10 protocol, you started changing the procedures
11 around?

12 A. No, sir. Consider that a minor deviation,
13 simply, it's like you put your right shoe on
14 first or your left shoe--

15 Q. Okay.

16 A. It's that simple.

17 Q. The exhibit in front of you, also, in
18 paragraph two -- number two, I should say, not
19 paragraph two, first page?

20 A. Paragraph two, first page.

21 Q. Not paragraph two, item number two, where it says
22 scope?

23 A. Yes, sir.

24 Q. It says that this procedure allows for the
25 screening and confirmation of EDTA in suspected

1 bloodstains, right?

2 A. That's correct.

3 Q. The protocol isn't actually validated to do -- to
4 quantitate a particular specific level of EDTA,
5 correct?

6 A. That's exactly right.

7 Q. And the difference, just so we're clear, is that
8 protocol is designed to see if there's any level
9 of EDTA that can be detected under your -- above
10 your bar, your limit, right?

11 A. Yes, that's part of it, yes.

12 Q. But the protocol is not designed to allow you to
13 actually fix a number and say this is 500
14 micrograms or whatever, right?

15 A. It's not validated to provide an accurate number
16 on any measurement we make where we put a number
17 on it.

18 Q. Okay. Mass spec instruments, though, you can set
19 up a protocol and they are sometimes used to
20 actually quantitate, right?

21 A. Yes, they are.

22 Q. But you didn't use it -- you didn't use the
23 instrument in this type of protocol to do that,
24 right?

25 A. That's correct, we did not.

1 Q. And you did not, for instance, when you tested in
2 the blood vial that had Mr. Avery's name on it,
3 you didn't quantitate what level of EDTA was in
4 the tube, right?

5 A. It wasn't validated to do quantitative analysis,
6 so we did not --

7 Q. All right.

8 A. -- put a specific value on the amount of EDTA
9 that was present in the tube.

10 Q. That's fine. That's all I'm asking. You didn't
11 do it, right?

12 A. That's right.

13 Q. And you issued your report, Exhibit -- what is
14 it, 326? No. Do you have the report up there
15 with you?

16 A. Yes, I do.

17 Q. What is the number?

18 A. Exhibit 435.

19 Q. 435. You didn't -- As per the protocol, you
20 didn't express any kind of opinion in the report
21 about how much, if any, EDTA was detected in the
22 vial from -- of Mr. Avery's blood, right?

23 A. No, I did not.

24 Q. Okay. And one of the things that was kind of
25 really unique about it, or is unique about this

1 case, is that when you are testing that purple
2 vial, it's 11 years old, right?

3 A. Yes, I believe it was.

4 Q. It was drawn from Mr. Avery's arm in January of
5 1996 and tested in your lab in February of 2007,
6 correct?

7 A. I would have to refer to my notes.

8 Q. Go ahead.

9 A. Yes, that's a correct statement.

10 Q. Okay. And we talked a little bit -- or you
11 talked a little bit about this, I think, with
12 Mr. Gahn, but the whole question of the stability
13 or lack of stability of this chemical, EDTA, is
14 an issue of research, correct? In the scientific
15 community?

16 A. I don't know how much it's researched these days.
17 It's -- I think it's very well documented. I
18 don't know how much ongoing research there is on
19 it.

20 Q. Well, you mentioned that it's a concern that some
21 environmentalists have that this chemical could
22 be building up in our water and our soil, right?

23 A. That's correct, yes.

24 Q. On the other hand, manufacturers who include this
25 chemical in their products are countering that by

1 saying that this a biodegradable product and will
2 ultimately be dissolved and not be a problem?

3 A. No, sir, I don't believe that's true.

4 Q. Are the manufacturers telling the
5 environmentalists that you are right, this drug
6 is just going to build up in our soil and water
7 forever?

8 A. I don't know that the manufacturers are saying
9 anything to the environmentalists.

10 Q. You are not aware of any debate, ongoing research
11 in that field?

12 A. No, sir, I'm not.

13 Q. But you did mention that you were aware of some
14 degree of studies about the stability of EDTA,
15 right? I believe you testified to that.

16 A. Yes, I'm aware of a number of studies that
17 discuss the stability of EDTA as well as
18 chemistry reference books that talk about the
19 stability of EDTA.

20 Q. Okay. Can you cite me to any study, published
21 study, that's ever studied the -- or evaluated
22 the degradation rate of EDTA in an 11 year old
23 vial of blood?

24 A. No, sir.

25 Q. Can you cite me to any published study that has

1 ever tried to characterize the degradation rate
2 of EDTA in any blood substance, stains or liquid?

3 A. Yes, sir, I can.

4 Q. What's that?

5 A. The *Journal of Analytical Toxicology* article that
6 I believe you have. I'm sorry. For
7 clarification, did you say an 11 year old
8 bloodstain?

9 Q. Well, at first I said 11 year old and you are
10 aware there is no study of blood that old, right?

11 A. Yes, sir, I'm aware of that.

12 Q. You do know, though -- Let me just step back for
13 a second, you do know that EDTA is biodegradable
14 eventually, correct, or is that the wrong term?

15 A. That's the correct term, the research suggests
16 that it is not very biodegradable.

17 Q. But the research also suggests that it can be
18 broken down, correct?

19 A. Extremely harsh conditions, yes.

20 Q. Well, waste water treatment plants have been
21 doing studies where they determined that if you
22 increase the PH in the treatment plant, you can
23 break down EDTA quite readily, right?

24 A. Well, the published references say that if you
25 boil EDTA in a highly alkaline solution, which

1 would be high PH, it doesn't breakdown.

2 Q. You are not aware of studies that talk about
3 using lime in waste water treatment to increase
4 the PH so that it breaks down?

5 A. Well, the lime may be doing other things, other
6 than just dealing with PH. And there are
7 numerous steps that they take to breakdown the
8 EDTA in water, so it's not just lime.

9 Q. Okay. But it is -- there are steps they take to
10 break it down.

11 A. Again, very harsh steps.

12 Q. In your opinion, you have never done any
13 yourself --

14 (Court reporter asked to have the last answer repeated.)

15 A. Harsh. Harsh steps.

16 Q. Harsh in your opinion because you have never
17 actually done of any of those studies, right?

18 A. Harsh in my review of the literature, as they
19 call them. I'm quoting some of those references.
20 They are referring to things that, as a chemist,
21 I consider to be quite harsh.

22 Q. Have you ever done any kind of experiment
23 yourself to see if you can actually make EDTA
24 break down into its components?

25 A. No, I haven't done any studies.

1 Q. Okay.

2 A. But your question is twofold there. And you said
3 into its components, I'm not aware of the
4 components that EDTA breaks into.

5 Q. Well, at some point, it can be degraded, whether
6 it's harsh or whatever, that's what I'm talking
7 about.

8 A. And then it would just fall apart as a molecule.

9 Q. Okay. I apologize, I don't know all the
10 terminology, but you get my drift, right? You
11 understand the question?

12 A. I do understand the question.

13 Q. And you haven't performed any experiments to
14 break it down, break the molecules apart?

15 A. I have not performed any such experiments.

16 Q. Okay. You did, however, testify about performing
17 a little study just last week, right?

18 A. Correct.

19 Q. And that study was designed to see whether or not
20 you would still be able to detect EDTA in some
21 blood spot cards that you had had on -- or that
22 your lab, one of your units had, right, from a
23 number of years ago or, actually, 33 months?

24 A. I need you to --

25 Q. All right.

1 A. -- repeat that question, please.

2 Q. It's a little study that you are talking about in
3 which you tried to see if -- if you could still
4 detect EDTA in some spot cards, that were 33
5 months old, is something you did last week,
6 right?

7 A. That's correct, yes, last week.

8 Q. And you actually did it on February 28th?

9 A. If I can refer to my notes.

10 Q. Go ahead.

11 A. Yes, sir, that's correct, February 28th.

12 Q. Now, on February 26th, you issued the report in
13 this case, right?

14 A. That is correct.

15 Q. With your opinions, right?

16 A. That's correct.

17 Q. The opinions that you knew you'd have to express
18 in court, under oath, in front of a jury, right?

19 A. Correct, yes.

20 Q. And so when you issued that report, you had done
21 no study whatsoever of whether or not EDTA would
22 be stable enough to be found in some old
23 bloodstains or blood vial, correct?

24 A. Yeah, I had not personally done it, but it was in
25 the literature.

1 Q. And the literature you are referring to is this
2 analytical chemistry thing, right?

3 A. No, sir. The Journal of Analytical Toxicology
4 did a stability study of EDTA in old blood stains
5 as well.

6 Q. Two years old, right?

7 A. I believe it was 24 months, yes.

8 Q. Okay. And you knew in this case you were talking
9 about a blood vial that's 11 years old, five
10 times longer, right?

11 A. Well, my understanding there, the bloodstains
12 were just about two years old themselves.

13 Q. Well, if the vial of blood that came out of
14 Mr. Avery's arm on January of 1996 was used to
15 plant the stains in the RAV4 in 2005, then that
16 blood at that time was already almost nine years
17 old, correct?

18 A. That's correct.

19 Q. And, then, since that date, another 16 months or
20 so had elapsed?

21 A. Yes, that's correct.

22 Q. Okay. So you issue your report, without doing
23 any study of your own on what the stability might
24 be of EDTA in a bloodstain, correct?

25 A. That is correct.

1 Q. And so, then, two days later -- Was that after
2 Mr. Gahn called you and asked you a question that
3 I had raised, that you decided to do this study?

4 A. No, I decided to do the study based on the letter
5 you sent requesting materials, discovery
6 materials, and one of the items you requested
7 were any studies that the FBI had done on the
8 stability of old bloodstains.

9 Q. Okay.

10 A. It prompted me to start thinking, is there a way
11 that we could do it.

12 Q. Okay.

13 A. And I went to our DNA Unit and asked them if they
14 had any old blood cards with EDTA on it, and they
15 did. So we decided to go ahead and run them to
16 see if it would help, for this particular case.

17 Q. Okay. So -- I'm glad you cleared that up. So,
18 then, this -- this study that you did on
19 stability was because the defense attorney in the
20 case had pointed out to you that something might
21 be lacking in your ability to express an opinion
22 to the jury about how stable EDTA was or was not;
23 would that be fair?

24 A. No, that wouldn't be fair at all, sir.

25 Q. Okay. Well, we'll let the jury draw whatever

1 inference they want from that. But I'm showing
2 you now what exhibit -- what's exhibit -- I'm
3 sorry -- 444, this is your EDTA stability study,
4 right? It's up on the screen?

5 A. Oh, that is the summary of the EDTA stability
6 study. Those are my notes doing a quick review
7 of what we found.

8 Q. Okay. And these are the other notes attached to
9 this study dated February 28 of '07, correct?

10 A. That's correct.

11 Q. And those are Mr. Brewer's initials, again?

12 A. Yes, that's Dr. Brewer's initials.

13 Q. Dr. Brewer, I'm sorry.

14 A. Yes.

15 Q. And other than these handwritten notes and this
16 one paragraph, there's nothing else that tells us
17 about this study that you did, right?

18 A. No, that's false.

19 Q. Did you write up some report?

20 A. No, there are pages of data that are related to
21 that study.

22 Q. Okay. Just graphs and charts and things of that
23 nature, right?

24 A. That's correct. That's the actual study. This
25 is the interpretation of the study and the notes

1 as to how the study was put together and how it
2 was actually run.

3 Q. Okay. So would you submit this to some journal
4 to be published, in its form?

5 A. That one paragraph, I don't believe would be
6 accepted for publication, sir.

7 Q. I thought not. Let me just talk about the timing
8 of this for a second. If you had done this test,
9 two days after you issued your report, because
10 you are worried about my cross-examination of
11 you, and if you had found that these --

12 ATTORNEY GAHN: Objection, your Honor, to
13 the form of that question and that's not what his
14 testimony was.

15 Q. I haven't finished it, but I will start
16 rephrasing it. If you had done this study, two
17 days after issuing your report and you knew you
18 were going to come into court and testify under
19 oath about and if you had gotten results that
20 would show this EDTA really wasn't as stable as
21 you thought it was, you would be -- you would
22 have a bit of a problem there, wouldn't you?

23 A. Well, we would be refuting all the published
24 scientific data out there that suggests that EDTA
25 is an incredibly stable complex, so it would be

1 rather a eureka moment, quite frankly.

2 Q. And so, then, there would have been no reason for
3 you to do this study at all, right? If it's --
4 If it's that clear in the published literature,
5 there would have been no reason for you to do
6 this study two days after you issued your report,
7 would there?

8 A. Obviously, we didn't do it as part of the method
9 development, so I do not consider it to be a
10 relevant aspect of putting the method together,
11 doing the analysis in this case, and providing
12 that report to the agency that requested the
13 examinations.

14 But I do believe that it assists in the
15 final interpretation. It does assist in
16 answering your question, your specific question
17 that we had not addressed in my unit. It had
18 been addressed in the publication, as I alluded
19 to earlier. I did think it was a good idea to do
20 since we did have available to us bloodstains
21 that were 33 months old. I didn't think, as a
22 scientist, that I could just pass that by and not
23 test them.

24 Q. Well, I'm very glad to hear that, sir.

25 A. I'm sorry?

1 Q. I'm very glad to hear that, as a scientist, you
2 didn't just pass that by. But, tell me, page
3 two, which is the only place that describes the
4 actual method that was used; is this a protocol?

5 A. I'm sorry?

6 Q. Is this a protocol for testing the stability of
7 EDTA in 33 month old bloodstains?

8 A. These are the notes describing the steps that
9 were taken in order to conduct the study. But
10 the protocol that we used is the published
11 protocol, the issued standard operating procedure
12 for the analysis of EDTA in dried bloodstains.

13 Q. So, did you submit a protocol to determine the
14 stability of EDTA, long term, over many, many
15 months?

16 A. I don't think I understand that question.

17 Q. You just used the protocol you developed to see
18 if there is EDTA in a particular stain at a given
19 time, right? Correct?

20 A. Yes.

21 Q. Which isn't designed to quantitate how much EDTA,
22 if any, is there?

23 A. That's right.

24 Q. My question is, did you develop a protocol, as a
25 scientist, that would be accepted for peer

1 review, that would determine -- be designed to
2 determine the stability of EDTA, as the term you
3 actually used here, to determine EDTA stability?

4 A. Yes, I believe that the work that was done here
5 is worthy of -- total worthy of publication if we
6 decide to write it up and submit it to a journal.

7 Q. Okay. But you just used the other protocol that
8 you already developed, you didn't develop a new
9 protocol to study how stable EDTA was; am I
10 right?

11 A. I'm sorry. I'm not completely understanding your
12 question. We used this stepwise procedure, page
13 two.

14 Q. Let me just ask, very simple: Did you develop a
15 new protocol -- the question probably begs the
16 answer -- but you did not develop a new protocol
17 and go through your rigorous review and approval
18 and validation and studies, and all of that, for
19 the specific question of determining the
20 stability of EDTA, correct?

21 A. We did not develop a new protocol to address
22 the -- any potential breakdown of EDTA, but we
23 did determine that we could still --

24 Q. Okay.

25 A. -- find EDTA in a 33 year old -- not -- 33 month

1 old bloodstain.

2 Q. And looking at this result, you tested a total of
3 10 spot cards, right?

4 A. That's correct.

5 Q. That you got from the DNA Unit?

6 A. Yes.

7 Q. You didn't know where they came from, right?

8 A. I didn't, no.

9 Q. Didn't know whether they came out of a
10 purple-topped tube, a yellow-topped tube, a
11 red-topped tube, or a gray-topped tube, right?

12 A. Wrong.

13 Q. Wrong?

14 A. That's an incorrect statement you just made.

15 Q. Okay. How did you know what kind of tube a
16 little spot on a piece of paper came from?

17 A. Because I was informed by the analyst in DNA that
18 these were all EDTA bloodstains.

19 Q. Okay. So you relied on that, whatever
20 information that was?

21 A. Yes.

22 Q. Okay. And when you tested them, you found that 4
23 of the 10 spot cards you could not determine --
24 you could not detect the iron complex EDTA,
25 correct?

1 A. That's correct, 4 out of the 10 it failed --

2 Q. Okay.

3 A. -- the requirements failed to actually make the
4 call. There was an indication of it's presence,
5 though.

6 Q. But something that's an indication, that doesn't
7 reach your threshold, you don't make a call?

8 A. That's exactly right because we err -- we work
9 conservatively.

10 Q. Right. Because something that's just an
11 indication could be an indication of other
12 things, right? That's why you have threshold
13 limits, correct?

14 A. Well, as we discussed earlier, we have the
15 guideline for mass spectral comparison, which was
16 Exhibit 441. That defines how we interpret the
17 mass spectral data. And those four samples
18 failed the requirements in here to actually make
19 the call.

20 Q. All right. So, 40 percent of the samples that
21 were only 33 year -- 33 months old, were
22 already -- had already degraded in the EDTA iron
23 complex?

24 A. No, sir. I wouldn't say that at all. We don't
25 know what the original concentration of EDTA was,

1 of the iron complex, in that spot. Additionally,
2 this was done on spot cards and we validated our
3 method to be done on cotton tipped swabs.

4 We did not, in this study, go to see,
5 you know, all the steps we talked about earlier
6 about detection limit. We didn't look at
7 interferences. We didn't look at matrix
8 suppression. We did not do the -- Well, the
9 carryover would probably be irrelevant here. But
10 we didn't do all of those steps for extracting it
11 from a filter paper, a DNA filter paper, which is
12 probably insignificant, but scientifically I
13 can't say that with absolute certainty, that that
14 couldn't have some affects because --

15 Q. Okay.

16 A. -- this -- this material may --

17 Q. Sir.

18 A. -- bind more tightly to that filter paper, the
19 bloodstain may. Because that's actually what
20 these are designed for, these are spot cards for
21 blood.

22 Q. Those steps you just mentioned: Carryover,
23 matrix suppression, limited detections, that's
24 called validation, right?

25 A. That's exactly right.

1 Q. And what you just told us is that you didn't
2 validate this study to detect EDTA in spot cards,
3 right?

4 A. That's exactly right.

5 Q. Thank you. So this study, then, wouldn't really
6 tell you how stable or not EDTA might be in a
7 liquid form that's 11 years old, right?

8 A. That's correct, yes.

9 Q. You mentioned -- You mentioned that you were
10 testing swabs, or your tests were designed for
11 swabs of cotton, right?

12 A. Yes, we did all of our validation on cotton
13 tipped swabs --

14 Q. Okay.

15 A. -- because that's what we were told the
16 evidentiary material was going to be in this
17 case.

18 Q. Okay. And cotton swabs are also absorbent, more
19 absorbent than paper, would you agree, or
20 disagree?

21 A. I don't know.

22 Q. You don't know. You haven't tested it, so you
23 don't have an opinion one way or the other?

24 A. I don't have an opinion.

25 Q. Okay. You do have an opinion, though, that EDTA

1 on -- in a bloodstain that is on fabric might be
2 absorbed in different ways so that throughout the
3 stain the level of EDTA is not homogenous,
4 correct?

5 A. Incorrect.

6 Q. You disagree with that?

7 A. Yes.

8 Q. Okay. Did you shake up the tube when you got it?

9 A. Yes, we did.

10 Q. Mix it up real well?

11 A. Yes.

12 Q. Have no way of knowing if somebody used that vial
13 to plant, as your little PowerPoint showed, drip,
14 drip, drip, drip, whether or not that
15 person would have shaken up the vial, 11 year
16 old -- or nine year old vial, before doing that,
17 do you?

18 A. Could you repeat that question?

19 Q. You have no way of knowing that if somebody used
20 that vial to plant blood in the Halbach vehicle,
21 whether that person shook that vial up like a
22 scientist would before doing so, do you?

23 A. If that was the scenario, then, I wouldn't know
24 if they shook that vial first.

25 Q. Okay. By the way you never did any -- I think

1 you testified about the swabs when you had the
2 photos up there, you kept referring to them as
3 bloodstains here and there, right? Do you recall
4 that?

5 A. Yes, that's what they were reported to us as
6 being.

7 Q. Okay. Reported to you, but you didn't do any
8 kind of presumptive tests on them?

9 A. No, sir, I'm not a qualified serologist.

10 Q. So the portion when you -- well, not you, but
11 when Mr. Brewer cut the swabs -- By the way, were
12 you present when he cut the swabs?

13 A. Yes, I was.

14 Q. Okay. You didn't test to be sure that the
15 section that he was cutting did or did not prove
16 presumptively positive for the presence of human
17 blood, right?

18 A. Again, I'm not qualified to do that. It was
19 reported to us that this was blood and that had
20 been confirmed by testing at another laboratory.

21 Q. Well, it had been confirmed to you that somewhere
22 on this swab, the portion of the swab that was
23 cut off by the prior lab had tested, that had
24 blood, right? As far as you know?

25 A. Yes, that's -- I believe that's what I said.

1 Q. Okay. But the portion that was left on those
2 swabs, you don't know that anybody ever tested to
3 see if there was blood, and if so, how much of
4 the swab that was being cut off contained the
5 blood, right?

6 A. That's correct.

7 Q. Okay. You know that blood and EDTA -- that EDTA
8 is a binding; you call it chelating, but the same
9 way -- another way of saying binding, right,
10 molecules?

11 A. Yeah, it binds -- it binds metals, that's
12 correct.

13 Q. Particularly metals, right?

14 A. Yes.

15 Q. And so it may bind with one substrate that a
16 stain is sitting on differently than another
17 substrate that a stain is sitting on, right?

18 A. If it's not already bound to another metal, yes.

19 Q. Okay. And by substrate, I'm talking -- it's
20 another way of saying a surface, particular
21 surface, right?

22 A. That's correct.

23 Q. You only tested three swabs that were reported to
24 have been taken, or found, in the Teresa Halbach
25 vehicle, right?

1 A. That's correct.

2 Q. Do you know how many other swabs or how many
3 other stains were also found in that vehicle?

4 A. No, I don't.

5 Q. Your opinion that there's no EDTA in the swabs
6 from the Halbach vehicle, then, is limited to the
7 three swabs that were presented to you; isn't
8 that right?

9 A. Could you repeat that?

10 Q. You expressed an opinion a little more broadly
11 than perhaps you intended to, I believe, which
12 was that your opinion was -- let me look for my
13 notes -- that the stains in the Halbach --
14 bloodstains in the Halbach vehicle could not have
15 come from the purple vial that you tested, right?

16 A. That's correct.

17 Q. But you're actually referring only to the three
18 stain swabs that you tested, correct?

19 A. No, I believe my original testimony is what I
20 meant.

21 Q. Well, are you telling me right now, that even
22 though you never tested three other swabs of
23 separate bloodstains found elsewhere in the RAV4
24 vehicle, that you're willing to express an
25 opinion that none of those three swabs have EDTA

1 either?

2 A. I am willing to -- to conclude that.

3 Q. Oh, you are?

4 A. Yes, sir. If I can elaborate.

5 Q. Well, no, let me finish my -- my question. So
6 even though you didn't test those other three
7 swabs, you are prepared to state that they could
8 not have come from the blue -- the purple-topped
9 vial that you tested of Mr. Avery's blood?

10 A. I believe that to be true within a reasonable
11 degree of scientific certainty, yes.

12 Q. Okay. I just wanted to know how far you were
13 willing to go. And the -- You also give another
14 interesting opinion where you -- I'm not sure
15 exactly how it came out after I objected and it
16 was rephrased, but that you believe the planting
17 scenario, one of those two -- you only gave two
18 scenarios there, one which is that the blood came
19 from a dripping finger that you so helpfully gave
20 us on the screen, right, that was one scenario?

21 A. To represent active bleeding. I wouldn't know if
22 it came from a finger or a toe or an arm.

23 Q. Oh, really, you just picked a dripping finger out
24 of just thin air, right?

25 A. That's what happened to be at Microsoft's web

1 site --

2 Q. Oh.

3 A. -- a finger, right.

4 Q. And that was one scenario. The other scenario
5 was that someone was pouring out these little
6 drops from the purple-topped tube, right?

7 A. Sure, yes.

8 Q. And I think if I understood you, you maybe went
9 even farther and said that because of your test
10 on those three stains, there was no way that --
11 that the blood in the RAV4 could have been
12 planted by anybody; isn't that what you said?

13 A. Yes, that was my opinion. That's correct.

14 Q. Or did you mean that they couldn't have been
15 planted from that purple-topped tube only?

16 A. Well, if you look at all of the information I was
17 given on this case, my opinion would be that it
18 couldn't have come from the EDTA tube that we
19 tested or any other EDTA tube.

20 Q. Okay. But you are not expressing the opinion
21 that it couldn't have been planted from some
22 other blood source, that didn't have EDTA
23 already, are you?

24 A. No, sir.

25 Q. Okay.

1 A. I'm not saying that.

2 Q. Okay. And you never tested any swabs that were
3 reported to you to have been recovered from the
4 garage floor or inside Mr. Avery's trailer --
5 trailer, were you?

6 A. Could you repeat that?

7 Q. You never tested any swabs that were given to you
8 that were reportedly recovered from the garage
9 floor or trailer of Mr. Avery, did you?

10 A. No, I wasn't.

11 ATTORNEY BUTING: Should we approach the
12 bench for a minute, your Honor?

13 THE COURT: Sure.

14 (Side bar taken.)

15 THE COURT: Members of the jury, we're
16 going to go a little longer than normal to get the
17 witness back to Virginia. I'm told we don't have
18 too much to go. But let's take a quick stretch
19 break and then allow the attorneys to finish. You
20 may continue.

21 ATTORNEY BUTING: Thank you, Judge.

22 Q. (By Attorney Buting)~ The -- Without getting too
23 bogged down in the procedure that's followed and
24 the protocol and all that, if you allow me to
25 oversimplify it, as I understand it, you take

1 these swabs -- And, by the way, let's just clear
2 one thing up, the photograph showed two control
3 swabs for each of these three stains, right?

4 A. Yes, that's correct.

5 Q. You didn't test both control swabs, though, did
6 you?

7 A. No, standard practice, we leave half for
8 retesting, so we tested one and left the other
9 for future testing if that was deemed necessary.

10 Q. Well, aren't these swabs supposed to have been
11 taken from different areas of, like, one side or
12 the other of a particular stain.

13 A. It's from the general area, that's correct.

14 Q. But the theory being that you don't swab the
15 exact same area twice, you swab -- you use the
16 second swab to swab a different control area
17 somewhere around the stain, right?

18 A. That's one way to do it, yes.

19 Q. All right. You don't know how it was done in
20 this case, because you weren't there?

21 A. That's correct, I was not there.

22 Q. Okay. But my point is, you didn't test -- you
23 didn't take half of each -- clip off half of each
24 swab and do it that way, right?

25 A. That's correct, we did not.

1 Q. You just tested one?

2 A. Yes.

3 Q. Okay. The -- As I understand it, what you do is

4 you clip off the swab. You put it in a little --

5 some sort of a little vial or something. You put

6 a solution in there. And it's actually 200

7 microliters of something, something of that

8 nature; does that sound right?

9 A. Well, perhaps you are oversimplifying it.

10 Q. Well, you put a solution -- you put a solution

11 into the dry swab sample, right?

12 A. You do, yes.

13 Q. And you allow it to react for a certain period of

14 time, right?

15 A. Forty-five minutes.

16 Q. And your protocol for this particular test, 45

17 minutes, correct?

18 A. Yes. Yes.

19 Q. And then you -- you centrifuge it?

20 A. Yes, we do.

21 Q. And then, what that does, is it separates the

22 liquid from the solids that drop to the bottom,

23 right?

24 A. The liquid portion goes through the filter and it

25 carries with it the EDTA and EDTA iron complex

1 that was dissolved into the solution.

2 Q. And the solids drop to the bottom?

3 A. No, sir.

4 Q. Well, okay, the liquid is at the top?

5 A. No, sir. If you would like, I can simplify this.

6 Q. Please.

7 A. Okay.

8 Q. Simply.

9 A. The swabs are cut and put into what's called a
10 molecular weight cut off filter, it's a filtering
11 device, sitting in this filter device. And then
12 we add a solution of the internal standard, which
13 I described earlier as the positive control, into
14 each sample. That's 200 microliters, which is --
15 again, that is approximately a 10th -- I'm
16 sorry -- a 20th of a drop, and that is placed
17 into the --

18 Q. Two hundred microliters?

19 A. I'm sorry, I misspoke. It's not --

20 Q. Yeah, I thought so.

21 A. It's approximately two drops. Thank you. It's
22 approximately two drops of liquid that are placed
23 into that -- onto that swab. And it's left to
24 sit for 45 minutes to allow for -- time for all
25 of the EDTA, or a portion of the EDTA and the

1 iron complex, to actually go into the water that
2 was added to it.

3 And then we centrifuge it at high speed
4 to drive the liquid through the filter device and
5 the liquid goes to the bottom of the tube and the
6 swab and all the solids remain at the top in the
7 filter itself. And then we analyze the liquid
8 portion.

9 Q. Okay. So I misspoke, it's the other way around,
10 the liquid is at the bottom, right?

11 A. Yes, sir.

12 Q. All right. And then goes into -- there's --
13 there's approximately 200 microliters of liquid,
14 a little less probably by then, right?

15 A. A little less, yes.

16 Q. Okay. Then it goes into a machine called auto
17 sampler, right?

18 A. No, not exactly.

19 Q. Well --

20 A. It's transferred into a small sampling container,
21 a vial, which is a sealed glass vial. And then
22 we manually place it onto an auto sampler.

23 Q. Okay. And then the auto sampler basically sucks
24 out just five microliters for the test, right?

25 A. For each of the individual tests that we ran on

1 this, yes.

2 Q. Correct. So out of each, Q-49, Q-48, Q-47, the
3 micro sampler takes five micro -- auto sampler
4 takes about five microliters, leaving 190 or so
5 left, correct?

6 A. Well, probably considerably less than 190, but it
7 leaves some residual liquid behind, yes.

8 Q. Okay. And then it's that five microliters that
9 gets tested in the instrument, correct?

10 A. That's right.

11 Q. But you don't save the remaining liquid to be
12 retested by the defense, or another lab, or
13 anything of that nature, do you?

14 A. No, we don't.

15 Q. And presumably, if you did, that would be one way
16 of verifying the results that came from the five
17 microliters that was tested, correct?

18 A. That would be one of many ways it could be --

19 Q. Okay.

20 A. -- reevaluated.

21 Q. Now, EDTA is found, you mentioned, in many, many
22 products, common household products, right?

23 A. Yes.

24 Q. You mentioned shampoos, detergents, and some
25 automotive cleaning products as well, right?

1 A. Yes.

2 Q. Including Armor All?

3 A. No.

4 Q. Make up?

5 A. Some cosmetics.

6 Q. Okay. Also used in photography?

7 A. In some applications of photography, yes.

8 Q. Okay. And, yet, when you tested the controls in

9 this case, you found no EDTA detectable, correct?

10 A. That's exactly right.

11 Q. And that was in the process whereby you have

12 diluted the -- or allowed the solid to react with

13 200 microliters of liquid, correct?

14 A. That's correct, yes.

15 Q. If you had allowed that to evaporate down to a

16 smaller amount, if there was any EDTA in the

17 liquid, it would be more concentrated, correct?

18 A. Yes, it would be.

19 Q. You did not do that in this case, on the

20 controls, for instance, to rerun them and see if

21 you would detect EDTA at a lower dilution?

22 A. No, I don't believe it was necessary to do.

23 Q. Okay. And, by the way, the -- even with this

24 brand new test you devised, you can't tell the

25 jury, to a absolute scientific certainty, if

1 there is such a thing, that there's no EDTA in
2 any of those blood stains. All you can say is
3 that there is none detectable given your limits
4 of detection, correct?

5 A. Yes, they are negative at our limit of detection,
6 which I feel --

7 Q. Okay.

8 A. -- is more than adequate.

9 Q. I understand that's your opinion, but the point
10 of it is, there might be a lower level of
11 detection which might reveal EDTA; isn't that
12 right?

13 A. Well, you could go lower and start detecting
14 environmental contamination from soil and water,
15 but that, I believe, would just confuse the
16 interpretation on this case.

17 Q. What that might do is just what happened in the
18 O.J. case, which is, show the jury that there is
19 EDTA in the bloodstain rather than that there is
20 not, correct?

21 A. Again, I didn't do the testing in the O.J. case
22 and I'm not fully aware of all the final findings
23 in that particular case. It's been, I believe,
24 12 years, actually.

25 Q. All right.

1 A. And -- But it's my recollection, to answer your
2 question, that we did not report that there was a
3 significant amount of EDTA in that bloodstain in
4 that case.

5 Q. I want to show you a photograph that we have
6 looked at earlier. Probably this -- one of these
7 two. But I will show you Exhibit 473, first.
8 Take a look at these two. Okay. Have you had a
9 chance to look at that?

10 A. Yes, I have.

11 Q. And is that the blood vial that looked the way it
12 looked when you got it?

13 A. No, sir.

14 Q. It's changed? The one you got was changed? How?

15 A. Well, I can't even verify that this is the same
16 vial, based on this photograph, either of these
17 photographs.

18 Q. Well, I think counsel -- we have had testimony
19 earlier, we can -- for your purposes, you can
20 assume that that is the same vial that ultimately
21 made it to the FBI Lab, at least we hope, okay.

22 ATTORNEY GAHN: I will agree that the
23 witness can assume that that's the vial that came
24 from the Manitowoc County Clerk of Court's Office
25 and was sent to the FBI for your analysis, Doctor.

1 Q. (By Attorney Buting)~ Okay.

2 A. Yes.

3 Q. So, then, my question is, the condition, the way
4 that vial looks to you right now in that picture,
5 is that consistent with the -- is that consistent
6 with the way the vial looked on that day that you
7 saw it?

8 A. If I can refer to my notes.

9 Q. Sure.

10 A. Again, I really can't tell fully because I can't
11 see all the markings on the vial to verify that
12 it's marked exactly the same as when we received
13 it. But when we -- when we received the vial of
14 blood, it came in a different container, as was
15 indicated earlier. It was sealed into a shipping
16 container like this and it has a label on the
17 side that I don't see in either of these
18 photographs. Additionally, the top was sealed
19 with evidence tape on here. Let me correct that
20 last statement, the vial itself was not sealed
21 with evidence tape, it's this outside container
22 that was.

23 Q. Okay. Let me put this up on the screen for you,
24 for the jury. Is this the same exhibit you are
25 looking at right now.

1 THE COURT: I'm not sure your microphone is
2 on, Mr. Buting.

3 ATTORNEY BUTING: Sorry.

4 Q. (By Attorney Buting)~ Is this the same exhibit
5 that you are looking at right now? Does it look
6 the same?

7 A. No, sir, I believe that's a different photograph.

8 Q. Let me see the photograph, please.

9 A. Yes.

10 Q. All right. Let's try this one. Okay. I think
11 counsel have agreed we have got Exhibit 473 up on
12 the screen now. Let me ask you, when you did
13 open up the vial, or the packaging, and found the
14 purple vial of blood that said -- or that was
15 reported to you to be Steven Avery's, did it
16 appear to you that the vial had been clearly
17 opened at some time?

18 A. Yes, it did.

19 Q. Okay. And is that, in part, because around the
20 edge, as I have zoomed in on this exhibit of the
21 stopper, there appears to be some red blood that
22 has actually seeped in onto the stopper itself?

23 A. That's exactly right, yes.

24 Q. Okay. And that's a clear sign that at some point
25 the top had been opened, right?

1 A. Yes, it is.

2 Q. All right. Your opinions that you expressed
3 today are to a reasonable degree of scientific
4 certainty, right?

5 A. Yes.

6 Q. And just as you would do in any other case where
7 you are expressing an opinion to a jury, correct,
8 as an expert?

9 A. Yes, based on the science, yes.

10 Q. All right. Well, let's talk about another case
11 that you were involved in in which a protocol was
12 developed rather hurriedly, not the O.J. one that
13 you were not involved in, but a fellow by the
14 name of Dr. William Sybers, does that ring a
15 bell?

16 A. Yes, it does.

17 Q. Correct me if I'm wrong, but Dr. Sybers was a
18 medical examiner in the State of Florida, whose
19 wife passed away and nine years later was charged
20 with her murder for poisoning -- allegedly
21 poisoning her with a particular sort of muscle
22 paralyzing drug, correct? Is that a fair
23 summary?

24 A. Yes.

25 Q. Okay. And so what they did was, they dug up poor

1 Mrs. Sybers' body and took samples from the
2 tissue of -- the embalmed tissue of her remains,
3 correct?

4 A. Yes, they did.

5 Q. And then, they went to you, to develop a protocol
6 to test for a particular drug called
7 succinylcholine, that's s-u-c-c -- maybe you can
8 spell it. S-u-c-c-i-n-y-l-c-h-o-l-i-n-e, is that
9 right?

10 A. No, that's wrong.

11 Q. Okay. Tell us, how do you spell it?

12 A. No, that's the correct spelling, your statement
13 was wrong.

14 Q. Okay. You developed a protocol to develop -- in
15 an effort to determine whether, from a metabolite
16 that could be found in someone's postmortem
17 fluids, one could determine if the parent drug
18 had been administered at some earlier time?

19 A. I need you to repeat that before I can respond.

20 Q. You developed a protocol, in that case -- First,
21 let me step back. What you were trying to do,
22 what you were asked to do, was to test these
23 postmortem fluids, a subject which, by the way,
24 you continue to testify on now, in 2007, right,
25 or six?

1 A. Again, that's a multi-question question, I can't
2 respond to it.

3 Q. They train you well on courtroom testimony, don't
4 they?

5 A. I'm just answering your questions --

6 Q. Okay.

7 A. -- truthfully, sir.

8 Q. You were correct that was a multi -- that was a
9 bad question, it's getting late. You still teach
10 at conferences about postmortem fluids, right?
11 The testing of postmortem bodily fluids?

12 A. I do, that's part of my job.

13 Q. Right. And it was back in 1999, I think, right?

14 A. Yes, it was.

15 Q. And you were asked in that case to try and see if
16 you could come up with a test protocol that could
17 determine whether or not Dr. Sybers had poisoned
18 his wife with a particular drug; is that right?

19 A. Not entirely correct, no.

20 Q. Well, you're going to fight me all the way on
21 this I can see. You developed a protocol to try
22 and find out whether the prosecution's theory
23 that Dr. Sybers had poisoned his wife was correct
24 or not, correct?

25 A. No, sir. That's never the intent of developing a

1 procedure is to determine someone's guilt or
2 innocence. It's to simply analyze for the
3 presence of a chemical in evidentiary material.
4 We don't decide the guilt or the innocence.

5 Q. Well, thank God for that.

6 ATTORNEY GAHN: Objection, your Honor.

7 THE COURT: Sustained.

8 Q. (By Attorney Buting)~ What you were trying to do
9 was to test bodily fluid that had been embalmed
10 nine years earlier and draw some conclusions
11 about whether or not one could make an assessment
12 of whether this parent drug had been administered
13 to the person before they died, correct?

14 A. If I can correct your question a little bit, move
15 things along. We tested, not postmortem fluids,
16 but we tested postmortem tissues, heart, kidney,
17 lung, fat, muscle, as I recall. We were asked to
18 develop the protocol to determine whether or not
19 a chemical called succinylmonocholine,
20 s-u-c-c-i-n-y-l-m-o-n-o-c-h-o-l-i-n-e, was
21 present in these tissues, because another
22 laboratory had found them and we were asked to
23 verify whether or not that laboratory had indeed
24 identified this particular chemical.

25 Q. Okay. And your testing indicated a positive

1 finding for succinylmonocholine in the victim's
2 kidney, correct?

3 A. That is correct.

4 Q. And that particular molecule is a metabolite of
5 the drug succinylcholine, correct?

6 A. Yes, it is.

7 Q. And your testimony was employed, by the
8 prosecution, to obtain a conviction of Dr. Sybers
9 for the murder of his wife by means of the
10 injection of this succinylcholine, correct?

11 A. I did pros -- I did testify for the prosecution
12 in that case, that's correct.

13 Q. And you rendered opinions to a reasonable degree
14 of scientific certainty, didn't you?

15 A. I believe I did. If I rendered an opinion, I
16 would make sure it was within a reasonable degree
17 of scientific certainty.

18 Q. Just as you are today?

19 A. Yes, sir.

20 Q. To a jury just as we have here today, correct?

21 A. To a jury, yes.

22 Q. And that jury convicted Mr. Sybers, correct?

23 A. Yes, they did.

24 Q. The conviction, however, was reversed by the
25 Court of Appeals in Florida four years later,

1 right?

2 A. I don't know when, but I do know that they
3 reversed the decision on appeal.

4 Q. And only after that, when additional tests were
5 done on other tissues or fluids from other
6 deceased persons, was it determined that that
7 very same metabolite you found in Mrs. Sybers'
8 body was also in theirs; isn't that right?

9 A. That's correct. I would like to elaborate on it.

10 Q. You can elaborate in a moment and I'm sure you
11 will take any opportunity you can. But the point
12 being, your protocol was hurriedly developed for
13 the trial of Mr. Sybers' case, right? Mid-trial,
14 while the trial was going on, yes or no?

15 A. I'm trying to answer, but you are not giving me a
16 chance, sir. Yes, it was developed for the
17 Sybers' case.

18 Q. Okay.

19 A. It was a court ordered test that we were --

20 Q. Okay.

21 A. -- told to do.

22 Q. And you didn't decline, right? You could have
23 said, no, we don't have enough time to do this?

24 A. I couldn't decline in that instance, no.

25 Q. Well, did you tell the Court, hey, I just don't

1 have time to do this properly and scientifically?

2 A. No, sir, I was told that the Attorney General of
3 the United States was going to call me and
4 request that we do this exam, so I decided that I
5 would do it.

6 Q. Did you tell the jury that you were under
7 pressure to do -- to develop a test protocol that
8 you didn't feel comfortable doing?

9 A. No, I never -- never told the jury I was
10 uncomfortable developing the test protocol.

11 Q. Okay.

12 A. But I do believe I informed them it was done
13 under rather rushed circumstances.

14 Q. Okay. And you never told them that there was any
15 concerns about the scientific validity of the
16 opinions you were expressing either, were you,
17 correct?

18 A. There were no concerns, in my opinion, about the
19 scientific certainty of what we did in
20 that particular case.

21 Q. Okay.

22 A. And I stand by it today.

23 Q. Okay. Except that years later, when you tested,
24 as you should have all along, other tissues from
25 other bodies, you found the same metabolite?

1 A. Well, it's a complex question; I can't just
2 answer yes or no. We did test tissues from other
3 bodies when we worked to develop the method and
4 validate the method before it was used on
5 specimens in the Sybers case, we did do that.

6 But what happened was years later we got
7 a new instrument into our laboratory and we had
8 additional cases where we were requested to
9 analyze for the same analyte. And when we
10 started to move the method over to the new
11 instrument, which was more sensitive than the old
12 method, we started to find this chemical there at
13 very low levels in bodies that we knew had never
14 been exposed to that particular drug.

15 So that was then reported immediately to
16 the investigators in Florida. We did all of that
17 work ourself. We reported it to the
18 investigators and informed the Court of our
19 findings.

20 Q. Now, just out of the goodness of your heart, you
21 kept testing these samples, is that what you are
22 saying? There was no ongoing post-conviction
23 litigation that was involved in this case?

24 A. No, sir, not at all. As I testified, we
25 continued to test specimens because we were

1 requested to do this examination on other cases
2 in the future.

3 Q. Okay. And what happened was this, you expressed
4 an opinion, in court, to the jury, that the
5 presence of the metabolite, succinylmonocholine,
6 proved to a scientific certainty, the prior
7 presence of or injection of succinylcholine,
8 correct?

9 A. Can I see what you are reading from, please.

10 Q. I just asked you the question?

11 A. I don't recall. I would have to see what you are
12 reading from.

13 Q. Okay. Well, I will show you this in just a
14 moment. In any event, several years later, the
15 attorney general, or the prosecutor in Florida,
16 submitted what's called a notice to the court,
17 that is marked as the Exhibit 439, correct?

18 A. I don't know what that form is called, I'm sorry.

19 Q. Well, have you seen this exhibit before?

20 A. First time I saw it was yesterday.

21 Q. Okay. But you saw it yesterday?

22 A. Yes.

23 Q. Okay. I'm going to read you a sentence and you
24 tell me in you agree or disagree with it. The
25 purpose of this filing is to notify the Court and

1 the defendant that recent scientific testing,
2 conducted by National Medical Services and the
3 Federal Bureau of Investigation Laboratories, has
4 discovered that the findings specifically related
5 to this defendant and the testimony of the
6 experts from each of these laboratories, though
7 believed to be correct at the time of the
8 testimony, can no longer be relied upon.

9 The findings of the presence of
10 succinylmonocholine in the specimens tested are
11 believed to be accurate and correct; however, the
12 opinions that the succinylmonocholine proves, to
13 a scientific certainty, the prior presence of, or
14 ingestion of, succinylcholine are not correct,
15 end quote.

16 A. I disagree with that statement.

17 Q. You do? Oh, this is the ***State of Florida vs.***
18 ***William Sybers***, correct?

19 A. Yes, it is.

20 Q. Okay. Prosecutor apparently agreed with it,
21 correct?

22 A. I think you would have to ask the prosecutor; I
23 don't know.

24 Q. Okay. Well, would you like to see the signature
25 of the State's attorney on this document?

1 A. Yes.

2 Q. Do you see that?

3 A. Yes.

4 Q. Okay. By the way, National Medical Services is
5 the lab that you interned at, correct?

6 A. I did a three month intern there while I was
7 working on my master's in 1987.

8 Q. And in the trial of that case, you and Dr. Kevin
9 Ballard, from that lab, were both testifying for
10 the prosecution, correct?

11 A. Yes, we were both called by the prosecution to
12 testify in that case, that's correct.

13 Q. Do you know how many years Mr. -- or Dr. Sybers
14 spent in prison before the -- before these tests
15 proved to disprove that original thesis?

16 A. I believe he's still in prison, sir.

17 Q. Well, did you ever go apologize to Dr. Sybers?

18 A. No, sir, I did not.

19 Q. Did you ever send a letter or apology to the
20 jurors who convicted him, for giving them an
21 opinion that was later retracted by the
22 prosecutor himself?

23 A. No, because I believed my original testing was
24 accurate, that the specimens did contain what I
25 said were in those specimens, which was

1 succinylmonocholine.

2 Q. And that your opinion was that the presence of
3 that proved poor Mrs. Sybers had been injected by
4 the parent drug?

5 A. And that opinion, of course, was based on the
6 research that was available at the time.

7 Q. And later research proved your opinion to be
8 wrong; isn't that right, sir?

9 A. Not exactly. Later research, with more sensitive
10 instrumentation that was not used in the Sybers
11 case, proved that we were able to find traces of
12 this chemical, now, when we used a more sensitive
13 approach than we actually used in this case.

14 Q. So, later science and instrumentation proved your
15 opinion, offered to the jury to a reasonable
16 degree of scientific certainty in that case, was
17 wrong, correct?

18 A. No, sir. I believe all it did is actually
19 confuse the issue.

20 Q. Just like you are doing here today in Mr. Avery's
21 case, correct?

22 A. I hope I'm not confusing the issue, sir.

23 Q. Well, I hope so too.

24 ATTORNEY BUTING: Thank you, sir that's all
25 I have.

1 THE COURT: Mr. Gahn, any redirect?

2 ATTORNEY GAHN: Yes, your Honor, just a
3 little bit.

4 **REDIRECT EXAMINATION**

5 BY ATTORNEY GAHN:

6 Q. Dr. LeBeau, will you, please, explain to the
7 jurors how you became involved in the Sybers
8 case, what transpired, and how it was finally
9 resolved?

10 A. Yes, I will. There was an investigation of a
11 medical examiner named William Sybers, in the
12 State of Florida. It was a very long ongoing
13 investigation where there was a great deal of
14 evidence -- the investigators felt there was a
15 great deal of evidence against this forensic
16 pathologist in the death of his wife. And the
17 investigation lasted approximately 10 years.
18 Because he was a medical doctor --

19 ATTORNEY BUTING: Judge, I'm going to
20 object, unless this is knowledge that he's acquired
21 on his own, from his involvement in the case, it's
22 hearsay and it's irrelevant. It's at least hearsay.

23 THE COURT: I think the background of the
24 case is already established and the witness should
25 move onto his role in it and what he knows happened

1 afterward, if we haven't heard it already.

2 A. The laboratory in Pennsylvania was involved in
3 this case and they analyzed those specimens from
4 her exhumed body for the presence of every single
5 chemical known to man. And they found the
6 presence of this chemical called
7 succinylmonochole. And in that, they concluded
8 that that would -- that chemical was a metabolite
9 that comes from succinylcholine. And that was
10 very well established in the research that dated
11 back into the '50s.

12 But because they were the only
13 laboratory that did this analysis and because
14 they had some prior evidence rejected by the
15 Court on that particular case, the Court ordered
16 the prosecution to find another laboratory to
17 verify the findings of the laboratory out of
18 Pennsylvania and they called upon us to do so.

19 So we developed a method -- quickly
20 developed a method to try to identify the
21 presence of this chemical, succinylmonochole,
22 in tissues, which is actually one of the most
23 difficult types of analyses to do. And we did
24 identify the presence of this chemical in some of
25 the same tissues that the laboratory in

1 Pennsylvania found it in, but not all of them.
2 And I testified to that in the trial, that we
3 were not able to find it in all those tissues and
4 that our method was not as sensitive as the
5 method that was used by the laboratory in
6 Pennsylvania.

7 I did conclude, at that trial, that the
8 only known source of succinylmonocholine, at the
9 time, came from injections of the parent drug,
10 succinylcholine. And I testified to that. We
11 did validate the method before it was put into
12 use. We ran negative tissues from other bodies
13 that we knew had never been exposed to
14 succinylcholine or succinylmonocholine.

15 Then, in the years after the trial and
16 the conviction, we were continuing to get
17 requests from other agencies that were claiming
18 that that same laboratory in Pennsylvania had
19 found the presence of this same chemical in old
20 cases, unclosed cases. And after awhile I
21 started to get concerned, because it didn't make
22 sense to me that this very unique drug would be
23 used in so many homicide cases.

24 So we started testing, using a new
25 instrument. And we transferred the method over

1 to this new instrument that was much more
2 sensitive than what we had used in the past. And
3 in the validation steps for the transfer, we ran
4 some blank tissues again, as we did before we
5 used it in the Sybers case. But this time we
6 started to find small, small amounts of the
7 chemical, succinylmonocholine.

8 And we -- as soon as we finished that
9 and we verified the findings, we consulted
10 heavily with the laboratory in Pennsylvania and
11 we concluded that this was present in very trace
12 amounts, naturally, in our bodies, at least in
13 postmortem specimens. So we were the very first
14 ones to identify this.

15 And we reported it immediately, not only
16 to the prosecutor in that case, but prosecutors
17 in other cases. And we also immediately put a
18 letter into the *Journal of Analytical Toxicology*
19 so that that information would be immediately
20 available to anyone else that may be doing this
21 testing. So my opinion at the time, I feel, was
22 correct. At the time, the only known source for
23 succinylmonocholine came from the parent drug
24 succinylcholine.

25 Q. And it was your testing for this chemical later

1 on that you notified the Court that the
2 technology that you had in place now was finding
3 it?

4 A. That's exactly right.

5 Q. And can you tell this jury how was the Sybers
6 case resolved.

7 A. My understanding is --

8 ATTORNEY BUTING: Objection, the -- we
9 can -- the Court can take judicial notice of how the
10 matter was ultimately resolved. And unless this
11 witness was involved in the resolution, I don't know
12 how that is relevant.

13 ATTORNEY GAHN: Well, your Honor, I will
14 take the exhibit that defense attorney has been
15 reading from and I would like to get a complete
16 reading of the exhibit.

17 THE COURT: Is the exhibit available?

18 ATTORNEY BUTING: Yes, it is.

19 Q. (By Attorney Gahn)~ This is Exhibit 439 that you
20 have seen before?

21 A. Yes, it is.

22 Q. And do you know, how was this case resolved
23 against Mr. Sybers?

24 A. Dr. Sybers pled guilty.

25 Q. Thank you.

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ATTORNEY GAHN: That's all I have.

RECROSS-EXAMINATION

BY ATTORNEY BUTING:

Q. Dr. Sybers pled guilty to time served and was released immediately, wasn't he?

A. That I don't know, sir.

Q. You haven't researched it? You didn't look that up; is that what you are saying? Do you know that Dr. Sybers was released from prison, in 2003, as a result of entering a plea that was time served, after this notice was filed with the Court?

THE COURT: I'm going to intercept here and stop with your comment. I think the relevance of whatever happened to him later is borderline. I believe the testimony that's relevant to this case is already in the record.

ATTORNEY BUTING: All right.

THE COURT: Members of the jury, we're going to excuse you for today. I apologize for running late. Again, I will remind you not to discuss the case with each other or with anyone else and we'll see you tomorrow morning.

(Jury not present.)

THE COURT: You may be seated. Counsel,

1 I'm not going to take up any of the outstanding
2 motions at this time, but we probably should deal
3 with Exhibit 466, the PowerPoint presentation of
4 this witness that the defense objected to -- defense
5 objected to the admission.

6 ATTORNEY BUTING: I object to it because it
7 really draws a conclusion that -- of a dripping -- a
8 finger dripping blood, when the State is trying to
9 argue that that may have been the source of the
10 blood is highly prejudicial and apparently without
11 any foundation from this witness, according to his
12 own testimony.

13 THE COURT: Mr. Gahn.

14 ATTORNEY GAHN: I think that the witness --
15 that the doctor testified that his PowerPoint
16 demonstration would be helpful to the jury. And I
17 think he explained that on cross-examination that
18 the only reason he used that was because it was in
19 the Microsoft. I really don't think it has any
20 impact.

21 THE COURT: In the Court's mind, the jury
22 has already seen it. He's given a satisfactory
23 explanation. I believe the jury understands it was
24 used for illustrative purposes only and it is
25 consistent with the opinion that he gave, so I'm

1 going to admit Exhibit 466.

2 ATTORNEY BUTING: I would also move to
3 admit whatever -- what are those two, the curriculum
4 vitae, No. 480, of Mr. Brewer -- Dr. Brewer, oh,
5 and No. 479, which is the original intake internal
6 communication document.

7 THE COURT: Are there any exhibits that you
8 marked that you are not requesting be admitted?

9 ATTORNEY BUTING: I don't believe so. I
10 think we have introduced everything else.

11 THE COURT: Any objection from the State to
12 any of the marked exhibits being admitted?

13 ATTORNEY GAHN: Only to the CV of
14 Dr. Brewer, I don't what the purpose of that is.
15 Dr. Brewer did not testify.

16 THE COURT: He did not testify, but there
17 was testimony he played a role in the testing of the
18 blood, so I'm going to allow that exhibit as well.
19 Anything else today?

20 ATTORNEY STRANG: Are 475 through 478 in?

21 ATTORNEY GAHN: Yes.

22 ATTORNEY STRANG: They are, okay.

23 THE COURT: All right. We'll see you
24 tomorrow morning.

25 ATTORNEY GAHN: Your Honor, may Dr. LeBeau

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go back to Virginia?

THE COURT: Assuming the defense isn't asking him to say.

ATTORNEY BUTING: No, we're not.

THE COURT: He is excused.

THE WITNESS: Thank you, your Honor.

(Proceedings concluded.)

1 STATE OF WISCONSIN)
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2 COUNTY OF MANITOWOC)

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I, Diane Tesheneck, Official Court Reporter for Circuit Court Branch 1 and the State of Wisconsin, do hereby certify that I reported the foregoing matter and that the foregoing transcript has been carefully prepared by me with my computerized stenographic notes as taken by me in machine shorthand, and by computer-assisted transcription thereafter transcribed, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge and ability.

Dated this 2nd day of January, 2008.

Diane Tesheneck, RPR
Official Court Reporter

'05 [1] 36/22	32/21 33/5 33/15 37/22 37/25	453 [1] 20/2
'06 [6] 25/3 29/9 38/12 38/19	39/19 40/1 41/6 56/16 57/12	454 [2] 20/13 22/22
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'50s [1] 255/11	57/13 58/15 59/25 63/8 140/10	457 [4] 2/15 22/8 22/22 35/21
'90s [1] 74/21	140/11 157/19 160/21 163/21	458 [2] 108/16 110/18
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142/7 142/8 142/9 142/9 146/21	24 [1] 214/7	24/1 24/21 28/25 35/22
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10:15 [2] 45/12 45/16	28th [2] 213/8 213/11	71/10 71/14 72/5 72/7
10th [1] 234/15	29th [1] 20/7	468-469 [1] 2/17
11 [8] 36/24 208/2 209/22 210/7	2:30 [2] 160/5 160/6	469 [5] 2/17 42/3 44/4 44/19 46/3
210/9 214/9 224/7 225/15	2nd [2] 12/4 263/15	47 [1] 236/2
118 [8] 17/8 18/23 19/11 20/4	3	470 [4] 2/18 63/17 63/18 63/19
23/7 23/19 24/2 29/4	3/5/07 [3] 20/1 20/12 23/4	471 [6] 2/18 71/3 72/2 72/3 72/5
12 [4] 7/3 7/18 96/10 238/24	30 [2] 94/12 115/14	72/7
12th [2] 20/23 21/21	300 degrees [1] 89/12	471-474 [1] 71/9
13 [2] 130/2 130/3	31st [2] 178/14 179/11	472-474 [1] 2/19
137 [7] 2/10 2/14 2/14 2/19 2/19	326 [1] 207/14	473 [2] 239/7 241/11
2/20 2/20	33 [9] 59/17 212/23 213/4 218/21	474 [7] 2/19 71/9 71/11 71/14
13th [6] 179/9 179/10 179/22	219/7 220/25 220/25 222/21	71/16 72/2 72/3
185/14 185/22 185/24	222/21	475 [3] 99/3 136/22 261/20
14 [6] 57/9 59/25 63/8 179/5	332 [6] 95/2 95/4 95/11 97/25	475-477 [1] 2/19
179/11 179/13	98/1 98/13	476 [1] 98/17
14th [3] 60/12 178/15 178/24	334 [3] 95/3 96/15 97/10	477 [2] 2/19 99/14
15 [6] 57/9 78/22 83/15 138/11	336 [3] 95/3 95/20 97/17	478 [5] 2/20 104/3 104/6 136/22
201/10 201/15	35 [3] 2/15 2/15 2/16	261/20
15 feet [1] 68/7	36 [4] 2/5 2/15 2/15 2/16	479 [3] 2/20 176/4 261/5
15th [6] 178/22 178/23 179/22	381 [2] 1/5 3/3	48 [2] 193/1 236/2
185/15 186/1 203/7	4	480 [4] 2/21 195/21 195/23 261/4
16 [4] 2/4 78/7 172/12 214/19	40 [1] 78/13	49 [1] 236/2
17 [1] 1/4	40 percent [1] 222/20	4:30 [1] 27/5
19 [1] 142/6	42 [1] 2/17	5
190 [2] 236/4 236/6	43 [1] 193/13	50 [1] 78/13
196 [1] 2/21	433 [2] 79/2 136/23	500 [1] 206/13
1985 [6] 18/1 40/3 41/6 43/13	433-437 [1] 2/14	50th [1] 129/19
44/9 57/15	434 [4] 121/13 124/6 136/22 204/8	526 [1] 162/7
1987 [1] 252/7	435 [4] 136/11 136/13 207/18	5th [1] 170/9
1990's [1] 115/21	207/19	6
1994 [1] 73/16	436 [7] 121/22 121/24 121/25	60 [1] 138/6
1995 [4] 20/7 20/14 20/23 21/21	124/22 147/14 155/6 157/22	624 [1] 22/16
1996 [4] 22/10 61/7 208/5 214/14	437 [10] 2/14 121/22 122/5 122/6	63 [1] 2/18
1997 [7] 122/4 122/8 125/16	125/2 136/22 151/19 154/14 155/7	64 [1] 2/6
132/24 146/4 155/7 189/12	157/22	66 [1] 2/7
1999 [2] 145/7 244/13	439 [2] 250/17 258/19	7
1st [1] 178/10	441 [3] 199/21 199/22 222/16	71 [2] 2/18 2/19
2	444 [1] 216/3	72 [6] 2/17 2/17 2/18 2/18 2/18
20 [2] 78/23 138/11	447 [5] 26/2 26/3 26/6 28/25	2/18
20 feet [1] 68/8	35/22	73 [1] 2/9
20 percent [1] 121/2	447-451 [1] 2/15	7:30 p.m [1] 14/2
200 [4] 233/6 234/14 235/13	448 [5] 27/8 27/9 27/14 28/5	8
237/13	28/17	85 [8] 17/8 18/22 19/11 20/3 23/7
2000 [1] 73/14	449 [2] 27/19 28/3	23/19 24/2 29/4
2003 [3] 17/13 18/12 259/10	45 [3] 31/24 233/16 234/24	8:30 [2] 27/4 27/5
2004 [2] 89/2 93/21	450 [1] 28/8	9
2005 [19] 16/10 24/22 29/22 31/17	451 [8] 2/15 28/19 28/20 28/25	90s [1] 84/17
	35/22 60/10 71/16 71/16	
	452 [4] 18/19 19/8 35/21 36/7	
	452-457 [1] 2/15	

9	add [1] 234/12	174/8 201/15 208/8 213/10 215/15
9th [1] 171/13	added [3] 90/21 126/1 235/2	air [1] 229/24
A	addition [1] 55/4	Airborne [1] 27/10
A-10 [4] 7/2 7/18 95/17 98/15	additional [8] 12/9 12/11 71/25 74/19 81/7 98/11 247/4 249/8	alerted [1] 69/9
A-12 [3] 7/3 7/18 96/10	additionally [5] 80/17 125/17 126/1 223/1 240/18	alkaline [1] 210/25
A-8 [5] 7/1 7/18 95/8 95/19 95/20	additive [1] 91/20	allegation [6] 79/21 79/24 80/10 147/1 176/20 178/3
abbreviate [1] 81/6	address [3] 9/24 14/19 220/21	allegations [7] 146/19 146/20 146/23 146/25 172/4 173/4 173/14
ability [6] 4/22 5/17 131/3 142/12 215/21 263/14	addressed [7] 9/8 20/15 20/16 20/25 22/11 218/17 218/18	allegedly [1] 242/20
above [4] 21/12 21/25 26/9 206/9	adequate [1] 238/8	allow [17] 4/2 4/3 12/19 51/24 53/25 56/17 66/1 91/1 120/4 148/20 148/20 206/12 231/19 231/24 233/13 234/24 261/18
absent [2] 4/14 4/19	adjust [1] 203/11	allowed [7] 4/7 39/4 55/21 196/20 203/14 237/12 237/15
absolute [2] 223/13 237/25	administer [1] 16/13	allowing [3] 4/23 29/13 39/1
absolutely [9] 37/23 89/7 89/17 122/22 155/5 163/12 175/18 183/21 186/8	administered [2] 243/18 245/12	allows [3] 83/16 195/13 205/24
absorbed [1] 225/2	admissible [1] 3/25	alluded [1] 218/18
absorbent [2] 224/18 224/19	admission [3] 136/20 136/22 260/5	almost [1] 214/16
abundant [1] 94/13	admit [2] 261/1 261/3	alone [1] 140/6
Academy [1] 76/8	admitted [11] 2/13 36/3 36/13 72/4 72/12 97/3 103/9 137/1 137/16 261/8 261/12	along [9] 3/19 4/3 93/5 126/20 127/3 129/11 194/9 245/15 248/24
accept [4] 73/21 79/15 160/2 170/20	adopted [1] 185/25	already [17] 6/15 70/7 95/4 96/16 111/1 156/9 192/14 214/16 220/8 222/22 222/22 227/18 230/23 254/24 255/1 259/17 260/22
accepted [3] 200/18 217/6 219/25	advances [1] 4/23	although [1] 68/5
access [17] 5/1 6/5 26/10 26/12 29/13 43/2 53/4 53/5 55/5 55/14 55/22 56/9 64/4 65/3 65/14 65/16 65/25	advised [1] 96/23	always [4] 101/9 120/19 169/3 181/3
accessed [4] 12/4 12/5 30/21 67/14	advisement [1] 12/1	America [5] 21/17 21/19 27/16 88/15 144/22
accessing [1] 30/15	affect [1] 203/25	American [2] 76/8 77/11
accomplish [1] 119/12	affecting [1] 203/23	among [1] 102/13
accordance [1] 135/20	affects [2] 165/20 223/14	amount [11] 83/23 107/19 115/14 118/11 118/22 159/13 194/11 194/19 207/8 237/16 239/3
according [3] 94/1 165/1 260/11	affixed [3] 19/19 20/8 22/24	amounts [4] 132/5 134/15 257/6 257/12
accredit [1] 77/6	afternoon [2] 137/19 137/20	analogy [1] 82/22
accrediting [1] 163/11	afterward [2] 144/7 255/1	analyses [7] 100/13 106/13 133/9 133/19 194/8 195/4 255/23
accreditation [2] 77/13 77/18	afterwards [2] 60/3 148/13	analysis [55] 21/7 22/15 27/24 73/22 79/18 82/1 82/9 96/3 101/14 107/11 107/13 107/25 109/21 110/11 112/19 113/5 115/25 117/1 118/9 120/18 120/24 121/25 124/20 125/15 125/21 125/22 126/24 128/18 128/20 129/12 129/16 130/3 130/8 131/11 133/2 134/6 138/18 139/12 139/15 139/21 140/1 141/15 143/7 145/23 168/19 175/23 176/14 182/16 195/15 196/12 207/5 218/11 219/12 239/25 255/13
accredited [5] 76/23 76/25 77/1 77/9 77/14	again [68] 12/18 14/5 33/15 76/6 80/21 82/14 86/3 86/14 89/9 90/12 92/24 93/21 93/25 96/16 97/10 97/14 98/7 98/12 99/1 99/12 99/17 101/15 104/10 109/11 109/25 111/14 111/16 111/17 112/15 114/10 114/14 114/24 115/12 117/10 117/22 127/2 127/4 128/12 128/17 129/12 130/16 131/24 132/9 134/1 148/22 150/11 150/21 152/7 152/15 154/2 156/24 158/5 158/21 159/8 160/8 166/9 169/23 187/23 201/19 211/11 216/11 226/18 234/15 238/21 240/10 244/1 257/4 259/21	analyst [1] 221/17
accrediting [2] 78/4 128/18	against [11] 25/13 41/7 84/10 146/20 146/23 172/11 173/15 175/1 184/15 254/15 258/23	analyte [1] 249/9
accredits [1] 77/10	agencies [1] 256/17	analytes [1] 131/12
accurate [4] 162/24 206/15 251/11 252/24	agency [11] 8/8 22/13 22/17 34/7 74/5 77/14 80/9 80/14 101/8 178/2 218/12	Analytic [1] 147/17
accurately [4] 110/19 111/21 129/17 129/20	agent [8] 39/12 85/16 86/17 95/1 98/10 107/18 170/17 170/24	analytical [34] 81/15 81/16 81/20 82/5 84/13 84/15 84/19 100/21 101/1 101/4 114/16 114/23 116/3 122/3 122/8 122/9 122/10 122/15 122/16 122/18 124/23 125/2 125/4 125/8 125/8 128/13 132/2 132/9 147/18 161/8 210/5 214/2 214/3 257/18
accused [4] 80/6 80/18 80/21 144/19	agents [5] 148/23 149/4 163/5 172/3 173/19	analyze [12] 74/1 77/23 79/7 116/22 117/21 126/25 127/5 131/25 170/21 235/7 245/2 249/9
acid [2] 85/15 91/12	ago [10] 14/5 39/10 115/22 142/7 142/8 142/9 163/23 163/24 172/12 212/23	analyzed [8] 93/22 101/18 101/18 101/19 110/5 115/20 154/5 255/3
acquired [1] 254/20	agree [11] 58/17 58/18 96/25 139/9 140/14 174/13 193/25 196/1 224/19 239/22 250/24	analyzing [4] 107/7 128/25 128/25
acquisition [1] 185/19	agreed [6] 12/13 161/10 162/12 170/20 241/11 251/20	
acquit [2] 142/24 143/4	agreement [4] 9/12 10/6 10/8 162/14	
acquitted [1] 5/23	agrees [2] 62/5 100/4	
across [1] 156/17	agricultural [1] 85/10	
active [5] 76/1 76/8 127/23 175/9 229/21	Ah [1] 143/23	
actively [1] 126/17	ahead [14] 5/22 25/13 41/3 67/17 70/19 105/16 139/1 152/14 159/22	
actual [14] 45/8 100/13 106/13 114/15 144/2 149/25 159/11 171/11 171/17 178/11 180/18 195/3 216/24 219/4		
actually [58] 13/14 14/14 25/6 34/24 43/19 43/22 47/24 61/4 61/14 62/14 72/6 86/11 88/6 101/2 102/8 103/18 106/8 107/6 109/24 115/12 117/8 124/3 125/11 125/25 127/2 132/18 143/20 168/17 171/13 178/24 179/19 183/23 186/6 193/13 194/5 194/19 201/11 203/17 206/3 206/13 206/20 211/17 211/23 212/23 213/8 217/2 220/3 222/3 222/18 223/19 228/17 233/6 235/1 238/24 241/22 253/13 253/18 255/22		

A		
<p>analyzing... [1] 135/22 Andrew [1] 32/23 Angeles [1] 143/22 angle [1] 61/19 annually [1] 76/17 another [30] 31/13 54/14 74/5 80/5 92/4 106/5 117/3 124/15 129/7 151/20 155/21 168/18 179/20 180/3 184/16 187/18 187/20 192/8 199/11 214/19 226/20 227/9 227/16 227/18 227/20 229/13 236/12 242/10 245/21 255/16 answer [24] 35/10 53/24 57/19 94/14 135/8 138/24 145/4 147/11 147/11 148/21 152/8 154/10 160/24 168/6 168/7 169/11 188/12 190/24 201/13 211/14 220/16 239/1 247/15 249/2 answered [3] 35/13 64/16 65/19 answering [3] 100/1 218/16 244/5 answers [3] 169/13 169/17 194/25 anticipate [2] 12/14 69/10 anticoagulant [2] 90/25 92/6 anticoagulants [1] 92/12 anxious [1] 137/21 anybody [8] 29/15 30/21 54/17 57/14 180/16 181/12 227/2 230/12 anyone [4] 31/17 157/11 257/20 259/22 anything [17] 6/12 34/24 42/16 58/22 66/19 72/13 94/8 121/17 150/5 168/15 173/23 177/1 184/2 191/10 209/9 236/13 261/19 anywhere [2] 155/16 176/22 apart [9] 83/22 83/24 87/3 89/4 89/13 92/3 192/15 212/8 212/14 apologize [3] 212/9 252/17 259/20 apology [1] 252/19 apparently [4] 104/15 158/2 251/20 260/10 appeal [1] 247/3 Appeals [1] 246/25 appear [3] 112/16 200/17 241/16 appearances [2] 1/11 3/6 appeared [6] 1/22 110/8 110/16 111/16 112/15 153/12 appears [7] 3/8 26/16 27/17 28/8 61/18 61/23 241/21 appellate [3] 5/16 5/16 41/16 applicable [1] 9/23 application [3] 4/15 4/20 5/12 applications [2] 164/17 237/7 applicator [1] 110/8 apply [2] 124/18 201/1 approach [3] 188/18 231/11 253/13 approaching [1] 126/6 appropriate [3] 16/14 73/24 164/5 approval [15] 179/15 179/17 180/19 186/7 186/9 186/10 186/23 188/5 188/11 188/13 188/20 204/1 204/6 204/7 220/17 approve [1] 188/15 approved [1] 186/22 approving [1] 188/3 approximate [1] 58/20 approximately [16] 34/20 68/1 78/13 121/2 143/15 146/21 148/13 151/1 163/23 163/24 172/12 234/15 234/21 234/22 235/13</p>	<p>254/17 April [2] 29/22 34/23 archive [1] 43/14 area [57] 13/25 18/16 25/11 25/21 26/19 26/20 26/21 35/5 43/14 43/18 44/21 47/18 49/3 49/7 49/8 49/11 49/12 52/12 53/1 53/8 53/19 54/11 54/11 56/25 64/15 65/21 67/1 67/11 67/13 67/15 68/3 68/13 75/8 80/8 98/22 99/19 107/4 107/8 109/3 110/15 111/5 111/8 111/22 113/7 113/16 118/16 118/19 123/12 127/13 139/20 140/19 149/14 192/24 194/4 232/13 232/15 232/16 areas [6] 8/5 8/12 9/2 80/2 94/22 232/11 argue [2] 14/11 260/9 argument [5] 11/20 11/21 11/23 14/8 14/13 arise [2] 9/10 11/15 arm [4] 8/8 208/4 214/14 229/22 Armor [1] 237/2 around [21] 38/19 49/20 63/4 84/11 84/12 88/19 93/4 94/7 107/9 132/5 132/6 140/8 144/14 171/9 172/3 178/9 194/15 205/11 232/17 235/9 241/19 arrest [1] 173/5 arriving [1] 111/18 article [32] 121/25 122/6 123/1 123/10 123/11 124/21 124/23 125/1 125/2 125/4 139/4 139/24 147/21 148/3 148/7 148/11 148/14 148/23 149/7 149/24 150/6 151/20 152/3 152/7 153/20 153/25 161/8 161/11 161/14 161/22 161/25 210/5 articles [15] 78/18 78/23 78/24 78/24 87/7 88/10 119/1 122/23 138/12 138/14 139/19 157/2 161/1 161/6 183/24 ASCLD [1] 77/13 aside [1] 106/23 asked [35] 18/21 37/22 51/16 56/23 57/7 64/13 66/13 67/6 74/1 77/22 120/24 124/21 140/19 140/21 141/22 142/10 152/12 156/6 161/5 167/2 167/22 168/2 168/8 174/23 189/10 189/13 191/6 211/14 215/2 215/13 243/22 244/15 245/17 245/22 250/10 asking [11] 36/3 41/21 41/23 72/4 72/6 95/18 99/25 151/3 151/4 207/10 262/3 asks [1] 47/10 aspect [1] 218/10 assault [6] 118/14 118/24 119/3 119/4 119/8 119/9 assaults [5] 120/7 120/13 139/12 140/10 140/13 assess [1] 117/9 assessment [1] 245/11 assign [2] 73/22 181/3 assigned [5] 52/25 57/25 99/12 100/20 193/14 assignment [1] 193/16 assist [1] 218/15 assistance [2] 79/18 116/3 assistant [1] 24/24 assisted [1] 263/10 assists [1] 218/14 associated [3] 116/24 132/15</p>	<p>151/25 Association [1] 76/5 assume [3] 191/3 239/20 239/23 Assuming [1] 262/2 assumption [2] 13/8 37/13 assurance [9] 74/9 186/15 186/20 186/24 187/19 187/24 188/6 200/6 204/2 assured [2] 69/16 70/1 assuring [1] 114/21 athletes [1] 85/5 attached [1] 216/8 attaches [2] 86/4 87/16 attack [2] 119/10 169/6 attempt [1] 15/7 attend [2] 76/12 76/16 attended [2] 34/1 66/6 attention [4] 19/7 23/11 32/20 48/9 attorney [22] 1/17 1/19 2/4 2/5 2/6 2/7 2/9 2/10 2/11 2/12 19/13 19/14 20/14 21/23 54/8 173/12 189/16 215/19 248/2 250/15 251/25 258/14 attorney's [3] 79/16 170/3 190/21 attorneys [10] 25/19 30/21 30/23 31/20 39/1 44/21 54/3 58/24 189/4 231/19 attribute [1] 132/21 attributed [2] 5/8 158/20 audio [2] 59/13 59/15 audit [3] 144/20 145/7 145/10 August [3] 38/12 38/19 122/8 author [4] 123/21 123/22 184/4 184/5 authored [6] 78/17 78/17 78/22 78/22 119/2 138/11 authoritative [1] 122/20 authors [15] 147/14 147/19 147/20 147/21 147/25 149/12 149/16 150/3 150/13 151/25 152/18 153/8 153/13 153/17 158/1 auto [4] 235/16 235/22 235/23 236/3 automatic [1] 65/25 automotive [1] 236/25 autopsy [1] 139/2 available [8] 5/18 7/13 7/17 114/21 218/20 253/6 257/20 258/17 average [1] 131/21 AVERY [42] 1/6 1/21 3/2 3/11 4/15 4/21 5/9 5/19 6/4 13/24 17/8 17/13 18/11 19/11 20/3 20/6 22/17 23/18 24/3 29/4 39/19 40/12 41/7 44/7 50/15 94/25 103/21 103/24 106/21 128/1 134/9 134/14 134/24 172/11 172/22 173/4 173/15 174/3 175/1 175/5 192/17 231/9 Avery's [17] 4/9 19/13 40/3 42/6 43/13 67/14 67/23 183/4 185/7 207/2 207/22 208/4 214/14 229/9 231/4 241/15 253/20 avoid [1] 132/12 aware [15] 13/23 41/15 42/7 56/5 172/13 189/10 189/13 209/10 209/13 209/16 210/10 210/11 211/2 212/3 238/22 away [3] 67/16 68/5 242/19 awe [1] 198/20 awhile [2] 92/5 256/20</p>

B		
bachelor's [1] 74/11	181/17 183/4 184/2 184/22 187/7	175/9 229/21
back [43] 11/18 15/16 30/15 41/5	198/3 225/16 225/22 243/19	blind [12] 184/20 184/21 184/22
44/13 45/2 47/18 47/20 49/3 50/3	245/13 249/4 250/19 252/14	191/13 191/16 191/19 191/23
50/19 53/1 54/11 54/25 55/9	252/14 256/11 257/4 258/20	191/24 192/1 192/13 192/18 193/2
62/22 67/8 67/11 69/5 69/22	began [5] 14/2 28/24 151/8 178/9	blindly [2] 123/15 184/9
71/20 71/24 72/13 78/2 78/3	178/11	blond [1] 49/2
90/10 102/21 115/3 123/19 123/24	begin [4] 32/22 112/18 137/1	blonde [1] 49/14
137/21 157/21 157/23 160/12	162/7	blood [134] 3/22 4/17 5/9 8/7
169/9 177/6 182/8 210/12 231/17	beginning [7] 18/18 24/23 30/19	10/10 10/11 10/12 10/13 11/7
243/21 244/13 255/11 262/1	31/4 33/18 154/20 178/9	27/12 28/10 28/21 39/20 39/21
background [6] 48/16 49/1 50/4	begs [1] 220/15	40/14 40/16 42/6 42/11 57/22
51/1 74/10 254/23	behalf [6] 1/12 1/14 1/16 1/18	62/22 69/13 69/13 69/19 70/4
backside [1] 28/9	1/20 3/12	88/21 88/23 89/19 89/20 89/21
bad [3] 174/17 195/2 244/9	behind [8] 13/25 44/25 48/12	89/23 89/24 90/20 91/1 91/9
Badly [1] 54/9	48/13 49/10 107/19 191/19 236/7	91/18 91/24 91/24 91/25 92/1
bag [1] 82/23	being [40] 11/8 12/5 23/23 27/14	92/3 92/7 92/10 92/14 92/15
bags [1] 102/5	28/1 29/24 30/4 30/11 38/3 43/13	92/18 93/1 93/4 93/8 94/13 94/24
bailiffs [6] 52/17 55/7 64/6 64/16	44/7 47/14 56/7 68/11 80/17	95/6 103/15 103/21 103/23 104/18
64/18 65/17	90/25 95/6 98/2 106/10 109/4	105/22 105/25 106/7 106/13
balance [1] 124/2	111/11 112/8 113/9 123/2 124/21	106/19 109/1 111/16 112/17
Ballard [1] 252/9	127/4 128/1 129/4 132/10 134/5	115/10 115/15 122/7 126/14
Baltimore [1] 74/19	158/5 158/7 162/24 185/20 194/10	126/19 126/22 127/1 127/17
bank [3] 116/18 116/19 143/21	226/6 227/4 232/14 247/12 261/12	127/22 127/25 128/1 128/2 129/8
bar [5] 105/3 105/7 105/9 206/10	believe [62] 12/5 19/8 19/12 19/14	129/9 129/18 129/18 130/9 130/10
231/14	24/13 27/11 31/23 33/1 33/13	130/12 130/14 130/17 130/18
base [2] 84/10 156/13	46/11 57/6 57/24 58/13 61/25	130/24 131/5 131/15 132/14
based [19] 18/2 29/1 124/7 124/25	62/6 65/19 71/23 80/24 112/23	132/14 133/22 134/4 134/12
128/12 128/15 128/17 134/16	115/6 125/10 142/6 143/17 146/18	134/13 134/24 139/7 151/20 173/6
134/17 134/18 147/22 148/3 148/7	148/6 150/7 152/23 158/2 159/23	175/9 175/12 176/19 192/17 207/2
184/7 185/3 215/4 239/16 242/9	166/11 171/10 174/5 178/11 179/8	207/22 209/23 210/2 210/10
253/5	181/15 181/16 184/17 201/13	212/21 213/23 214/4 214/9 214/13
basement [3] 18/15 43/9 43/10	208/3 209/3 209/15 210/6 214/7	214/16 215/14 223/21 225/20
basically [4] 81/1 124/17 128/20	217/5 218/14 220/4 226/25 228/11	226/17 226/19 226/24 227/3 227/5
235/23	228/19 229/10 229/16 237/22	227/7 229/9 229/18 230/11 230/22
basis [2] 97/3 190/19	238/15 238/23 241/7 246/15	238/2 239/11 240/14 241/14
batch [1] 125/22	248/12 252/16 253/18 259/16	241/21 260/8 260/10 261/18
Bay [4] 170/6 170/7 170/18 170/24	260/23 261/9	bloodstain [29] 7/4 88/25 95/22
Bear [1] 59/8	believed [4] 80/6 251/7 251/11	96/6 96/11 96/18 97/22 107/8
beat [1] 171/15	252/23	107/22 115/18 115/20 116/8
became [5] 36/21 38/21 79/10	believes [2] 69/14 70/12	126/15 126/21 127/11 141/19
120/22 254/7	bell [1] 242/15	155/25 156/22 157/14 158/9 167/4
because [77] 9/21 14/15 24/25	belong [1] 75/21	190/1 210/8 214/24 221/1 223/19
30/11 31/2 31/11 33/21 34/10	bench [2] 105/15 231/12	225/1 238/19 239/3
35/16 42/10 42/16 43/20 50/23	benefit [1] 142/11	bloodstains [36] 3/21 4/12 5/4 5/7
51/5 53/1 54/22 56/12 57/19	besides [4] 35/6 84/18 181/13	5/8 8/4 10/10 93/12 93/17 94/20
64/18 65/6 65/10 83/19 86/18	187/18	94/23 114/2 121/7 122/1 124/7
87/19 92/2 94/12 107/14 107/22	best [7] 29/6 29/9 31/16 35/14	134/22 135/3 140/23 141/6 141/16
110/6 115/13 115/24 117/17	62/2 171/3 263/13	141/23 142/12 152/5 153/10
120/16 123/9 131/4 131/9 132/8	better [1] 86/11	155/18 206/1 213/23 214/11 215/8
132/21 138/25 142/16 146/24	between [9] 9/6 9/9 40/1 57/12	218/20 219/7 219/12 221/18 226/3
155/1 155/15 157/23 162/14 167/8	67/22 132/15 176/11 179/22	228/14 228/23
168/20 171/17 185/6 187/10	190/12	blue [3] 83/3 83/13 229/8
188/14 191/2 191/9 192/14 198/19	beyond [2] 68/22 154/11	board [4] 50/25 76/2 77/13 135/9
211/16 215/19 217/9 221/17 222/8	bias [3] 184/10 184/14 192/2	bodies [6] 138/20 248/25 249/3
222/10 223/14 223/19 224/15	big [5] 18/14 30/12 43/4 51/5	249/13 256/12 257/12
230/9 232/20 240/10 241/19	202/24	bodily [2] 244/11 245/9
245/21 249/25 252/23 254/18	bind [6] 85/19 86/16 92/17 92/22	body [12] 77/1 77/5 77/10 78/4
255/12 255/13 256/21 260/6	223/18 227/15	92/21 128/18 165/11 166/10 169/5
260/18	binding [3] 86/18 227/8 227/9	243/1 247/8 255/4
become [1] 10/17	binds [3] 92/18 227/11 227/11	body's [1] 163/11
becomes [1] 5/18	biodegradable [3] 209/1 210/13	bogged [1] 231/23
Bedowle [2] 150/8 150/9	210/16	boil [1] 210/25
before [62] 1/9 15/4 18/16 25/8	biologist [1] 149/7	bomb [2] 85/2 169/5
29/22 29/25 32/14 36/24 37/17	biology [2] 22/11 88/1	book [2] 32/3 119/2
43/22 45/25 46/15 56/5 64/21	Biomedical [2] 22/14 27/23	books [1] 209/18
65/7 69/3 69/9 69/22 72/13 74/4	bit [19] 6/14 10/3 15/8 37/9 41/5	borderline [1] 259/15
75/10 78/9 80/25 88/8 89/13	41/23 44/13 85/11 88/17 138/1	bore [2] 162/3 204/14
90/14 91/8 94/15 102/9 102/17	154/11 162/22 181/16 191/14	boss [1] 175/19
102/24 104/22 109/18 121/1 136/8	208/10 208/11 217/22 245/14	bosses [1] 175/24
141/4 142/2 151/7 152/21 155/18	254/3	botching [1] 198/17
166/24 167/5 168/21 179/24 180/6	blame [1] 68/16	both [17] 5/3 6/16 10/4 11/5 12/25
	blank [2] 132/13 257/4	13/2 49/23 55/16 94/9 97/15
	bleeding [5] 126/17 126/17 127/23	122/25 155/7 155/9 161/5 232/5

B	50/21 68/5 166/18 calcium [12] 92/1 92/2 92/15 92/17 92/23 92/23 93/4 93/7 94/12 94/13 115/13 115/15 calendar [1] 15/1 called [34] 15/23 32/3 34/9 72/23 75/17 81/4 100/16 117/19 117/20 125/18 129/5 130/21 138/4 154/1 156/14 162/25 170/17 179/3 181/18 181/22 191/16 201/18 203/22 215/2 223/24 234/9 235/16 243/6 245/19 250/16 250/18 252/11 255/6 255/18 calling [1] 69/10 calls [3] 3/1 64/7 69/3 Calumet [5] 7/16 7/20 7/23 8/20 10/14 cannot [1] 118/7 capacity [2] 17/5 17/18 capillary [1] 154/1 car [5] 7/3 96/12 107/17 110/20 173/6 card [3] 61/18 88/22 88/22 cardboard [8] 18/8 24/15 24/17 25/8 44/5 47/1 50/8 61/14 cards [8] 212/21 213/4 215/14 221/3 221/23 223/2 223/20 224/2 care [5] 34/11 66/9 175/16 175/22 176/1 carefully [1] 263/8 carries [1] 233/25 carry [1] 24/18 carrying [1] 158/21 carryover [13] 132/1 132/12 132/17 132/20 152/24 157/24 158/2 158/7 158/16 158/18 158/23 223/9 223/22 case [240] 1/5 3/2 7/2 7/12 9/9 9/13 9/23 16/22 17/7 17/8 17/11 17/13 18/2 18/22 19/10 19/11 20/3 21/13 22/16 23/18 23/19 24/2 24/3 24/3 24/4 24/4 29/3 29/17 30/13 32/4 32/8 37/15 39/8 40/5 41/6 42/6 42/19 48/7 50/15 54/6 54/12 54/14 55/25 57/13 79/8 79/11 79/19 79/20 79/24 80/23 81/3 88/20 94/16 97/22 98/2 98/12 99/8 99/13 100/21 100/22 100/25 101/14 101/16 102/13 103/22 104/18 107/2 107/7 107/13 107/14 107/21 107/24 108/10 111/7 112/4 112/6 113/24 114/13 115/22 119/24 120/23 121/2 121/5 121/10 121/16 121/19 124/7 126/7 127/16 128/4 128/10 132/16 133/7 133/23 134/20 135/6 135/8 135/22 136/14 136/16 141/21 142/4 142/17 142/19 142/20 143/3 143/10 143/14 143/19 144/2 144/9 144/18 145/17 146/6 146/17 147/23 148/5 148/10 148/11 149/2 149/10 149/14 149/20 150/15 150/18 151/7 151/17 152/6 152/11 153/10 155/1 155/10 155/13 155/19 155/21 156/7 156/19 157/11 157/15 157/18 158/8 158/25 159/6 159/8 159/10 159/15 160/8 161/7 161/11 161/19 162/11 162/13 162/16 164/1 164/2 164/11 167/10 168/10 168/13 169/23 170/8 170/21 171/21 172/10 173/15 173/21 174/23 175/22 176/14 177/5	177/5 178/8 182/8 183/4 183/4 184/19 184/22 185/7 185/10 185/11 186/17 187/9 189/12 189/19 190/1 191/11 192/11 192/12 192/16 192/18 192/20 193/19 194/18 195/4 203/7 204/7 204/24 208/1 213/13 214/8 215/16 215/20 218/11 224/17 230/17 232/20 237/9 237/19 238/16 238/18 238/21 238/23 239/4 242/6 242/10 243/20 244/15 246/12 247/13 247/17 248/20 249/5 249/23 252/8 252/12 253/11 253/13 253/16 253/21 254/8 254/21 254/24 255/3 255/15 257/5 257/16 258/6 258/22 259/16 259/22 cases [30] 17/3 23/18 24/9 73/21 73/23 77/21 77/24 77/24 79/15 101/11 116/9 116/9 116/11 117/2 117/2 120/21 138/2 149/15 168/2 177/17 182/1 192/11 196/4 196/18 249/8 250/1 256/20 256/20 256/23 257/17 caseworkers [1] 182/13 cash [1] 25/1 cause [4] 130/8 131/1 131/13 131/17 caused [1] 85/4 CD [9] 7/2 9/13 97/22 98/2 99/8 103/5 112/6 113/24 137/11 ceiling [1] 48/15 cells [5] 91/24 91/25 92/3 92/7 92/16 Center [2] 181/23 183/2 central [2] 18/9 74/12 centrifuge [2] 233/19 235/3 certain [5] 13/13 18/22 30/16 86/19 233/13 certainly [9] 70/14 80/15 100/11 106/16 126/10 139/17 139/18 141/18 174/12 certainty [15] 38/17 40/6 54/22 58/18 134/22 223/13 229/11 237/25 242/4 246/14 246/17 248/19 250/6 251/13 253/16 certification [3] 20/8 20/11 20/12 certifications [1] 22/23 certified [9] 18/21 19/23 21/2 21/11 22/1 23/1 23/2 196/22 196/22 certify [1] 263/6 CF [2] 1/5 3/3 chain [2] 176/7 186/21 chair [2] 50/5 76/3 chambers [1] 102/17 chance [2] 239/9 247/16 changed [6] 65/10 65/11 65/11 132/22 239/14 239/14 changing [2] 161/18 205/10 characteristic [2] 199/9 200/15 characteristics [1] 81/22 characterize [1] 210/1 charged [3] 172/11 172/22 242/19 charges [4] 5/25 172/14 172/16 173/1 charts [1] 216/22 check [2] 77/3 124/2 checking [1] 71/22 chelating [3] 85/16 86/17 227/8 Chem [1] 161/9 chemical [53] 74/2 75/19 81/18 81/21 81/25 82/2 82/5 83/19
C		
CA [1] 93/5 cabinet [6] 18/10 44/24 46/23		

C		
<p>chemical... [45] 83/22 84/4 84/7 84/9 85/15 85/15 85/18 87/1 87/2 89/4 89/9 89/14 89/14 91/17 91/19 93/23 117/21 117/22 119/19 132/4 145/23 164/7 164/20 165/3 195/15 196/12 199/10 199/17 200/16 208/13 208/21 208/25 245/3 245/19 245/24 249/12 253/12 255/5 255/6 255/8 255/21 255/24 256/19 257/7 257/25</p> <p>chemicals [7] 82/10 82/19 83/5 84/1 119/21 121/1 131/16</p> <p>chemist [15] 101/2 144/11 145/15 175/16 180/17 181/3 181/11 195/7 195/11 196/14 196/15 196/18 196/24 198/17 211/20</p> <p>chemistry [36] 73/8 73/15 73/18 74/11 75/8 75/14 76/19 81/15 81/16 81/17 81/20 82/5 84/13 84/15 84/19 85/10 108/5 122/8 122/15 122/16 122/18 125/2 125/8 132/2 132/2 144/18 145/13 145/25 157/5 172/7 180/11 180/13 186/18 200/1 209/18 214/2</p> <p>chemists [3] 100/16 149/7 152/23</p> <p>chief [10] 73/8 73/13 73/19 79/13 186/11 186/14 186/17 186/18 187/18 188/14</p> <p>chose [2] 94/11 115/12</p> <p>chosen [1] 4/6</p> <p>Christmas [1] 168/21</p> <p>chromatograph [3] 81/5 82/18 83/6</p> <p>Chromatography [1] 122/2</p> <p>Cingular [4] 12/14 12/25 13/7 13/9</p> <p>cipher [1] 65/9</p> <p>circled [1] 162/10</p> <p>circling [1] 162/8</p> <p>circuit [14] 1/1 1/10 16/12 16/21 17/5 17/19 17/22 18/4 19/19 19/25 20/15 23/7 29/2 263/5</p> <p>circumstances [1] 248/13</p> <p>cite [2] 209/20 209/25</p> <p>citizen [1] 177/20</p> <p>citrate [1] 91/13</p> <p>citric [1] 91/12</p> <p>claim [1] 202/12</p> <p>claimed [1] 159/12</p> <p>claiming [1] 256/17</p> <p>clarification [2] 100/3 210/7</p> <p>clarified [1] 100/5</p> <p>clarify [1] 180/2</p> <p>classification [1] 172/2</p> <p>cleaning [4] 86/11 107/18 127/14 236/25</p> <p>clear [20] 32/19 57/19 59/24 60/19 61/12 62/13 63/3 80/20 93/24 109/12 152/20 155/5 157/21 182/25 184/24 193/7 206/7 218/4 232/1 241/24</p> <p>cleared [1] 215/17</p> <p>clearly [2] 151/6 241/16</p> <p>clerk [33] 16/7 16/8 16/12 16/13 16/19 17/5 17/18 17/22 18/4 19/19 19/25 20/15 20/17 20/24 20/24 21/22 26/24 27/2 29/2 30/4 33/4 35/5 36/21 36/21 47/19 49/3 49/16 64/5 65/12 67/8 67/9 134/25 239/24</p> <p>Clerk's [17] 3/22 4/18 5/9 27/15 30/4 42/19 42/22 44/18 48/19</p>	<p>48/20 51/11 52/10 54/12 55/5 56/18 56/25 68/13</p> <p>clerks [13] 17/19 44/15 49/11 49/20 49/23 53/13 53/15 54/23 55/2 55/2 65/24 66/3 66/7</p> <p>clicking [1] 194/16</p> <p>clip [2] 232/23 233/4</p> <p>close [2] 51/6 100/24</p> <p>closed [3] 41/8 41/10 41/11</p> <p>closer [1] 60/9</p> <p>closeup [1] 61/22</p> <p>clot [1] 92/7</p> <p>clothing [2] 48/5 116/20</p> <p>clots [1] 92/8</p> <p>clotting [1] 93/1</p> <p>co [3] 78/17 78/22 119/2</p> <p>co-authored [3] 78/17 78/22 119/2</p> <p>coauthored [1] 138/11</p> <p>code [11] 26/9 26/10 26/12 26/13 53/5 65/5 65/9 65/12 65/14 65/16 193/2</p> <p>codes [1] 65/10</p> <p>Colborn [5] 32/23 33/4 56/24 57/9 173/20</p> <p>cold [1] 137/22</p> <p>colleagues [2] 141/25 146/3</p> <p>collected [15] 94/22 94/25 98/2 98/21 99/8 99/18 107/4 111/4 112/6 113/6 113/16 113/24 134/5 135/4 172/25</p> <p>collection [8] 89/19 89/20 89/24 90/12 90/16 90/22 90/23 93/8</p> <p>Collectively [1] 114/8</p> <p>color [2] 91/6 91/7</p> <p>colors [1] 83/3</p> <p>combination [4] 12/17 52/7 56/3 56/13</p> <p>combined [1] 129/25</p> <p>comes [6] 26/24 93/5 126/20 127/3 202/25 255/9</p> <p>comfortable [1] 248/8</p> <p>coming [4] 54/2 68/19 103/5 168/21</p> <p>comment [1] 259/14</p> <p>comments [3] 123/17 123/19 123/20</p> <p>commercial [4] 85/22 86/13 107/16 164/17</p> <p>committed [1] 164/10</p> <p>committees [2] 76/4 76/7</p> <p>common [4] 67/5 118/10 149/19 236/22</p> <p>commonly [2] 64/18 74/23</p> <p>communication [2] 176/10 261/6</p> <p>community [2] 122/21 208/15</p> <p>companies [2] 31/1 39/3</p> <p>company [2] 46/8 75/20</p> <p>compare [2] 83/25 191/10</p> <p>comparison [2] 199/22 222/15</p> <p>compilations [1] 134/20</p> <p>compile [1] 74/3</p> <p>compiled [2] 101/20 197/10</p> <p>compiles [1] 101/5</p> <p>compiling [1] 114/17</p> <p>complaints [1] 146/15</p> <p>complete [4] 70/8 179/1 179/14 258/15</p> <p>completed [12] 9/25 69/22 105/1 171/4 178/15 178/19 178/21 178/24 185/22 185/23 188/1 196/21</p> <p>completely [3] 38/3 166/12 220/11</p> <p>completes [1] 196/19</p>	<p>completing [1] 133/3</p> <p>complex [12] 115/2 127/10 127/21 129/23 133/16 217/25 221/24 222/23 223/1 233/25 235/1 249/1</p> <p>complexes [3] 93/6 93/6 93/7</p> <p>complicate [1] 83/1</p> <p>components [6] 83/17 85/9 130/18 211/24 212/3 212/4</p> <p>comports [1] 60/4</p> <p>compositions [1] 164/21</p> <p>compound [2] 202/13 202/20</p> <p>compounds [1] 82/6</p> <p>computer [1] 263/10</p> <p>computer-assisted [1] 263/10</p> <p>computerized [1] 263/9</p> <p>conceivable [1] 13/2</p> <p>concentrated [1] 237/17</p> <p>concentration [6] 128/24 129/5 130/1 131/21 131/23 222/25</p> <p>concept [2] 132/1 191/15</p> <p>concern [9] 22/12 38/25 42/9 80/1 87/23 88/5 132/8 171/25 208/20</p> <p>concerned [7] 38/21 87/14 105/21 107/17 175/15 176/7 256/21</p> <p>concerning [4] 12/3 133/11 133/21 134/8</p> <p>concerns [5] 37/7 162/23 174/10 248/15 248/18</p> <p>conclude [2] 229/2 256/7</p> <p>concluded [5] 159/5 159/7 255/7 257/11 262/7</p> <p>concluding [1] 202/19</p> <p>conclusion [10] 11/4 133/11 133/14 133/21 133/25 134/8 134/11 158/16 203/4 260/7</p> <p>conclusions [3] 80/25 136/16 245/10</p> <p>condition [7] 50/17 50/20 109/8 109/24 110/1 111/21 240/3</p> <p>conditions [4] 89/5 89/11 112/13 210/19</p> <p>conduct [5] 5/13 6/17 12/7 120/23 219/9</p> <p>conducted [1] 251/2</p> <p>conferences [7] 30/6 34/1 76/12 76/16 76/22 140/18 244/10</p> <p>confirm [2] 24/24 25/3</p> <p>confirmation [1] 205/25</p> <p>confirmed [2] 226/20 226/21</p> <p>confirming [2] 20/17 21/25</p> <p>conformed [1] 20/19</p> <p>confuse [4] 107/22 127/15 238/15 253/19</p> <p>confusing [1] 253/22</p> <p>confusion [1] 130/8</p> <p>conjunction [1] 20/4</p> <p>Connecticut [1] 74/16</p> <p>conservatively [1] 222/9</p> <p>consider [8] 116/15 122/23 139/25 202/7 202/25 205/12 211/21 218/9</p> <p>considerable [2] 118/11 118/21</p> <p>considerably [1] 236/6</p> <p>considered [6] 118/20 122/19 154/15 154/17 154/18 191/23</p> <p>consistency [1] 77/7</p> <p>consistent [10] 3/19 31/12 39/5 110/9 199/10 200/22 201/1 240/5 240/5 260/25</p> <p>constitute [1] 202/19</p> <p>constitutes [1] 186/6</p> <p>construed [1] 163/13</p> <p>consulted [1] 257/9</p> <p>consume [1] 7/11</p>

C

contact [2] 67/21 100/24
contacted [6] 33/19 79/16 157/17 160/19 163/19 169/23
contain [4] 134/14 136/15 165/2 252/24
contained [6] 24/14 27/12 28/16 106/20 134/4 227/4
container [14] 27/12 28/9 28/12 28/21 61/13 104/16 106/1 106/1 106/9 106/20 235/20 240/14 240/16 240/21
containers [2] 24/21 29/11
contains [2] 24/3 61/15
contaminants [1] 107/10
contamination [2] 107/5 238/14
CONTD [3] 45/22 103/10 160/17
contending [1] 3/19
contends [1] 6/1
contents [1] 60/5
context [1] 153/4
continuation [1] 3/3
continue [3] 120/4 231/20 243/24
continued [2] 70/3 249/25
continues [2] 87/17 87/19
continuing [1] 256/16
continuously [1] 128/24
contributing [2] 74/5 101/8
control [29] 5/4 7/15 7/19 9/2 10/9 10/14 94/21 98/11 98/20 98/21 99/7 99/17 103/18 106/25 107/1 107/3 113/2 113/3 113/6 113/15 113/23 125/19 125/21 133/12 193/14 232/2 232/5 232/16 234/13
controlled [4] 103/16 127/12 133/17 133/17
controls [5] 7/10 7/12 114/1 237/8 237/20
convened [1] 173/12
conversation [1] 20/18
conversations [2] 150/23 170/19
converting [1] 166/10
converts [1] 165/11
convicted [3] 5/25 246/22 252/20
conviction [8] 5/15 5/15 9/8 41/13 246/8 246/24 249/22 256/16
cooler [1] 144/14
cop [3] 174/2 174/11 176/25
copied [2] 12/23 13/14
copies [4] 18/22 18/25 23/5 70/23
cops [1] 174/17
copy [11] 19/24 20/19 21/3 21/11 21/24 22/1 23/21 79/4 121/15 176/5 176/9
Cornell [1] 152/1
corner [1] 67/16
Corp [2] 22/10 27/16
Corporation [2] 21/17 21/18
corpse [1] 177/23
correct [206] 8/13 28/18 37/1 37/2 37/6 42/8 42/15 43/6 43/12 43/15 43/19 43/24 44/8 44/20 45/7 46/17 47/12 48/1 48/8 48/17 48/25 49/4 49/22 50/2 50/7 53/10 53/12 53/22 55/3 56/14 56/22 57/5 57/6 59/2 60/13 60/18 60/22 60/23 61/3 61/15 61/16 63/22 67/9 67/10 75/1 88/12 89/7 96/13 97/23 97/25 98/16 103/16 128/12 138/3 138/13 141/16 141/20 141/24 142/4 142/20 142/23 144/5 144/23 152/2 154/23 156/23

157/15 157/16 157/19 157/20 159/3 160/22 163/2 163/7 163/23 166/25 167/1 171/19 171/25 172/6 172/21 175/4 177/8 177/9 178/16 178/18 179/16 180/24 181/25 182/23 183/6 184/1 184/7 185/3 186/4 186/12 192/22 193/21 193/23 196/13 197/7 197/9 199/4 199/12 199/24 200/2 200/19 202/14 202/15 202/21 202/22 203/1 203/9 204/18 204/22 204/23 206/2 206/5 206/25 208/6 208/9 208/14 208/23 210/14 210/15 210/18 212/18 213/7 213/11 213/14 213/16 213/19 213/23 214/17 214/18 214/21 214/24 214/25 216/9 216/10 216/24 219/19 220/20 221/4 221/25 222/1 222/13 224/8 225/4 227/6 227/12 227/22 228/1 228/16 228/18 230/13 232/4 232/13 232/21 232/25 233/17 236/2 236/5 236/9 236/17 237/9 237/13 237/14 237/17 238/4 238/20 240/19 242/7 242/17 242/22 243/3 243/12 244/8 244/19 244/23 244/24 245/13 245/14 246/2 246/3 246/5 246/10 246/12 246/20 246/22 247/9 248/17 250/8 250/17 251/7 251/11 251/14 251/18 251/21 252/5 252/10 252/12 253/17 253/21 257/22 263/12
correction [1] 199/14
Correctional [4] 20/21 21/2 21/14 22/3
correctly [4] 8/7 65/22 66/5 114/19
correspond [3] 110/25 112/3 113/4
correspondence [1] 16/24
corresponds [2] 108/24 113/22
corrupt [3] 174/1 174/10 176/25
corruption [4] 80/4 171/25 172/5 173/14
cosmetics [1] 237/5
cotton [6] 106/4 110/7 223/3 224/11 224/12 224/18
could [82] 9/8 9/10 9/16 11/23 12/8 13/3 25/2 26/7 27/13 35/14 35/24 49/19 50/3 50/22 51/23 53/4 56/8 57/8 62/1 65/23 66/16 67/8 67/14 70/17 78/20 79/2 79/17 82/11 84/21 86/25 89/15 90/4 90/13 95/10 104/4 107/22 109/7 109/23 111/14 113/11 115/3 116/12 128/21 129/1 129/14 129/20 130/1 131/17 135/4 135/11 143/1 148/22 160/22 163/8 167/3 168/15 169/24 176/1 190/10 194/25 208/21 213/3 215/11 218/22 220/23 221/23 221/24 222/11 225/18 228/9 228/14 229/7 230/11 231/6 236/18 238/13 243/16 243/17 244/16 244/16 245/11 247/22
couldn't [14] 56/12 59/14 62/25 143/24 144/1 144/3 161/24 181/8 190/16 223/14 230/14 230/18 230/21 247/24
counsel [21] 3/13 4/16 4/21 6/4 18/19 18/20 43/25 59/10 59/16 70/18 71/2 71/11 71/19 96/20 99/25 102/16 106/15 160/11 239/18 241/11 259/25
count [2] 107/5 180/19

counter [8] 26/15 26/17 26/18 26/19 26/21 54/18 66/3 66/10
countering [1] 208/25
country [5] 80/3 117/1 117/6 155/21 190/1
country's [1] 118/20
COUNTY [26] 1/1 7/16 7/20 7/23 8/20 10/14 16/7 16/9 16/12 17/6 20/1 20/16 20/25 21/22 23/7 27/3 33/2 33/14 34/18 40/20 55/20 75/11 134/25 176/25 239/24 263/2
couple [5] 39/10 39/15 42/1 71/19 161/14
course [20] 5/23 9/20 13/8 51/12 52/13 54/6 74/20 79/12 80/10 87/23 92/9 101/24 120/10 120/19 146/13 172/9 172/9 180/23 181/12 253/5
courses [1] 197/19
court [88] 1/1 1/10 1/25 3/1 3/23 4/7 4/10 4/14 4/20 4/25 5/11 6/3 6/6 6/18 9/19 10/6 10/22 11/20 13/15 13/22 14/11 14/16 16/7 16/8 16/12 16/13 16/15 16/25 17/5 17/19 17/22 18/5 19/19 19/25 20/5 20/16 20/24 21/22 23/7 26/11 29/2 30/4 51/22 52/22 57/15 58/11 58/14 59/14 62/5 63/21 65/12 68/20 69/9 70/1 70/6 70/11 78/10 100/4 102/25 105/12 141/4 141/15 155/22 157/12 162/25 163/6 190/23 191/5 191/6 196/3 211/14 213/18 217/18 246/25 247/19 247/25 249/18 250/4 250/16 250/25 255/15 255/15 258/1 258/9 259/12 263/4 263/5 263/19
Court was [1] 191/5
Court's [10] 3/17 9/7 16/19 26/25 27/2 33/4 58/25 134/25 239/24 260/21
courthouse [4] 52/17 55/11 55/16 55/17
courtroom [3] 105/14 197/14 244/3
courts [3] 16/21 35/5 64/5
cover [1] 50/22
coverage [1] 16/15
covered [2] 8/3 104/13
create [3] 16/17 30/2 150/19
created [1] 29/21
credit [1] 149/20
crime [18] 10/21 77/12 95/14 97/21 98/14 104/13 104/15 118/13 126/16 126/19 127/3 127/5 136/11 143/4 177/6 177/21 177/24 178/2
crimes [6] 80/4 118/24 119/5 140/12 177/8 177/11
criminal [5] 20/17 74/12 155/18 155/25 174/2
criticisms [1] 131/10
criticize [1] 153/16
criticized [1] 154/21
critique [1] 123/17
cross [21] 2/5 2/10 35/13 35/20 36/14 36/17 45/20 45/22 64/13 65/20 69/12 69/21 70/2 70/3 137/17 148/19 154/7 160/17 190/7 217/10 260/17
cross-examination [17] 2/5 2/10 35/13 35/20 36/17 45/20 45/22 64/13 65/20 69/12 70/2 137/17 148/19 154/7 160/17 217/10

C

cross-examination... [1] 260/17
cross-examine [1] 190/7
crunch [1] 155/2
Culhane [7] 7/15 10/21 95/5 95/13 95/22 96/17 97/21
cumbersome [5] 18/14 24/17 43/3 47/14 174/7
current [1] 76/18
currently [1] 124/12
curriculum [7] 79/4 137/24 195/24 196/2 196/5 197/2 261/3
custody [3] 18/4 34/2 176/7
cut [10] 110/5 110/16 111/18 169/18 226/11 226/12 226/23 227/4 234/9 234/10
cutting [1] 226/15
CV [2] 138/10 261/13

D

damaged [2] 4/14 4/18
dash [4] 8/15 8/16 8/18 9/14
dashboard [4] 7/2 95/7 95/22 110/19
data [19] 84/10 134/19 180/4 180/17 180/24 181/13 183/3 183/11 185/13 185/18 185/19 194/9 196/10 202/3 202/25 203/2 216/20 217/24 222/17
date [18] 1/8 22/1 22/9 25/2 28/13 29/17 31/5 34/25 38/15 58/4 59/24 61/7 166/19 168/9 168/12 170/9 172/24 214/19
dated [12] 20/1 20/6 20/12 20/14 20/23 21/21 22/8 23/4 171/17 216/9 255/10 263/15
dates [5] 39/11 166/5 166/9 172/18 172/20
day [15] 1/4 3/18 14/21 49/25 50/5 50/18 52/21 64/20 73/19 73/19 119/21 178/13 185/23 240/6 263/15
day-to-day [1] 73/19
days [9] 14/4 179/11 179/13 182/17 208/16 215/1 217/9 217/17 218/6
deadline [2] 171/10 171/15
deal [7] 90/22 90/23 112/17 152/22 254/13 254/15 260/2
dealing [10] 53/1 54/23 55/1 77/9 126/13 130/9 130/24 131/5 182/18 211/6
DEAN [2] 1/17 3/11
death [1] 254/16
debate [1] 209/10
decade [1] 117/23
decades [3] 84/12 87/13 164/15
deceased [3] 138/19 139/8 247/6
December [19] 20/14 20/23 21/21 39/9 57/4 57/12 57/18 58/9 58/15 59/25 60/12 63/8 122/3 157/19 157/19 160/21 163/20 164/8 167/2
December 12th [2] 20/23 21/21
December 14 [2] 59/25 63/8
December 14th [1] 60/12
December 6 [1] 20/14
decide [4] 30/1 183/17 220/6 245/4
decided [5] 14/12 215/3 215/4 215/15 248/4
deciding [1] 124/11
decision [6] 14/8 14/9 123/25

190/20 190/21 247/3
decisions [3] 73/21 101/17 194/10
decline [2] 247/22 247/24
decreasing [1] 130/1
deemed [1] 232/9
defendant [7] 1/7 1/18 1/20 1/21 21/16 251/1 251/5
defense [25] 3/16 3/18 4/24 5/1 5/12 7/17 8/24 10/25 11/17 12/18 58/8 69/16 69/24 70/1 105/2 142/24 143/2 143/11 190/6 215/19 236/12 258/14 260/4 260/4 262/2
defer [1] 70/21
defines [1] 222/16
definition [1] 200/14
degradation [3] 93/16 209/22 210/1
degraded [2] 212/5 222/22
degree [9] 74/11 74/14 134/21 209/14 229/11 242/3 246/13 246/16 253/16
degrees [1] 89/12
delivered [1] 82/20
delivering [1] 64/24
demands [1] 43/17
demonstrate [1] 130/16
demonstration [3] 103/2 103/6 260/16
density [2] 106/3 132/24
department [19] 7/16 7/20 7/23 10/15 33/2 33/14 33/19 34/6 34/12 34/19 40/11 53/18 55/4 55/10 65/17 66/25 67/3 68/19 74/9
depends [2] 168/5 203/21
depict [2] 110/19 111/21
depicted [3] 24/21 28/2 112/9
deputies [9] 45/5 51/10 51/14 52/13 52/15 54/10 64/4 64/14 65/21
deputy [9] 20/24 44/15 49/23 53/13 53/15 54/23 55/2 66/24 67/8
describe [15] 26/7 75/2 75/24 78/20 79/10 81/1 81/14 84/21 90/2 90/13 101/12 109/23 112/13 118/18 128/8
described [5] 93/25 96/7 99/21 114/3 234/13
describes [3] 79/5 131/8 219/3
describing [2] 96/21 219/8
description [2] 90/6 196/9
designation [3] 108/21 193/13 198/18
designations [5] 192/25 193/2 193/4 193/17 195/6
designed [7] 206/8 206/12 212/19 219/21 220/1 223/20 224/10
desk [9] 25/18 25/21 25/23 44/20 47/9 49/3 66/16 68/2 68/3
desks [1] 66/3
despite [1] 197/2
destroyed [2] 4/13 4/19
detail [3] 11/11 37/18 158/5
details [5] 9/7 12/5 150/23 151/2 151/5
detect [8] 89/2 129/14 131/3 212/20 213/4 221/24 224/2 237/21
detectable [2] 237/9 238/3
detected [3] 152/24 206/9 207/21
detecting [1] 238/13
detection [6] 128/19 129/6 223/6 238/4 238/5 238/11

detections [1] 223/23
detergent [2] 85/24 86/12
detergents [2] 86/3 236/24
determination [3] 79/17 156/3 200/11
determine [24] 62/23 64/10 80/23 81/18 82/5 84/7 116/22 128/19 155/24 156/21 157/14 164/20 199/9 219/13 220/1 220/2 220/3 220/23 221/23 243/15 243/17 244/17 245/1 245/18
determined [5] 9/17 11/4 66/14 210/21 247/6
determining [4] 116/7 122/6 151/19 220/19
develop [30] 117/20 118/8 120/11 120/20 121/5 121/9 121/18 124/5 124/10 124/11 151/12 151/14 151/16 153/9 156/6 167/12 167/22 168/2 178/9 185/6 219/24 220/8 220/14 220/16 220/21 243/5 243/14 245/18 248/7 249/3
developed [24] 88/11 119/23 121/15 124/6 128/5 133/5 148/4 150/15 151/10 152/21 153/14 170/22 178/8 203/6 219/17 220/8 242/12 243/14 243/20 244/21 247/12 247/16 255/19 255/20
developing [6] 84/23 152/4 154/17 182/5 244/25 248/10
development [4] 101/16 154/21 187/11 218/9
deviate [1] 203/19
deviation [5] 203/15 203/24 204/3 204/4 205/12
deviations [2] 203/22 203/23
device [5] 30/13 66/2 234/11 234/11 235/4
devised [1] 237/24
diagnostic [1] 200/11
Diane [3] 1/24 263/4 263/19
die [4] 116/19 116/19 116/23 116/24
died [1] 245/13
diet [1] 92/19
difference [3] 116/12 170/16 206/7
differences [3] 178/19 190/11 190/12
different [30] 30/6 49/14 55/2 64/19 64/20 66/11 71/15 71/17 81/10 84/2 86/13 86/19 89/24 90/11 90/14 90/15 90/16 90/18 93/8 125/14 129/9 133/9 133/19 134/6 138/6 225/2 232/11 232/16 240/14 241/7
differently [2] 203/12 227/16
difficult [3] 50/13 92/9 255/23
difficulties [1] 88/6
digital [1] 45/24
diluted [1] 237/12
diluting [3] 128/24 128/25 129/1
dilution [1] 237/21
direct [9] 2/4 2/9 16/4 32/20 56/23 69/21 73/5 103/10 154/15
directed [3] 21/18 23/11 190/23
directing [1] 19/7
direction [1] 70/5
directive [1] 38/2
directly [1] 49/20
Directors [2] 76/3 77/12
disagree [7] 139/9 139/14 159/19 224/20 225/6 250/24 251/16
disappearance [3] 36/25 40/22

D
disappearance... [1] 57/10
discharged [1] 85/2
disciplines [1] 156/18
disclose [1] 189/11
discovered [3] 42/5 57/22 251/4
discovery [2] 189/3 215/5
discuss [7] 9/11 102/13 155/9
155/12 160/8 209/17 259/22
discussed [5] 30/8 34/13 34/14
34/17 222/14
discusses [2] 161/22 176/16
discussion [6] 13/5 34/2 34/20
104/23 144/7 168/14
discussions [2] 12/7 35/3
dishonest [1] 174/2
dismissed [1] 41/11
displayed [5] 23/23 26/6 27/14
109/4 111/11
disprove [1] 252/15
dispute [3] 9/6 11/2 97/5
dissolved [2] 209/2 234/1
distance [1] 67/25
District [2] 19/12 79/16
divider [1] 45/1
division [2] 73/18 181/19
divisions [1] 176/12
DNA [13] 19/15 20/6 21/4 21/6
21/9 21/15 22/19 117/11 181/9
215/13 221/5 221/17 223/11
docket [1] 50/10
doctor [9] 74/10 89/18 97/13
103/20 137/19 152/14 239/25
254/18 260/15
doctor's [1] 89/22
doctorate [2] 74/16 74/22
document [12] 19/18 20/9 29/23
38/15 108/7 108/8 121/14 199/25
201/21 203/15 251/25 261/6
documented [2] 114/19 208/17
documents [10] 13/10 13/12 18/22
19/1 19/3 21/5 23/3 34/24 47/25
189/6
doesn't [15] 50/19 87/2 100/12
106/2 130/17 132/5 166/17 191/21
192/9 196/9 201/2 202/9 202/16
211/1 222/6
doing [29] 31/14 36/13 54/22
62/14 80/7 80/13 116/16 125/20
126/23 131/7 131/16 132/2 157/12
174/11 182/11 185/1 187/11
193/19 203/24 210/21 211/5
214/22 216/6 218/11 225/16
225/22 248/8 253/20 257/20
domain [4] 156/8 156/15 157/1
157/10
done [44] 3/20 7/8 54/18 58/13
78/5 87/12 100/22 101/2 101/9
101/14 108/10 119/19 123/13
123/15 134/20 148/7 148/12
149/25 156/2 157/11 165/14
167/10 179/4 181/7 183/24 184/9
185/13 185/20 187/20 211/12
211/17 211/22 211/25 213/20
213/24 215/7 217/8 217/16 220/4
223/2 223/3 232/19 247/5 248/12
door [22] 7/5 9/14 25/12 26/4
26/16 45/9 46/4 52/5 52/9 56/9
65/8 66/4 67/22 68/7 68/8 68/12
96/11 98/22 111/5 111/8 111/22
113/17
doorbell [2] 26/17 66/1

doors [1] 49/8
doorway [1] 56/3
down [21] 25/2 43/4 43/14 58/5
77/5 89/11 157/1 165/16 165/20
166/1 166/2 175/17 175/23 210/18
210/23 211/4 211/10 211/24
212/14 231/23 237/15
downstairs [1] 43/7
DR [6] 2/8 72/23 103/12 149/13
150/9 261/15
Dr. [34] 5/6 69/11 69/14 69/20
69/20 70/8 72/21 74/25 95/3
98/13 98/17 103/2 134/16 136/10
146/22 147/2 149/13 216/12
216/13 242/14 242/17 244/17
244/23 246/8 252/8 252/13 252/17
254/6 258/24 259/4 259/9 261/4
261/14 261/25
Dr. Brewer [3] 216/13 261/4
261/14
Dr. Brewer's [1] 216/12
Dr. Bruce [1] 149/13
Dr. Fred [1] 146/22
Dr. Kevin [1] 252/8
Dr. LeBeau [13] 5/6 69/14 69/20
69/20 70/8 95/3 98/13 98/17
103/2 134/16 136/10 254/6 261/25
Dr. Marc [3] 69/11 72/21 74/25
Dr. Sybers [9] 242/17 244/17
244/23 246/8 252/13 252/17
258/24 259/4 259/9
Dr. Whitehurst [1] 147/2
Dr. William [1] 242/14
draw [3] 48/9 215/25 245/10
drawn [2] 89/22 208/4
draws [1] 260/7
dried [8] 3/21 4/11 5/4 5/7 5/7 8/4
122/1 219/12
dries [1] 126/19
drift [1] 212/10
drink [1] 88/8
drip [5] 225/13 225/14 225/14
225/14 225/14
dripping [4] 229/19 229/23 260/7
260/8
drive [1] 235/4
drop [10] 129/19 129/24 131/4
131/17 131/19 131/21 131/23
233/22 234/2 234/16
drops [4] 129/9 230/6 234/21
234/22
drug [37] 52/24 52/25 118/6
118/14 118/23 118/24 119/2 119/4
119/6 119/7 119/19 120/6 120/12
138/2 138/14 139/11 140/9 140/12
140/13 165/16 165/20 166/2 166/6
166/17 192/8 209/5 242/22 243/6
243/17 244/18 245/12 246/5
249/14 253/4 256/9 256/22 257/23
drugs [17] 33/23 84/24 84/25
119/11 120/6 120/12 120/18 138/4
138/5 138/6 165/2 165/7 165/11
165/25 166/15 166/21 192/6
dry [3] 129/10 130/14 233/11
dug [1] 242/25
duly [2] 15/24 72/24
during [12] 3/25 5/21 11/15 33/5
49/25 52/13 56/5 64/20 105/9
143/13 160/9 161/7
duties [5] 16/11 17/23 49/25 73/17
182/7
duty [2] 74/5 106/6
DVD [7] 59/23 60/7 60/24 62/8

62/20 63/1 63/20
E
each [15] 7/6 12/7 81/12 102/4
103/19 103/20 125/24 232/3
232/23 232/23 234/14 235/25
236/2 251/6 259/22
earlier [21] 24/13 61/2 61/12
92/16 101/7 115/4 116/1 156/11
160/22 161/5 181/17 185/4 218/19
222/14 223/5 234/13 239/6 239/19
240/15 243/18 245/10
early [9] 34/21 34/22 34/25 39/9
57/4 74/21 84/17 146/10 171/7
easier [2] 46/1 94/14
easily [2] 87/3 89/4
edge [1] 241/20
editor [7] 123/6 123/10 123/14
123/16 123/20 123/25 184/4
editor's [1] 184/8
EDTA [186] 7/1 85/13 85/14 85/15
85/21 85/22 86/10 86/12 87/7
87/10 87/14 87/17 87/19 88/4
88/18 88/21 88/25 89/3 89/14
91/17 92/14 92/14 92/16 92/22
93/2 93/5 93/9 93/12 94/3 94/4
94/4 94/7 94/9 94/10 94/24
107/15 107/19 114/4 115/1 115/3
115/9 115/9 115/11 115/18 115/20
116/7 121/7 121/25 122/7 124/7
126/4 126/14 127/2 127/10 127/10
127/12 127/16 127/21 127/21
127/23 128/21 128/24 129/8
129/14 129/22 129/23 130/11
131/3 132/11 133/5 133/11 133/16
133/16 133/21 134/2 134/2 134/8
134/15 135/5 135/12 140/22 141/6
141/15 141/19 141/22 142/12
142/21 143/7 146/16 147/22
151/19 152/5 152/24 153/9 154/5
155/9 155/12 155/17 155/24
156/22 157/14 158/3 158/17
158/17 158/19 158/21 158/24
159/1 159/4 159/8 159/13 159/18
162/17 167/3 175/11 176/19
189/25 199/2 199/3 205/25 206/4
206/9 207/3 207/8 207/21 208/13
209/14 209/17 209/19 209/22
210/2 210/13 210/23 210/25 211/8
211/23 212/4 212/20 213/4 213/21
214/4 214/24 215/14 215/22 216/3
216/5 217/20 217/24 219/7 219/12
219/14 219/18 219/21 220/2 220/3
220/9 220/20 220/22 220/25
221/18 221/24 222/22 222/25
224/2 224/6 224/25 225/3 227/7
227/7 228/5 228/25 230/18 230/19
230/22 233/25 233/25 234/25
234/25 236/21 237/9 237/16
237/21 238/1 238/11 238/19 239/3
educated [1] 100/18
educational [1] 74/10
effect [1] 29/23
effective [2] 166/16 192/7
efficiency [1] 101/9
effort [3] 148/14 153/9 243/15
efforts [1] 150/19
either [11] 13/4 81/21 126/16
139/11 159/14 182/21 184/15
229/1 239/16 240/17 248/16
elaborate [9] 138/25 159/21
169/17 177/3 178/5 178/7 229/4
247/9 247/10

E		
<p>Elaine [3] 20/20 20/25 22/2 elapsed [1] 214/20 elected [1] 36/21 electrophoresis [1] 154/1 electrospray [3] 122/1 131/8 131/10 eliminate [1] 178/3 eliminating [1] 176/20 eloquence [1] 14/16 else [15] 66/19 72/13 120/1 156/9 169/23 179/23 180/16 180/20 181/12 186/13 216/16 257/20 259/22 261/10 261/19 elsewhere [1] 228/23 em [1] 91/8 email [1] 12/22 embalmed [2] 243/2 245/9 employ [1] 200/23 employed [5] 16/6 17/20 73/12 78/7 246/7 employee [2] 53/18 66/25 employees [5] 54/2 54/10 67/6 147/25 161/15 enable [1] 6/16 enclosed [4] 21/11 22/12 27/21 27/21 enclosing [3] 21/2 21/23 22/12 end [15] 3/18 13/4 13/9 24/22 28/22 39/8 50/19 60/11 168/22 171/2 171/9 178/12 199/2 200/5 251/15 ended [1] 14/2 energy [1] 83/24 enforcement [9] 39/8 39/18 40/2 40/4 79/25 80/12 169/5 173/22 177/7 engaged [1] 163/1 enough [8] 8/24 9/13 12/19 69/12 136/5 166/16 213/22 247/23 ensure [5] 16/14 77/4 106/2 107/9 124/2 ensured [1] 128/11 ensuring [1] 114/18 entails [1] 73/20 enter [1] 4/25 entered [3] 19/14 95/4 96/16 entering [1] 259/10 entire [11] 24/2 81/9 101/15 124/25 145/19 147/5 148/3 148/7 157/1 157/4 193/11 entirely [2] 51/17 244/19 entitled [6] 17/7 32/3 121/25 122/6 122/7 199/22 entitles [1] 69/14 entity [2] 27/16 77/23 entrance [2] 26/4 26/13 entry [4] 7/5 32/4 32/8 56/17 envelopes [1] 98/11 environment [7] 85/18 85/20 87/15 87/18 88/5 88/7 88/24 environmental [2] 89/5 238/14 environmentalists [3] 208/21 209/5 209/9 equivalent [2] 129/19 195/8 erodes [1] 80/13 err [1] 222/8 error [1] 160/23 especially [2] 33/7 117/19 essentially [14] 70/23 79/5 81/10 83/18 84/1 88/16 100/17 117/12 124/25 127/6 132/20 171/11</p>	<p>176/11 195/9 establish [2] 62/4 176/18 established [2] 254/24 255/10 esteemed [2] 147/13 147/16 estimate [2] 167/21 169/3 etcetera [5] 88/9 114/21 132/22 181/5 194/12 ethylenediaminetetraacetic [1] 85/14 eureka [1] 218/1 Europe [1] 88/15 evaluate [1] 131/18 evaluated [2] 132/17 209/21 evaluating [1] 202/2 evaluation [1] 130/21 evaporate [1] 237/15 even [11] 40/11 43/23 53/14 54/1 60/19 83/1 228/21 229/6 230/9 237/23 239/15 evenings [1] 56/21 event [7] 51/12 53/9 53/19 59/17 156/16 173/2 250/14 events [1] 63/8 eventually [3] 72/10 120/21 210/14 ever [27] 30/13 33/3 33/6 33/7 33/8 33/16 35/4 35/7 39/12 78/9 78/14 140/21 141/4 141/14 141/22 152/20 155/15 155/17 163/25 182/12 189/25 209/21 210/1 211/22 227/2 252/17 252/19 every [12] 31/9 37/20 52/21 55/8 108/7 118/4 119/21 125/20 147/1 188/18 194/24 255/4 everybody [5] 31/9 38/13 38/23 39/20 204/14 everyday [1] 64/25 everyone [5] 5/23 30/20 31/21 31/22 39/5 everything [3] 120/19 187/23 261/10 evidence [73] 5/25 11/8 12/2 12/9 12/11 22/13 22/19 27/22 28/22 32/4 32/6 33/20 33/22 34/3 34/5 34/11 34/16 35/3 35/21 37/14 60/16 60/16 60/20 61/17 63/3 68/20 70/13 73/25 74/3 79/19 79/22 79/25 95/5 96/17 100/9 101/17 101/25 103/7 104/14 104/23 105/10 108/8 108/22 112/3 113/5 118/10 121/16 135/14 158/25 159/2 159/5 159/18 162/13 170/20 174/2 174/12 174/24 175/1 176/21 176/24 178/4 184/21 192/19 192/21 192/22 193/14 193/15 193/17 240/19 240/21 254/14 254/15 255/14 evidentiary [7] 108/25 110/25 113/21 158/11 158/15 224/16 245/3 exact [4] 24/24 25/2 38/15 232/15 exactly [27] 31/5 34/25 39/11 81/14 109/9 109/25 147/24 165/18 167/19 184/12 186/25 192/4 192/22 194/7 195/12 202/8 206/6 222/8 223/25 224/4 229/15 235/18 237/10 240/12 241/23 253/9 258/4 exam [1] 248/4 examination [41] 2/4 2/5 2/6 2/7 2/9 2/10 2/11 2/12 16/4 35/13 35/20 36/17 45/20 45/22 64/1 64/13 65/20 66/21 69/12 69/21 69/22 70/2 73/5 103/10 104/2</p>	<p>105/11 112/21 116/25 117/3 117/25 118/8 120/22 137/17 148/19 154/7 160/17 217/10 250/1 254/4 259/2 260/17 examinations [7] 75/6 75/7 116/14 117/15 117/15 121/4 218/13 examine [7] 18/19 23/11 98/23 102/2 112/11 121/23 190/7 examined [3] 15/25 72/25 112/4 examiner [17] 100/20 100/20 101/5 143/20 150/25 181/9 191/20 194/2 195/11 196/17 196/18 196/22 196/24 200/24 204/6 242/18 254/11 examiner's [2] 75/12 192/3 examiners [2] 100/19 101/10 examining [1] 18/20 example [7] 86/20 89/11 107/18 117/24 118/1 131/14 193/13 Examples [1] 116/17 except [3] 123/16 189/18 248/23 exceptions [1] 38/7 excerpt [2] 59/9 63/7 excerpts [1] 59/23 excess [1] 115/10 excludes [1] 35/24 excuse [3] 149/8 169/9 259/20 excused [2] 69/2 262/5 exhibit [133] 10/18 19/8 20/2 20/13 20/22 21/20 22/8 23/12 23/16 23/21 24/1 24/7 24/21 25/25 27/6 27/8 27/9 27/11 27/11 27/13 27/18 27/19 27/21 28/2 28/7 28/8 28/17 28/19 31/24 32/1 35/22 42/3 44/3 46/3 50/9 51/1 58/10 59/18 59/20 60/10 62/2 63/13 63/15 63/17 68/20 71/9 79/1 79/2 95/4 95/10 95/11 95/16 95/20 96/14 96/15 97/10 97/17 97/20 98/1 98/13 98/14 98/17 98/19 99/3 99/4 99/14 103/1 103/1 103/5 104/1 104/3 104/5 104/6 105/19 108/15 108/16 110/18 110/23 110/24 111/21 111/25 112/2 112/22 112/23 112/24 112/25 113/11 113/13 113/18 113/19 121/13 121/24 122/5 122/6 124/6 124/22 125/2 136/10 136/11 136/13 136/22 137/3 147/14 151/19 154/14 155/6 157/22 176/4 195/21 195/23 199/19 199/20 204/8 205/17 207/13 207/18 216/2 216/2 222/16 239/7 240/24 241/4 241/11 241/20 250/17 250/19 258/14 258/16 258/17 258/19 260/3 261/1 261/18 Exhibit 332 [2] 95/4 98/1 Exhibit 334 [2] 96/15 97/10 Exhibit 433 [1] 79/2 Exhibit 434 [1] 124/6 Exhibit 435 [3] 136/11 136/13 207/18 Exhibit 436 [2] 124/22 147/14 Exhibit 437 [6] 122/5 122/6 125/2 151/19 154/14 157/22 Exhibit 439 [1] 258/19 Exhibit 448 [1] 28/17 Exhibit 449 [1] 27/19 Exhibit 45 [1] 31/24 Exhibit 450 [1] 28/8 Exhibit 451 [1] 60/10 Exhibit 452 [1] 19/8 Exhibit 453 [1] 20/2</p>

E	F	February 15th [3] 178/22 179/22 203/7
<p>Exhibit 454 [1] 20/13 Exhibit 455 [1] 20/22 Exhibit 456 [1] 21/20 Exhibit 459 [2] 110/24 111/21 Exhibit 460 [1] 112/2 Exhibit 461 [2] 112/23 112/25 Exhibit 462 [1] 113/13 Exhibit 463 [1] 113/19 Exhibit 464 [5] 23/12 23/16 23/21 24/21 35/22 Exhibit 465 [1] 103/1 Exhibit 466 [2] 103/1 260/3 Exhibit 467 [1] 32/1 Exhibit 468 [2] 44/3 50/9 Exhibit 473 [1] 241/11 Exhibit 475 [2] 99/3 136/22 Exhibit 476 [1] 98/17 Exhibit 477 [1] 99/14 Exhibit 478 [1] 104/6 exhibits [40] 2/13 10/23 13/15 16/24 17/3 18/17 18/18 18/21 19/5 22/23 24/5 24/19 28/24 29/1 35/21 36/2 42/2 44/1 47/15 47/22 47/24 48/1 48/6 60/9 60/15 70/23 71/7 71/25 95/2 96/21 97/2 102/25 121/22 121/22 124/8 136/20 136/25 137/15 261/7 261/12 exhumed [1] 255/4 existence [2] 37/7 151/7 exists [1] 156/22 exonerated [3] 17/13 18/12 43/16 expect [3] 110/7 115/15 158/14 experience [7] 75/2 79/6 88/18 134/17 139/15 152/4 181/4 experienced [1] 73/23 experiment [2] 126/2 211/22 experiments [3] 81/8 212/13 212/15 expert [12] 78/9 78/14 139/20 139/25 140/1 141/5 150/9 155/22 156/20 195/14 196/11 242/8 expertise [3] 118/16 118/18 138/2 experts [4] 77/2 118/20 123/11 251/6 expiration [3] 166/5 166/9 166/19 explain [21] 64/16 85/12 86/25 100/6 100/8 103/2 105/24 106/24 108/23 109/7 114/10 116/12 148/14 148/21 148/24 169/17 178/6 191/14 196/3 198/18 254/6 explained [4] 158/2 158/23 170/18 260/17 explaining [1] 87/4 explanation [2] 149/9 260/23 explosive [2] 85/2 85/3 explosives [1] 85/1 exposed [2] 249/14 256/13 express [6] 4/19 27/10 207/20 213/17 215/21 228/24 expressed [5] 141/15 155/23 228/10 242/2 250/3 expressing [3] 230/20 242/7 248/16 extent [1] 108/7 extra [1] 42/13 extract [1] 132/13 extracting [1] 223/10 extractions [1] 194/23 Extremely [1] 210/19 eyes [1] 187/1</p>	<p>F95 [1] 22/16 F95-624 [1] 22/16 fabric [1] 225/1 facilitated [13] 118/14 118/23 118/24 119/3 119/4 120/6 120/13 138/2 138/15 139/12 140/9 140/12 140/13 facility [5] 20/21 21/2 22/4 34/8 55/11 fact [23] 10/2 41/10 43/16 52/21 59/16 60/4 94/6 105/13 129/25 139/18 142/6 148/3 148/14 153/15 155/15 159/1 173/8 181/21 197/2 199/7 202/9 202/17 203/15 Fahrenheit [1] 89/13 failed [3] 222/1 222/3 222/18 fails [1] 202/17 fair [18] 11/17 26/23 37/2 38/18 42/4 51/9 89/5 158/12 158/14 164/7 169/2 184/13 194/20 195/2 195/5 215/23 215/24 242/22 fall [3] 56/16 182/8 212/8 FALLON [12] 1/13 2/4 2/6 3/9 12/23 14/15 15/18 56/23 63/22 108/12 121/12 121/21 false [1] 216/18 familiar [11] 17/6 17/10 17/23 33/9 41/18 41/20 60/15 118/13 171/14 189/8 191/17 familiarity [1] 18/1 far [11] 7/14 9/7 48/10 101/16 129/3 130/4 175/15 185/11 185/12 226/24 229/12 farther [3] 44/13 81/7 230/9 fashion [2] 14/19 184/20 Fassbender [4] 39/13 58/1 95/1 98/10 faster [3] 168/13 170/10 170/15 fat [1] 245/17 faulty [2] 159/16 159/16 faxed [1] 13/15 FBI [76] 5/5 7/5 7/11 7/19 8/6 73/9 73/10 73/15 73/17 75/4 75/10 76/23 77/10 80/1 80/2 89/16 100/8 108/5 108/6 114/11 114/14 115/17 115/19 116/10 141/25 143/13 144/19 145/11 145/16 145/21 146/3 146/9 146/22 147/25 148/5 148/24 149/5 150/25 151/7 152/4 152/23 153/8 157/22 159/5 159/6 159/7 161/15 162/17 163/1 163/3 170/2 170/4 170/24 171/20 171/24 172/2 173/3 173/19 174/16 174/23 175/19 176/10 176/12 177/7 180/11 181/17 183/1 186/10 188/19 189/11 192/11 193/11 200/1 215/7 239/21 239/25 FBI's [2] 174/10 177/4 FDA [1] 165/1 FE [9] 17/8 18/22 19/11 20/4 23/7 23/19 24/2 29/4 93/5 February [24] 11/18 14/24 170/9 171/9 171/18 178/10 178/10 178/15 178/22 179/5 179/9 179/10 179/22 179/22 185/14 185/24 186/1 203/6 203/7 208/5 213/8 213/11 213/12 216/9 February 13th [3] 179/9 179/10 179/22 February 14 [1] 179/5 February 14th [1] 178/15</p>	<p>February 1st [1] 178/10 February 22 [1] 14/24 February 26th [2] 171/18 213/12 February 27th [1] 11/18 February 28 [1] 216/9 February 28th [2] 213/8 213/11 federal [7] 117/2 169/4 177/8 177/21 177/24 178/2 251/3 feel [3] 238/6 248/8 257/21 feet [3] 68/7 68/7 68/8 fellow [2] 76/10 242/13 felt [1] 254/14 ferret [1] 174/17 fertilizers [1] 86/1 few [11] 31/6 43/2 84/21 87/13 116/25 119/17 119/24 140/5 176/6 176/9 198/24 field [12] 75/3 75/22 76/12 76/18 78/15 81/17 122/13 151/23 170/17 176/11 200/18 209/11 fields [1] 84/18 fight [2] 201/8 244/20 figure [4] 81/23 82/1 84/8 190/9 file [66] 17/11 17/14 17/15 17/16 18/3 18/6 18/13 18/22 19/24 22/9 22/17 23/7 24/2 24/4 24/4 24/6 24/14 24/20 25/20 25/22 29/7 29/13 30/21 31/10 31/18 37/22 40/3 40/9 40/15 41/8 41/10 41/11 41/18 41/20 41/23 42/7 42/10 42/17 42/17 43/13 43/13 44/6 44/7 44/7 44/9 44/12 44/13 44/18 47/14 47/24 48/4 49/18 49/19 50/14 54/5 54/5 54/12 54/16 54/17 57/15 58/11 67/14 67/17 67/21 67/23 189/4 filed [6] 16/25 19/10 21/24 22/10 58/8 259/11 files [14] 16/22 16/23 17/2 17/3 29/24 30/16 31/2 42/19 43/11 44/22 47/13 52/22 52/22 54/4 filing [8] 18/9 18/16 44/24 46/23 50/21 53/2 68/5 250/25 filings [1] 16/23 fill [1] 203/18 filled [1] 91/9 filter [8] 223/11 223/11 223/18 233/24 234/10 234/11 235/4 235/7 filtering [1] 234/10 filtrate [1] 204/13 final [3] 188/20 218/15 238/22 finally [1] 254/8 finances [1] 5/20 find [30] 21/11 22/13 24/20 87/22 89/1 107/6 124/14 124/17 127/9 127/11 127/16 127/21 128/21 129/22 132/20 161/25 162/1 166/2 168/18 173/25 174/24 176/23 187/18 220/25 244/22 249/12 253/11 255/16 256/3 257/6 finding [6] 87/21 107/21 123/11 159/17 246/1 258/2 findings [8] 107/6 136/15 238/22 249/19 251/4 251/9 255/17 257/9 finds [1] 184/5 fine [3] 35/18 71/3 207/10 finger [5] 229/19 229/22 229/23 230/3 260/8 fingerprint [4] 83/22 83/25 84/2 104/23 fingerprints [1] 117/13</p>

F
finish [3] 102/9 229/5 231/19
finished [4] 101/3 103/12 217/15 257/8
fire [1] 55/13
first [57] 4/10 8/23 15/18 15/24 29/25 33/5 33/16 37/3 39/7 41/6 44/4 46/9 64/23 71/8 72/24 83/9 104/4 109/8 110/3 120/8 120/19 120/23 124/21 126/15 127/9 128/8 128/23 141/8 141/14 141/18 141/21 149/4 152/14 152/19 157/17 160/19 163/19 163/25 164/2 171/21 176/6 176/9 180/22 180/24 193/15 204/17 205/2 205/9 205/14 205/19 205/20 210/9 225/24 239/7 243/20 250/20 257/13
FitzGerald [1] 19/13
five [11] 49/13 69/4 166/18 204/11 214/9 233/15 235/24 236/3 236/4 236/8 236/16
fix [1] 206/13
flaps [1] 50/22
flash [1] 198/25
floating [2] 93/3 94/7
floor [2] 231/4 231/9
Florida [6] 242/18 246/25 249/16 250/15 251/17 254/12
fluid [4] 139/2 139/3 139/21 245/9
fluids [11] 138/18 138/18 139/13 139/16 140/2 243/17 243/23 244/10 244/11 245/15 247/5
fluoride [2] 91/14 91/15
foam [1] 50/25
focus [2] 40/19 169/12
focused [3] 94/3 94/9 182/17
follow [8] 77/15 128/4 144/6 161/14 180/25 203/8 204/11 204/20
followed [4] 38/3 163/9 187/3 231/23
following [5] 11/4 77/4 79/12 143/18 163/4
follows [3] 15/25 72/25 132/13
food [3] 85/8 86/19 131/16
foods [2] 85/9 85/25
foregoing [2] 263/7 263/7
forensic [18] 22/14 27/22 74/14 75/8 75/9 76/2 76/5 76/8 76/13 76/19 76/19 122/14 157/5 181/23 183/1 195/10 196/24 254/15
forensics [1] 181/18
forever [2] 9/16 209/7
Forgive [1] 147/20
form [19] 21/9 35/9 82/16 88/2 90/24 92/8 94/10 115/9 126/3 141/11 148/18 149/8 189/1 197/23 203/19 217/4 217/13 224/7 250/18
formally [1] 185/25
formed [2] 101/20 197/10
forms [2] 101/5 191/24
forth [4] 47/20 62/22 74/8 204/11
Forty [2] 177/17 233/15
Forty percent [1] 177/17
Forty-five [1] 233/15
forward [5] 13/6 21/17 31/15 38/24 164/9
found [37] 39/21 45/23 85/21 85/22 85/23 85/24 85/24 86/1 86/12 112/6 113/25 126/16 130/18 131/20 132/18 142/21 156/16

156/18 157/11 158/3 213/22 216/7 217/11 221/22 227/24 228/3 228/23 236/21 237/9 241/13 243/16 245/22 247/7 248/25 255/5 256/1 256/19
foundation [6] 35/16 41/2 53/23 99/24 145/2 260/11
foundational [4] 51/24 64/10 70/10 119/25
four [14] 70/22 74/19 75/13 147/21 148/23 161/15 167/5 167/20 167/23 168/3 168/16 169/2 222/17 246/25
Fox [4] 20/21 21/1 21/14 22/3
fragile [3] 87/5 89/9 89/10
fragmentation [1] 84/5
fragments [1] 199/15
frame [6] 9/15 32/21 58/19 68/21 174/3 174/12
framing [1] 40/13
frankly [3] 159/24 176/2 218/1
Fred [1] 146/22
free [4] 94/4 105/11 115/8 126/3
freelance [1] 41/22
frequently [2] 52/23 140/20
Friday [1] 27/4
fro [1] 49/25
front [13] 13/10 25/23 26/1 60/10 79/1 98/3 99/14 102/1 108/25 111/1 191/2 205/17 213/18
full [4] 19/23 82/23 136/4 175/5
fully [2] 238/22 240/10
functions [1] 174/16
function [13] 4/14 4/19 5/12 6/5 14/8 25/22 62/3 63/13 68/5 104/17 105/6 106/4 169/17
future [3] 158/21 232/9 250/2

G
GAHN [24] 1/15 2/9 2/11 3/9 6/10 8/10 10/8 11/22 12/24 71/21 102/22 119/16 166/25 168/14 169/16 169/21 170/19 170/23 171/22 189/10 208/12 215/2 254/1 260/13
Gahn's [1] 167/24
gain [2] 26/13 56/8
gained [1] 30/5
garage [4] 13/25 14/1 231/4 231/8
gatekeeper [1] 79/14
gave [9] 11/21 108/21 140/11 169/21 188/22 193/4 229/17 229/19 260/25
geez [1] 164/3
general [13] 25/14 26/23 29/12 29/14 41/22 42/25 67/4 144/21 146/25 202/2 232/13 248/2 250/15
general's [3] 145/6 145/9 146/14
generally [9] 17/23 55/24 58/6 86/6 165/9 174/18 174/20 177/7 202/18
generated [3] 93/20 93/21 203/3
gently [2] 62/21 62/22
gets [3] 172/7 184/2 236/9
getting [5] 37/4 61/22 178/1 231/22 244/9
GHB [1] 138/4
give [13] 50/3 55/20 84/1 90/6 140/5 140/21 142/11 149/20 167/21 168/6 169/12 189/14 229/13
given [9] 38/2 116/19 171/10 200/15 219/18 230/17 231/7 238/3

260/7
gives [2] 83/21 84/3
giving [3] 141/5 247/15 252/20
glad [3] 215/17 218/24 219/1
glass [3] 89/20 129/10 235/21
gloves [2] 61/10 105/13
God [1] 245/5
goes [12] 48/14 49/8 69/22 90/20 116/20 154/10 169/6 179/15 233/24 235/5 235/12 235/16
going [77] 6/18 7/22 7/24 8/21 12/6 12/12 14/22 18/17 30/3 33/25 34/17 35/15 45/11 45/25 49/18 53/21 54/3 57/17 57/20 58/6 59/8 59/20 62/19 67/15 69/17 70/20 70/24 72/10 90/13 92/22 92/25 95/1 98/10 102/9 102/9 103/25 104/1 105/20 105/21 108/12 121/12 121/21 126/12 126/21 138/10 143/18 144/3 147/3 151/11 160/3 162/1 168/9 171/1 171/8 174/4 176/3 176/5 190/18 201/8 203/24 204/2 204/3 204/14 209/6 217/18 224/16 231/16 244/20 247/14 248/3 250/23 254/19 259/13 259/20 260/1 261/1 261/18
gone [4] 30/7 103/3 140/8 168/22
good [14] 3/7 3/10 30/10 36/19 36/20 37/13 47/17 56/11 82/22 137/19 137/20 200/22 201/1 218/19
goodness [1] 249/20
gotten [2] 155/22 217/19
government [1] 197/1
grade [1] 78/1
graded [2] 187/16 188/22
graduate [1] 74/20
grand [1] 173/13
graphs [1] 216/22
gray [2] 91/13 221/11
gray-stoppered [1] 91/13
gray-topped [1] 221/11
great [6] 13/17 112/16 152/22 194/9 254/13 254/15
green [6] 83/3 83/14 170/6 170/7 170/18 170/24
grounds [4] 8/20 40/17 202/12 202/19
group [3] 124/15 149/11 149/12
Grove [1] 75/17
grow [2] 184/25 185/5
GS [1] 198/2
guess [16] 6/19 9/3 17/12 29/9 37/18 38/16 41/17 41/19 50/16 54/15 56/19 57/11 58/4 65/4 136/9 190/9
guest [1] 76/21
guideline [1] 222/15
guidelines [4] 84/6 199/22 200/14 201/19
guilt [4] 6/1 6/3 245/1 245/4
guilty [2] 258/24 259/4
guy [2] 193/20 194/21
guys [2] 148/15 148/25

H
hair [3] 49/2 49/14 175/6
Halbach [9] 12/17 13/1 36/24 57/10 225/20 227/24 228/6 228/13 228/14
Halbach's [11] 7/3 39/21 95/7 95/23 96/12 97/23 110/20 133/12

<p>H</p> <p>Halbach's... [3] 133/22 134/23 173/6</p> <p>half [10] 7/6 7/8 7/11 7/12 7/18 103/4 163/24 232/7 232/23 232/23</p> <p>hallway [1] 49/7</p> <p>hand [6] 15/22 28/3 81/11 117/14 204/4 208/24</p> <p>handed [2] 101/4 199/18</p> <p>handle [2] 10/24 34/17</p> <p>hands [1] 114/16</p> <p>handwriting [1] 61/1</p> <p>handwritten [1] 216/15</p> <p>happen [2] 5/20 5/21</p> <p>happened [9] 63/9 142/14 156/2 229/25 238/17 249/6 250/3 254/25 259/15</p> <p>happening [1] 117/6</p> <p>happens [3] 91/24 92/7 104/22</p> <p>happy [1] 178/5</p> <p>hard [5] 70/23 86/5 86/6 86/8 139/5</p> <p>harsh [8] 210/19 211/11 211/15 211/15 211/16 211/18 211/21 212/6</p> <p>hasn't [2] 142/14 156/2</p> <p>Haven [3] 74/15 74/16 75/15</p> <p>haven't [10] 8/3 37/18 115/24 156/2 211/25 212/13 217/15 224/22 255/1 259/7</p> <p>having [9] 15/24 24/14 72/24 74/23 94/20 112/5 113/16 113/24 166/6</p> <p>Hazlewood [1] 21/4</p> <p>Hazlewood's [1] 20/19</p> <p>headed [1] 202/4</p> <p>heading [2] 200/10 201/18</p> <p>Health [4] 20/20 21/1 21/13 22/2</p> <p>hear [10] 11/20 11/23 14/15 14/18 59/14 141/8 141/14 144/7 218/24 219/1</p> <p>heard [13] 10/5 10/11 14/6 91/25 97/5 137/13 138/8 138/8 144/10 144/11 164/1 164/2 255/1</p> <p>hearing [3] 14/12 17/1 197/8</p> <p>hearsay [2] 254/22 254/22</p> <p>heart [2] 245/16 249/20</p> <p>heater [1] 46/23</p> <p>heavily [2] 182/17 257/10</p> <p>heavy [2] 24/18 106/5</p> <p>height [1] 48/15</p> <p>held [2] 28/9 28/21</p> <p>help [6] 80/19 97/4 142/24 143/3 162/8 215/16</p> <p>helped [1] 121/18</p> <p>helpful [7] 8/2 90/7 107/12 110/12 115/5 126/9 260/16</p> <p>helpfully [1] 229/19</p> <p>helping [1] 101/1</p> <p>helps [1] 86/19</p> <p>Henak [3] 19/14 20/15 21/23</p> <p>hereby [1] 263/6</p> <p>herein [2] 15/24 72/24</p> <p>hey [3] 53/20 57/14 247/25</p> <p>high [7] 18/12 106/3 131/13 131/22 132/24 211/1 235/3</p> <p>higher [2] 115/14 204/1</p> <p>highest [1] 76/11</p> <p>highly [2] 210/25 260/10</p> <p>himself [1] 252/22</p> <p>history [1] 147/9</p> <p>hold [3] 76/9 106/17 202/5</p>	<p>holding [2] 27/6 28/3</p> <p>holds [1] 139/19</p> <p>holidays [1] 168/20</p> <p>homeland [1] 182/18</p> <p>homicide [2] 177/20 256/23</p> <p>homogenous [1] 225/3</p> <p>Hon [1] 1/9</p> <p>honestly [1] 168/5</p> <p>Honor [25] 3/17 6/9 12/12 35/19 72/20 96/19 99/23 102/23 105/18 141/10 144/24 148/17 160/16 174/5 188/25 190/2 190/14 197/22 217/12 231/12 245/6 254/2 258/13 261/25 262/6</p> <p>hope [3] 239/21 253/22 253/23</p> <p>hopefully [2] 11/24 80/20</p> <p>hot [1] 175/6</p> <p>hours [3] 27/2 55/14 56/20</p> <p>household [1] 236/22</p> <p>however [5] 35/20 185/20 212/16 246/24 251/11</p> <p>huh [1] 146/10</p> <p>human [1] 226/16</p> <p>hundred [2] 46/8 234/18</p> <p>hurried [3] 153/11 153/13 154/21</p> <p>hurriedly [2] 242/12 247/12</p> <p>hurry [1] 151/10</p>	<p>82/8 84/25 94/1 96/9 98/19 99/4 108/15 110/22 112/1 112/24 113/12 113/20 117/8 121/14 131/3 133/15 134/1 136/12 176/4 255/20 255/24 257/14</p> <p>identifying [1] 98/14</p> <p>identity [6] 22/14 27/22 30/11 30/14 81/19 81/22</p> <p>ignition [3] 99/18 109/2 113/7</p> <p>ignored [1] 154/19</p> <p>illegal [4] 80/7 80/13 174/11 174/13</p> <p>illegible [1] 29/19</p> <p>illustrative [1] 260/24</p> <p>imagine [1] 55/23</p> <p>immediate [1] 26/15</p> <p>immediately [5] 249/15 257/15 257/17 257/19 259/5</p> <p>impact [1] 260/20</p> <p>important [8] 30/3 83/19 92/2 120/15 131/6 132/1 184/13 203/8</p> <p>importantly [1] 40/18</p> <p>impression [1] 14/11</p> <p>improvements [4] 123/18 125/6 125/10 125/13</p> <p>in [869]</p> <p>inappropriate [1] 70/12</p> <p>incapacitates [1] 119/7</p> <p>incident [1] 35/7</p> <p>include [9] 10/2 17/2 29/17 30/20 31/20 31/22 56/20 150/12 208/24</p> <p>includes [1] 182/5</p> <p>including [5] 49/13 161/17 165/7 195/13 237/2</p> <p>inclusive [1] 31/8</p> <p>incorrect [6] 145/5 149/3 177/12 188/17 221/14 225/5</p> <p>increase [2] 210/22 211/3</p> <p>incredibly [1] 217/25</p> <p>indeed [3] 127/18 134/14 245/23</p> <p>indefinitely [1] 4/13</p> <p>independent [10] 4/4 5/13 7/7 101/23 175/21 180/9 181/1 183/19 186/15 188/2</p> <p>independently [2] 183/10 188/15</p> <p>indicate [3] 21/5 105/8 189/17</p> <p>indicated [17] 59/16 79/14 86/17 91/4 101/7 107/15 116/1 126/18 156/11 168/12 172/25 182/9 185/4 187/20 201/3 240/15 245/25</p> <p>indicates [1] 91/7</p> <p>indication [6] 127/17 134/2 222/4 222/6 222/11 222/11</p> <p>individual [15] 32/23 33/9 80/11 80/14 80/16 83/17 116/18 116/21 125/24 139/8 145/16 146/19 184/15 193/5 235/25</p> <p>individuals [6] 49/24 122/12 146/21 146/24 149/20 200/8</p> <p>industry [4] 84/23 85/8 164/19 165/4</p> <p>inference [1] 216/1</p> <p>inform [1] 102/24</p> <p>information [7] 30/5 84/3 124/4 146/11 221/20 230/16 257/19</p> <p>informed [3] 221/17 248/12 249/18</p> <p>ingestion [1] 251/14</p> <p>initial [2] 168/20 193/16</p> <p>initialed [1] 28/14</p> <p>initially [4] 90/11 120/23 128/19 182/22</p> <p>initials [11] 96/2 96/4 97/14 98/8</p>
	<p>I</p> <p>I'm [153] 5/3 5/21 6/14 6/18 9/18 10/7 13/12 13/23 14/22 15/3 16/7 18/17 31/5 33/23 34/14 35/15 36/9 40/21 41/15 43/19 44/2 44/3 44/15 45/25 53/7 54/5 57/20 58/6 59/8 59/20 64/22 67/4 68/16 70/20 72/6 73/8 74/18 76/1 76/4 76/7 76/20 90/13 91/14 91/25 93/14 95/1 95/10 95/18 95/18 97/25 97/25 98/10 100/7 100/19 102/9 103/25 104/1 105/20 105/21 105/21 108/12 114/6 118/20 121/12 121/21 135/19 137/21 138/19 138/21 139/22 140/10 141/3 141/18 142/20 144/1 147/3 149/23 151/5 157/4 157/21 160/3 161/18 162/1 163/16 163/17 169/14 173/22 173/22 174/4 175/24 176/3 176/5 179/18 183/23 185/5 185/18 186/18 188/3 188/4 190/18 190/25 193/10 194/14 195/22 197/9 197/11 198/2 198/17 198/17 198/18 199/19 201/12 204/14 207/10 209/12 209/16 210/6 210/11 211/19 212/3 212/6 215/17 216/1 216/2 216/13 218/24 218/25 219/1 219/5 220/11 220/11 226/9 226/18 227/19 229/14 231/1 231/17 234/15 234/19 238/22 241/1 242/17 244/5 247/10 247/15 250/18 250/23 253/22 254/19 259/13 260/1 260/25 261/18</p> <p>I've [1] 78/7</p> <p>idea [9] 30/10 56/10 81/24 143/6 149/21 183/19 187/1 191/19 218/19</p> <p>ideas [1] 125/3</p> <p>identification [6] 42/3 63/17 71/9 97/4 104/3 195/21</p> <p>identifications [1] 104/17</p> <p>identified [9] 95/8 95/13 95/21 96/17 97/21 98/1 124/6 127/25 245/24</p> <p>identify [25] 35/25 44/4 81/21</p>	

I
initials... [7] 99/2 99/13 102/4 104/10 106/12 216/11 216/12
inject [2] 204/17 204/20
injected [3] 132/7 205/2 253/3
injection [5] 152/24 158/20 158/22 246/10 250/7
injections [1] 256/9
inner [15] 18/8 26/5 33/7 35/5 52/10 54/11 56/17 56/25 61/18 64/5 64/15 65/3 65/21 67/1 68/13
innocence [4] 6/2 6/3 245/2 245/4
inside [13] 26/14 35/7 35/10 39/21 51/10 62/23 91/7 106/2 106/4 106/5 106/7 107/17 231/4
insignificant [1] 223/12
inspection [1] 17/16
inspector [5] 144/21 145/6 145/9 146/14 146/25
instance [14] 37/20 42/11 50/10 86/21 156/19 164/19 165/21 179/17 182/14 192/5 193/10 207/1 237/20 247/24
Institution [1] 21/15
instructions [2] 205/6 205/7
instructor [1] 75/14
instrument [28] 81/4 82/12 82/20 83/8 83/18 83/20 84/14 89/16 128/12 130/23 132/23 164/5 164/6 164/12 164/14 165/15 166/24 195/4 198/1 198/13 198/13 203/1 206/23 236/9 249/7 249/11 256/25 257/1
instrumental [1] 153/25
instrumentation [8] 81/2 82/3 93/25 94/2 124/18 152/25 253/10 253/14
instruments [4] 81/10 82/15 198/14 206/18
insulin [1] 118/2
insurance [2] 31/1 39/2
intact [2] 8/16 8/18
intake [1] 261/5
intended [1] 228/11
intent [1] 244/25
intercept [1] 259/13
interest [4] 5/24 17/12 18/13 171/21
interested [3] 88/20 116/6 116/6
interesting [1] 229/14
interfere [4] 107/10 130/17 131/1 131/2
interferences [2] 130/7 223/7
interferes [1] 130/19
interior [3] 48/20 51/10 54/3
intern [2] 75/16 252/6
internal [4] 125/18 176/10 234/12 261/5
International [1] 76/5
interned [1] 252/5
interpret [4] 84/6 196/10 201/20 222/16
interpretation [7] 107/23 127/15 140/22 141/6 216/25 218/15 238/16
interviewed [1] 39/7
intimate [3] 150/23 151/2 151/4
introduce [5] 12/2 70/25 71/1 125/20 136/9
introduced [6] 48/6 71/7 83/10 83/11 125/17 261/10
invented [1] 156/9

investivity [2] 11/15 13/22
investigate [2] 173/4 173/13
investigating [4] 40/4 54/4 57/13 80/3
investigation [19] 40/22 54/6 54/13 56/6 57/17 57/20 57/21 80/19 116/6 145/15 145/18 173/3 173/7 173/13 173/21 251/3 254/10 254/13 254/17
investigations [4] 80/9 172/1 172/4 177/18
investigative [1] 169/5
investigator [6] 57/24 69/17 69/25 70/9 70/21 70/25
investigators [4] 116/2 249/16 249/18 254/14
invited [1] 76/20
involve [3] 138/14 139/11 140/9
involved [26] 47/15 76/4 79/10 79/21 80/7 80/9 80/18 138/17 145/7 145/12 145/14 172/8 173/20 177/5 177/10 178/2 181/2 184/10 187/11 194/24 242/11 242/13 249/23 254/7 255/2 258/11
involvement [2] 144/8 254/21
involves [1] 81/20
ion [7] 122/2 199/9 200/15 204/18 204/22 205/2 205/5
ions [3] 199/13 199/15 200/11
iron [21] 92/23 93/3 93/5 93/7 94/4 94/11 94/11 94/12 115/2 115/12 115/13 115/13 127/10 129/23 133/16 134/3 221/24 222/22 223/1 233/25 235/1
irrelevant [4] 154/23 155/1 223/9 254/22
issue [16] 6/19 9/1 13/23 14/7 14/19 30/12 34/13 70/11 80/23 166/13 166/14 176/8 208/14 214/22 253/19 253/22
issued [24] 55/20 101/22 159/9 178/18 178/21 178/23 179/24 180/6 184/23 185/14 185/25 186/6 187/8 188/19 188/21 197/11 199/25 203/6 207/13 213/12 213/20 217/9 218/6 219/11
issues [1] 182/18
issuing [2] 34/7 217/17
it's em [1] 91/8
It's not [1] 234/19
item [8] 34/1 35/24 107/6 108/20 108/21 113/21 158/15 205/21
items [11] 7/22 11/1 11/17 36/10 101/25 102/2 108/1 108/25 111/1 193/5 215/6
itself [10] 62/3 107/8 131/4 158/9 199/17 202/12 202/19 235/7 240/20 241/22

J
James [3] 19/13 33/10 33/12
Janet [5] 48/22 66/13 66/23 71/4 71/16
Janet's [2] 46/18 67/15
January [14] 16/10 36/22 39/9 57/4 61/7 65/11 169/22 178/12 178/13 178/14 179/12 208/4 214/14 263/15
January 31st [1] 178/14
January 4 [1] 61/7
jargon [1] 204/15
Jason [2] 193/20 195/23
JEROME [2] 1/19 3/11

job [5] 82/18 86/11 114/22 196/9 244/12
joint [2] 9/11 10/6
journal [22] 32/7 78/18 78/23 122/2 122/7 122/9 122/10 122/15 123/7 124/22 125/4 128/13 132/9 147/16 147/18 156/17 161/8 210/5 214/3 217/3 220/6 257/18
journals [8] 119/2 122/12 122/17 156/12 157/6 157/8 157/9 183/25
Judge [14] 1/10 3/7 13/19 20/19 21/4 36/15 45/21 62/12 69/8 70/20 72/11 154/7 231/21 254/19
judgment [6] 200/22 200/23 200/23 201/2 201/4 201/14
judicial [1] 258/9
July [5] 25/3 29/9 38/19 47/3 47/4
June [2] 22/10 200/3
June 21st [1] 200/3
June 6 [1] 22/10
juries [1] 196/4
jurisdiction [1] 177/16
Juror [1] 45/13
jurors [36] 15/13 72/13 75/24 78/21 79/3 81/1 81/14 82/12 84/21 85/12 87/1 90/3 90/7 93/24 96/7 99/6 99/16 100/8 101/12 103/3 105/24 106/24 108/24 109/7 109/23 110/14 111/14 112/13 114/3 114/10 115/5 116/12 118/18 126/9 252/20 254/7
jury [65] 1/4 3/5 3/15 3/21 3/24 15/9 15/14 15/16 45/14 45/18 61/12 62/11 69/2 69/6 69/12 70/7 72/15 72/17 88/17 102/1 102/11 102/15 102/20 128/8 136/3 137/13 141/8 141/13 155/16 155/25 156/20 160/7 160/10 162/3 162/22 163/8 173/13 189/23 190/11 191/14 193/8 197/17 197/21 198/19 213/18 215/22 215/25 231/15 237/25 238/18 240/24 242/7 246/20 246/21 246/22 248/6 248/9 250/4 253/15 258/5 259/19 259/24 260/16 260/21 260/23
justice [1] 74/12

K
K-3 [1] 193/1
keep [4] 11/15 62/19 169/4 198/17
keeping [3] 16/16 16/16 16/17
Ken [1] 3/8
KENNETH [1] 1/11
kept [11] 18/3 42/18 43/11 46/20 50/20 67/17 67/23 68/4 68/4 226/2 249/21
Kevin [1] 252/8
key [11] 26/9 56/2 56/8 56/10 56/16 64/4 65/2 65/4 65/6 65/7 92/2
keys [3] 55/5 55/19 56/6
kidney [2] 245/16 246/2
kind [27] 12/19 25/14 25/15 25/16 26/21 30/12 30/14 31/4 44/23 44/25 48/6 55/21 63/3 69/11 157/5 157/8 158/3 167/11 177/15 184/14 184/25 203/19 207/20 207/24 211/22 221/15 226/8
kinds [5] 16/19 33/22 89/24 165/6 166/6
knocks [1] 119/7
knowing [2] 225/12 225/19
knowledge [17] 29/1 56/8 62/6

K
knowledge... [14] 64/3 65/15 96/24
142/11 142/15 151/2 151/9 173/1
173/7 173/9 173/16 173/23 254/20
263/14
known [10] 77/11 81/9 85/16
128/23 131/9 202/11 202/18 255/5
256/8 257/22
knows [6] 64/8 64/11 77/23 96/22
123/15 254/25
KRATZ [3] 1/11 3/8 12/24

L
L-e-B-e-a-u [1] 73/4
L-shape [1] 26/22
L-shaped [1] 26/21
lab [46] 10/22 22/10 27/16 76/23
76/23 77/13 79/10 95/14 97/11
97/22 98/15 100/25 104/12 104/15
109/14 120/7 127/5 136/11 142/10
142/11 142/16 142/21 143/3
143/13 144/12 146/3 148/5 148/25
151/7 152/4 159/6 163/5 167/10
180/10 185/1 189/14 189/23
194/15 194/19 208/5 212/22
226/23 236/12 239/21 252/5 252/9
lab's [3] 143/18 144/8 203/18
label [4] 27/19 61/7 98/1 240/16
labeling [1] 28/5
labels [1] 166/6
laboratories [6] 22/15 77/14 84/13
92/10 251/3 251/6
laboratory [85] 21/16 21/18 27/23
73/9 73/10 73/15 73/17 74/9 75/5
75/7 75/11 75/15 75/16 75/19
77/1 77/3 77/7 77/10 77/11 77/12
77/12 79/13 84/16 86/22 91/3
95/8 96/1 97/14 98/7 99/1 99/12
103/14 106/11 108/7 108/9 108/20
110/2 111/19 114/11 114/14
115/17 115/19 116/10 117/6
117/11 124/19 126/23 126/24
127/7 128/16 134/4 136/13 141/25
145/11 145/23 146/22 149/5 149/9
149/15 150/25 152/19 153/14
159/7 168/19 177/5 180/11 186/1
186/16 188/19 189/16 193/11
196/3 200/1 226/20 245/22 245/23
249/7 255/2 255/13 255/16 255/17
255/25 256/5 256/18 257/10
labs [3] 117/1 117/16 118/3
lack [4] 35/16 155/24 190/12
208/13
lacking [1] 215/21
laid [1] 51/23
Lake [4] 20/21 21/2 21/14 22/3
large [12] 17/12 18/7 24/16 83/1
83/2 83/12 83/13 83/23 109/5
111/11 112/9 113/9
laser [1] 110/12
last [27] 11/19 12/22 14/13 16/2
19/17 22/7 39/15 73/2 93/22
98/13 115/17 115/19 142/9 163/3
165/7 167/10 178/13 179/8 185/23
196/15 201/10 204/13 211/14
212/17 213/5 213/7 240/20
lasted [1] 254/17
latch [4] 26/10 85/18 86/10 92/24
latching [1] 88/1
late [8] 57/4 57/18 157/19 160/20
163/20 163/20 244/9 259/21
latent [1] 117/12

later [24] 14/12 14/19 15/8 58/24
83/15 137/13 137/14 164/10
166/18 176/6 178/7 194/6 215/1
242/19 246/25 248/23 249/6
250/14 252/21 253/7 253/9 253/14
257/25 259/15
latex [1] 105/13
latter [2] 153/24 154/19
laundry [1] 85/24
lavender [2] 63/4 91/16
law [12] 1/17 1/19 39/7 39/18 40/2
40/4 79/25 80/12 141/5 169/4
173/22 177/7
lax [2] 31/4 37/10
lay [2] 41/1 198/20
layout [1] 49/5
LC [23] 81/6 81/9 82/4 82/17
82/18 83/6 84/12 84/22 122/1
125/15 131/7 131/9 131/10 133/4
134/18 152/25 164/5 165/4 165/5
165/9 165/10 198/2 198/16
LC/MS [9] 81/6 84/12 84/22
125/15 131/7 131/9 131/10 165/4
165/9
LC/MS/MS [11] 81/9 82/4 122/1
133/4 134/18 152/25 164/5 165/5
165/10 198/2 198/16
lead [3] 149/12 149/12 149/16
leads [1] 49/7
learn [1] 197/20
learned [1] 181/16
learning [1] 170/8
least [16] 10/9 12/22 13/3 13/3
14/8 30/15 50/10 56/15 110/5
116/16 142/8 142/9 163/3 239/21
254/22 257/12
leave [4] 6/20 107/19 168/23 232/7
leaves [3] 8/3 116/20 236/7
leaving [2] 3/23 236/4
LEBEAU [22] 2/8 5/6 69/11 69/14
69/20 69/20 70/8 70/22 71/2
72/21 72/23 73/4 74/25 95/3
98/13 98/17 103/2 103/12 134/16
136/10 254/6 261/25
LeBeau's [1] 8/6
left [7] 43/17 46/19 205/14 227/1
232/8 234/23 236/5
legal [2] 156/3 156/24
Lenk [7] 33/10 33/12 33/17 34/9
56/25 57/8 173/19
less [7] 42/18 42/21 42/24 176/1
235/14 235/15 236/6
let's [27] 9/5 9/20 41/4 44/16
45/12 57/19 60/25 64/12 67/12
71/8 71/18 105/3 150/14 151/5
155/4 156/25 161/13 161/13
178/14 191/13 193/7 193/18
198/12 231/18 232/1 241/10
242/10
lets [1] 198/6
letter [7] 20/14 20/23 21/21
193/12 215/4 252/19 257/18
letters [1] 117/5
level [15] 18/16 50/21 74/20 76/9
177/14 180/25 181/1 195/7 196/16
204/1 206/4 206/8 207/3 225/3
238/10
levels [4] 76/11 100/14 149/3
249/13
lieutenant [6] 33/13 33/17 56/25
57/8 173/19 173/20
lieutenants [1] 67/6
life [3] 15/5 140/21 166/11

lifetime [1] 117/18
light [1] 3/17
lights [1] 198/25
likely [1] 152/21
lime [3] 211/3 211/5 211/8
limit [5] 128/19 129/6 206/10
223/6 238/5
limitation [3] 135/17 201/11
201/19
limitations [2] 202/2 202/5
limited [4] 40/19 70/3 223/23
228/6
limits [3] 202/6 222/13 238/3
line [2] 120/17 188/11
linked [1] 81/11
liquid [19] 62/23 81/5 82/17 83/5
210/2 224/7 233/22 233/24 234/4
234/22 235/4 235/5 235/7 235/10
235/13 236/7 236/11 237/13
237/17
list [3] 31/3 55/8 150/13
literature [10] 87/6 87/9 121/18
124/13 124/14 156/10 211/18
213/25 214/1 218/4
litigation [1] 249/23
little [40] 25/22 31/4 37/9 41/5
44/13 52/6 60/21 66/2 67/18
81/19 83/1 85/11 86/25 88/17
90/14 105/21 112/18 138/1 154/10
162/22 164/10 169/24 174/7
181/16 191/14 208/10 208/11
212/17 213/2 221/16 225/13
228/10 230/5 231/16 233/4 233/5
235/14 235/15 245/14 254/3
live [1] 12/19
liver [1] 139/7
living [2] 139/3 139/6
load [1] 121/3
lobby [1] 26/19
local [3] 79/16 170/4 177/18
located [1] 73/10
location [4] 18/9 24/7 46/13 47/17
lock [4] 52/7 56/4 56/11 65/9
locked [2] 46/12 58/11
log [9] 30/2 30/18 32/4 32/8 32/16
37/14 37/14 37/15 37/24
logbook [2] 29/15 29/21
long [21] 16/8 31/3 46/15 49/2
50/6 59/11 73/12 84/11 115/22
115/23 151/14 151/16 156/25
165/7 166/16 167/9 169/11 182/4
203/14 219/14 254/12
longer [7] 129/2 129/14 132/23
166/19 214/10 231/16 251/8
looked [22] 37/19 40/15 40/19
47/2 50/16 58/10 60/5 60/12
62/23 65/5 126/3 130/9 145/24
146/24 147/1 157/6 157/10 172/17
239/6 239/11 239/12 240/6
looking [34] 5/22 24/1 26/7 31/17
40/7 45/24 50/9 54/5 54/12 54/16
60/25 70/5 84/8 84/24 85/1 91/22
93/23 114/24 115/1 115/8 117/4
118/2 118/6 124/10 165/10 165/15
165/24 165/25 168/25 175/3 187/2
221/2 240/25 241/5
looks [7] 22/18 27/19 28/13 32/3
109/9 140/6 240/4
Los [1] 143/22
lose [2] 5/24 168/23
lot [12] 30/5 47/17 49/24 66/8
85/22 86/7 86/13 92/19 94/7
100/12 117/5 117/14

L	78/12 100/18 116/14 138/14 138/17 219/14 219/14 228/2 228/2 236/18 236/21 236/21 252/13 256/23 marbles [11] 82/23 82/24 82/24 82/25 83/2 83/4 83/8 83/10 83/12 83/13 83/14 MARC [6] 2/8 69/11 72/21 72/23 73/3 74/25 MARCH [4] 1/8 34/23 171/7 171/13 March 9th [1] 171/13 marijuana [1] 85/7 mark [6] 42/1 58/5 59/19 63/13 71/8 149/13 marked [26] 2/13 18/18 42/3 59/18 59/20 63/17 71/9 71/25 79/2 95/2 96/10 98/14 102/25 103/25 104/3 121/13 121/22 136/11 176/3 195/21 195/23 199/19 240/12 250/17 261/8 261/12 market [1] 118/7 marketing [1] 165/2 marking [2] 19/18 70/22 markings [3] 28/12 104/11 240/11 Martz [8] 146/1 146/13 146/18 146/20 147/13 149/6 161/17 161/21 Martz's [2] 149/23 150/4 Maryland [1] 74/18 mass [19] 81/5 81/8 82/17 82/21 83/20 84/3 154/1 154/2 199/23 200/11 201/22 201/23 202/2 202/10 202/17 202/24 206/18 222/15 222/17 master [5] 55/5 55/19 56/2 56/10 56/16 master's [2] 74/14 252/7 match [2] 84/9 202/17 matches [3] 84/7 84/10 202/10 material [11] 6/1 81/25 82/10 106/3 106/6 132/25 158/13 182/20 223/16 224/16 245/3 materiality [1] 6/2 materials [3] 5/14 215/5 215/6 matrix [5] 130/21 130/22 131/15 223/7 223/23 matter [16] 3/4 5/19 6/14 11/25 12/8 12/18 12/20 21/25 51/3 51/8 81/19 104/24 155/15 258/10 263/7 263/13 matters [2] 11/15 70/3 maybe [19] 30/22 30/24 31/6 34/23 37/8 38/22 53/14 68/7 68/8 83/11 116/16 118/4 138/7 156/8 162/22 164/4 192/11 230/8 243/7 Mccord [2] 149/13 181/22 mean [39] 8/11 9/13 21/8 34/15 37/18 37/18 40/6 41/17 42/13 42/23 47/13 50/16 50/18 53/4 53/15 54/16 54/21 58/5 58/18 58/19 60/14 65/4 66/8 66/9 66/10 67/2 67/15 76/25 87/1 106/25 109/17 116/15 123/1 169/15 175/20 180/22 182/14 193/11 230/14 meaning [2] 18/9 203/23 means [4] 77/1 85/17 123/3 246/9 meant [4] 101/21 139/5 193/3 228/20 measure [3] 77/6 129/17 129/20 measurement [1] 206/16 measures [1] 65/13 mechanism [1] 90/10	media [4] 17/12 18/13 41/21 144/10 medical [7] 75/12 75/18 242/18 251/2 252/4 254/11 254/18 medicine [1] 166/18 medium [2] 82/25 83/10 meet [3] 123/23 124/19 129/2 meetings [1] 30/4 meets [2] 74/7 124/17 member [4] 65/16 76/1 76/4 76/8 members [9] 15/16 29/14 69/2 102/11 136/3 160/6 173/18 231/15 259/19 membership [2] 76/9 76/11 memory [2] 6/14 14/17 memos [1] 176/11 mention [1] 209/13 mentioned [12] 43/3 44/23 66/23 87/15 142/4 164/24 208/20 223/22 224/9 224/9 236/21 236/24 mere [1] 202/9 met [2] 124/23 188/7 metabolic [1] 92/20 metabolite [8] 165/10 165/17 243/15 246/4 247/7 248/25 250/5 255/8 metabolites [2] 84/24 166/10 metal [5] 7/4 86/7 127/21 132/23 227/18 metals [16] 85/17 86/4 86/10 86/16 86/18 87/16 87/23 87/24 92/17 92/18 92/19 92/24 93/6 115/10 227/11 227/13 method [34] 101/16 120/20 124/10 124/11 124/14 124/25 125/11 125/18 130/5 131/7 152/20 152/21 153/14 156/13 156/15 159/23 167/22 170/22 170/22 178/11 218/8 218/10 219/4 223/3 249/3 249/4 249/10 249/12 255/19 255/20 256/4 256/5 256/11 256/25 methods [1] 156/12 micro [2] 236/3 236/3 micrograms [1] 206/14 microliter [3] 129/18 129/18 129/23 microliters [9] 233/7 234/14 234/18 235/13 235/24 236/4 236/8 236/17 237/13 microphone [1] 241/1 microscope [2] 129/10 129/21 Microscope [1] 260/19 Microsoft's [1] 229/25 mid [4] 115/21 150/20 162/17 247/13 mid-nineties [1] 162/17 mid-trial [2] 150/20 247/13 might [20] 4/5 9/11 33/24 62/2 63/24 64/23 86/21 116/17 142/16 164/5 165/21 165/23 176/24 214/23 215/20 224/6 225/1 238/10 238/11 238/17 Mike [2] 12/16 13/1 mill [1] 177/11 Miller [2] 149/13 181/21 million [2] 130/2 130/3 Milwaukee [1] 170/5 mind [5] 53/11 53/20 118/2 169/4 260/21 mine [2] 74/6 162/1 minor [2] 204/4 205/12 minute [10] 35/18 44/17 58/7 59/17 59/17 83/9 105/4 150/14
M		
M-a-r-c [1] 73/3 ma'am [1] 68/16 machine [4] 199/8 203/1 235/16 263/10 machines [2] 194/16 198/21 made [27] 14/13 16/23 20/18 24/23 25/4 38/12 40/12 87/11 89/1 101/18 132/23 146/19 146/20 146/23 147/1 150/18 160/22 160/23 172/14 172/16 173/1 173/4 173/14 190/12 194/11 221/14 239/21 Madeline [4] 180/8 180/9 183/7 188/1 Madison [1] 104/15 mailed [2] 22/2 117/4 mails [1] 12/3 main [2] 43/18 49/11 maintain [3] 16/20 17/14 33/22 maintained [3] 18/7 23/6 44/6 maintaining [2] 17/2 34/2 major [2] 203/22 204/3 majority [8] 90/21 90/23 94/6 114/15 114/23 139/10 139/10 194/10 make [42] 9/23 32/18 38/10 39/5 53/20 62/1 74/7 79/17 92/24 94/14 104/17 107/20 123/17 123/18 125/6 125/10 127/13 132/4 155/5 156/3 163/16 164/9 164/25 166/15 182/23 182/23 182/24 182/24 184/13 187/2 194/18 198/19 203/15 206/16 211/23 222/3 222/7 222/18 237/4 245/11 246/16 256/21 makes [4] 86/7 92/9 123/25 200/15 makeup [1] 165/3 making [4] 38/6 73/20 88/2 175/6 malfeasance [1] 144/19 man [2] 194/13 255/5 managed [1] 149/1 manager [8] 20/21 21/1 22/3 75/11 100/12 150/11 194/13 194/14 mandatory [2] 9/22 38/24 MANITOWOC [22] 1/1 16/7 16/9 16/12 17/6 19/25 20/16 20/25 21/22 23/6 27/3 33/1 33/13 34/18 40/10 40/14 40/20 55/20 134/25 176/25 239/24 263/2 manner [1] 11/3 manually [1] 235/22 manufacturers [3] 208/24 209/4 209/8 manuscript [6] 123/6 123/13 123/18 123/21 123/22 184/5 many [17] 42/17 43/17 47/15		

M		N
<p>minute... [2] 162/7 231/12 minutes [9] 50/10 69/5 71/19 83/11 83/14 161/14 233/15 233/17 234/24 misconduct [1] 144/19 Missouri [2] 74/12 74/13 misspoke [2] 234/19 235/9 mistakenly [1] 161/10 Mix [1] 225/10 mixed [2] 91/20 92/15 mixture [3] 82/19 83/7 83/16 mode [4] 196/17 204/18 204/22 205/3 molecular [2] 22/11 234/10 molecule [2] 212/8 246/4 molecules [2] 212/14 227/10 moment [11] 18/20 63/24 70/18 106/23 140/4 140/7 162/2 198/1 218/1 247/10 250/14 Mondays [1] 27/4 money [1] 116/21 monitor [2] 144/1 165/12 monitoring [1] 162/25 Monsanto [1] 75/19 Montgomery [6] 180/8 180/9 181/13 183/7 184/18 188/1 month [3] 219/7 220/25 252/6 monthly [1] 116/17 months [21] 31/6 36/24 39/10 39/15 57/9 163/23 163/24 167/5 167/20 167/23 168/4 168/16 169/2 172/12 212/23 213/5 214/7 214/19 218/21 219/15 222/21 morning [10] 3/3 3/7 3/10 12/15 13/15 36/19 36/20 64/22 259/23 261/24 most [14] 73/23 82/16 87/12 88/3 101/1 118/3 122/11 122/16 138/7 152/21 168/22 182/7 194/7 255/22 motion [7] 3/17 4/8 11/17 11/22 12/10 13/23 58/8 motions [1] 260/2 mouth [1] 175/14 move [13] 24/17 35/20 43/4 49/25 71/14 103/6 136/21 162/3 164/9 245/14 249/10 254/25 261/2 moved [1] 72/6 moving [3] 49/20 71/6 136/19 Mr [13] 11/21 56/23 62/9 70/16 147/1 150/4 154/13 173/4 174/3 184/18 194/20 226/11 252/13 Mr. [118] 4/9 4/15 4/21 5/9 5/19 6/4 6/10 6/12 7/5 7/9 8/6 8/10 10/8 11/12 11/22 11/24 12/2 12/12 12/13 12/23 12/24 12/24 14/13 14/15 15/18 17/13 18/11 19/13 20/6 34/9 36/5 36/13 39/13 39/19 40/3 40/12 40/25 41/7 42/6 43/13 45/19 56/23 58/1 61/9 61/21 63/22 66/19 67/14 67/23 69/11 70/22 71/2 71/21 94/25 102/22 108/12 119/16 121/12 121/21 137/1 142/25 143/4 146/13 146/18 146/20 147/13 149/23 150/8 158/4 158/25 160/3 160/15 161/17 161/21 162/2 166/25 167/24 168/14 169/16 169/21 170/19 170/23 171/22 172/11 172/22 173/15 175/1 175/5 181/21 181/22 183/4 185/7 189/10 195/3 195/6 195/17 197/13 198/3 198/9</p>	<p>204/24 207/2 207/22 208/4 208/12 214/14 215/2 216/11 229/9 231/4 231/9 241/2 246/22 247/13 253/20 254/1 258/23 260/13 261/4 Mr. Avery [17] 4/15 4/21 5/9 5/19 6/4 17/13 18/11 20/6 39/19 40/12 41/7 172/11 172/22 173/15 175/1 175/5 231/9 Mr. Avery's [16] 4/9 19/13 40/3 42/6 43/13 67/14 67/23 183/4 185/7 207/2 207/22 208/4 214/14 229/9 231/4 253/20 Mr. Brewer [5] 195/3 195/6 197/13 204/24 261/4 Mr. Brewer's [2] 195/17 216/11 Mr. Bruce [1] 150/8 Mr. Buting [16] 7/5 7/9 11/24 12/13 36/5 36/13 40/25 45/19 66/19 69/11 137/1 160/3 160/15 198/3 198/9 241/2 Mr. Buting's [1] 12/2 Mr. Fallon [8] 12/23 14/15 15/18 56/23 63/22 108/12 121/12 121/21 Mr. Fassbender [1] 58/1 Mr. Gahn [20] 6/10 8/10 10/8 11/22 12/24 71/21 102/22 119/16 166/25 168/14 169/16 169/21 170/19 170/23 171/22 189/10 208/12 215/2 254/1 260/13 Mr. Gahn's [1] 167/24 Mr. Kratz [1] 12/24 Mr. LeBeau [2] 70/22 71/2 Mr. LeBeau's [1] 8/6 Mr. Lenk [1] 34/9 Mr. Martz [6] 146/13 146/18 146/20 147/13 161/17 161/21 Mr. Martz's name [1] 149/23 Mr. McCord [1] 181/22 Mr. Miller [1] 181/21 Mr. O.J [2] 143/4 158/4 Mr. Simpson [1] 142/25 Mr. Simpson's [1] 158/25 Mr. Steven [1] 94/25 Mr. Strang [5] 6/12 11/12 12/12 14/13 162/2 Mr. Sybers [2] 246/22 258/23 Mr. Sybers' [1] 247/13 Mr. Wiegert [3] 39/13 61/9 61/21 Mrs. [3] 243/1 247/7 253/3 Mrs. Sybers [1] 253/3 Mrs. Sybers' [2] 243/1 247/7 Ms [43] 10/21 20/16 29/6 36/19 45/23 64/3 81/6 81/9 81/9 82/4 82/4 84/12 84/22 122/1 122/1 125/15 131/7 131/9 131/10 133/4 133/4 134/18 134/18 152/25 152/25 164/5 164/5 165/4 165/5 165/5 165/9 165/10 165/10 181/13 184/18 194/22 194/22 198/2 198/2 198/13 198/13 198/16 198/16 multi [2] 244/1 244/8 multi-question [1] 244/1 multiple [2] 91/4 194/25 murder [2] 242/20 246/9 muscle [2] 242/21 245/17 must [9] 22/18 32/7 32/14 34/10 39/22 65/4 123/22 139/8 172/22 mutilation [1] 177/23 myself [11] 97/16 98/9 101/21 106/12 143/22 159/10 175/25 182/23 198/20 200/7 204/6 mystery [1] 193/18</p>	<p>name [18] 16/2 16/2 29/20 32/23 33/10 50/4 73/2 73/2 73/3 80/20 86/1 106/20 128/1 149/23 150/4 193/18 207/2 242/14 named [2] 193/20 254/11 namely [1] 103/14 narrative [3] 153/22 154/20 202/1 narrow [1] 49/6 National [3] 75/17 251/2 252/4 naturally [1] 257/12 nature [9] 21/6 21/8 46/24 154/21 173/24 177/1 216/23 233/8 236/13 near [5] 94/22 107/4 113/7 113/16 199/5 nebulous [1] 200/17 necessarily [1] 50/19 necessary [7] 9/18 12/9 12/12 70/11 167/18 232/9 237/22 need [19] 8/8 9/10 26/13 31/11 56/3 65/7 99/24 124/11 127/13 157/21 162/14 166/21 167/11 167/13 168/12 169/15 197/20 212/24 243/19 needed [2] 7/25 171/5 needs [5] 45/13 100/2 124/18 124/20 124/24 negative [7] 129/4 132/15 163/14 204/18 205/5 238/5 256/12 neither [1] 70/2 Netherlands [1] 88/14 never [24] 32/12 32/14 35/6 35/10 35/11 57/3 65/5 115/10 116/4 121/1 149/15 159/8 211/12 211/16 225/25 228/22 231/2 231/7 244/25 248/9 248/9 248/14 249/13 256/13 new [23] 30/4 54/6 65/12 74/15 75/15 84/24 84/24 118/6 150/19 167/22 182/5 182/12 188/15 198/4 220/8 220/15 220/16 220/21 237/24 249/7 249/10 256/24 257/1 newer [1] 125/15 newly [1] 150/25 news [1] 144/8 next [24] 22/5 25/25 27/6 27/18 28/7 44/11 44/24 59/23 69/3 72/19 77/8 82/20 83/18 83/20 110/22 111/25 112/22 112/23 113/11 113/18 113/18 131/25 132/7 132/12 nice [1] 137/23 night [1] 12/22 nine [6] 140/6 140/7 214/16 225/16 242/19 245/10 nineties [1] 162/17 No. [1] 204/9 No. 9 [1] 204/9 nobody [3] 39/22 57/7 142/10 non [8] 116/9 116/11 117/15 117/24 118/9 119/24 121/3 168/1 non-routine [8] 116/9 116/11 117/15 117/24 118/9 119/24 121/3 168/1 none [6] 40/2 40/3 130/17 173/8 228/25 238/3 Norm [1] 3/9 normal [10] 51/12 52/13 79/12 88/1 88/2 88/23 89/5 92/20 92/25 231/16 normally [9] 18/15 43/7 43/14 46/20 52/15 68/4 87/25 130/18 177/15</p>

N
NORMAN [1] 1/15
Nos [1] 71/9
notation [1] 204/5
note [2] 53/9 53/20
notes [12] 179/6 204/5 208/7
 213/9 216/6 216/8 216/15 216/25
 219/8 228/13 240/8 263/9
nothing [7] 29/23 90/19 90/21
 91/11 91/23 149/24 216/16
notice [5] 4/15 4/21 250/16 258/9
 259/11
notices [1] 48/11
notified [1] 258/1
notify [1] 250/25
notion [1] 126/14
November [12] 12/4 14/1 20/7
 39/19 40/1 57/12 57/18 67/13
 68/17 122/3 172/11 172/20
November 29th [1] 20/7
November 2nd [1] 12/4
November 5 [1] 14/1
November/December [1] 122/3
nowhere [1] 199/5
number [45] 29/17 48/18 55/1
 55/19 59/23 63/15 76/21 85/25
 88/24 90/18 94/19 95/8 95/10
 96/1 96/14 97/14 98/7 99/1 99/12
 104/5 104/13 106/11 107/15
 108/15 108/20 112/24 118/25
 130/10 137/5 137/8 146/19 149/3
 163/3 167/16 177/19 193/12
 199/20 205/18 205/21 206/13
 206/15 206/16 207/17 209/16
 212/23
numbers [2] 72/1 193/12
numerous [3] 87/8 170/19 211/7
nutshell [1] 81/17

O
O.J [44] 115/20 116/5 142/4
 142/17 142/18 142/20 143/2 143/4
 143/10 143/13 143/19 144/17
 145/17 146/6 146/17 148/4 148/8
 148/11 148/16 149/1 149/10
 150/15 150/22 151/6 151/17 152/6
 152/10 153/10 155/10 155/19
 158/4 158/7 159/9 161/6 161/11
 161/19 162/11 162/13 167/10
 189/12 190/15 238/18 238/21
 242/12
oath [3] 163/17 213/18 217/19
object [5] 96/20 137/6 174/4
 254/20 260/6
objected [3] 229/15 260/4 260/5
objection [37] 6/11 11/7 35/9
 35/16 36/6 36/12 40/17 51/15
 51/19 59/10 64/7 68/22 72/9
 72/11 99/23 103/8 109/11 109/15
 119/13 135/15 135/18 135/19
 136/24 141/10 141/12 144/24
 148/17 188/25 190/2 190/14
 190/19 190/25 197/22 217/12
 245/6 258/8 261/11
objective [4] 175/16 175/21 201/4
 201/14
observation [1] 62/2
observed [5] 110/20 111/15
 111/23 112/14 125/7
obtain [3] 18/25 21/15 246/8
obtained [1] 21/10
obvious [2] 110/4 111/17

obviously [2] 139/7 218/8
occasion [5] 33/18 35/2 54/1 54/10
 65/20
occasionally [2] 52/20 66/12
occasions [1] 39/14
occupation [1] 73/7
occur [2] 34/20 92/20
occurred [3] 110/10 132/25 150/24
October [6] 31/7 31/16 37/21
 37/25 41/6 67/12
off [20] 25/15 47/18 71/18 80/16
 99/8 101/4 110/17 113/24 116/20
 129/11 140/25 168/23 169/6
 169/18 199/1 226/23 227/4 232/23
 233/4 234/10
offered [6] 2/13 4/5 36/8 36/12
 154/15 253/15
office [87] 3/22 4/18 5/10 16/13
 16/17 16/18 17/14 17/17 17/20
 18/6 18/8 19/25 20/25 21/23 22/9
 22/21 23/19 24/12 25/9 25/12
 25/14 25/15 26/5 26/14 26/25
 27/2 27/15 29/8 33/4 33/5 33/8
 33/16 33/17 33/21 35/5 35/8
 35/11 35/11 35/17 36/22 37/3
 37/21 41/7 42/19 42/21 42/22
 42/22 43/21 43/23 44/19 48/19
 48/20 51/11 51/14 52/10 52/10
 52/16 54/3 54/12 55/1 55/5 56/18
 57/1 58/9 58/24 61/5 62/14 64/5
 64/15 64/19 64/21 64/23 64/24
 65/3 65/8 65/21 68/14 75/12
 79/16 80/16 89/22 134/25 170/2
 170/3 170/4 170/18 239/24
officer [4] 39/18 68/19 80/6
 173/23
officers [9] 39/8 40/2 40/4 52/24
 57/13 67/6 79/25 173/15 175/2
offices [1] 176/11
official [6] 1/25 23/5 80/5 196/25
 263/4 263/19
officially [2] 29/3 136/8
often [6] 76/15 76/20 100/25
 117/19 120/25 140/17
oh [20] 10/19 14/4 19/4 105/20
 146/13 150/1 155/4 156/4 161/13
 170/10 171/24 182/10 187/14
 196/7 216/5 229/3 229/23 230/2
 251/17 261/4
OJ [1] 191/11
old [31] 42/19 43/11 45/8 46/8
 46/8 54/5 54/5 208/2 209/22
 210/7 210/9 210/10 213/5 213/22
 214/4 214/6 214/9 214/12 214/17
 215/8 215/14 218/21 219/7 220/25
 221/1 222/21 224/7 225/16 225/16
 249/11 256/19
once [7] 43/16 57/22 67/11 68/11
 117/18 128/11 142/2
ones [6] 39/4 118/1 149/17 149/18
 193/15 257/14
ongoing [9] 41/13 151/11 179/4
 184/25 185/6 208/18 209/10
 249/22 254/12
only [30] 7/11 10/2 10/7 36/7
 41/10 52/15 64/3 83/18 149/5
 154/16 180/17 185/11 189/20
 189/24 189/24 203/7 219/3 222/21
 227/23 228/17 229/17 230/15
 247/4 255/12 256/8 257/15 257/22
 260/18 260/24 261/13
onto [9] 88/21 92/24 126/22
 129/21 130/14 234/23 235/22

241/22 254/25
open [11] 25/17 29/16 42/25 61/24
 66/4 68/12 104/16 105/5 105/20
 105/22 241/13
opened [11] 28/13 28/23 58/25
 59/1 60/6 60/20 63/9 104/11
 110/2 241/17 241/25
opening [2] 28/15 106/10
opens [1] 105/19
operating [2] 124/12 219/11
operation [1] 73/20
opinion [44] 35/17 101/6 101/20
 101/20 134/21 135/2 135/3 135/11
 154/24 155/23 156/20 157/13
 184/8 189/19 189/21 189/23
 197/11 207/20 211/12 211/16
 215/21 224/23 224/24 224/25
 228/5 228/10 228/12 228/25
 229/14 230/13 230/17 230/20
 238/9 242/7 246/15 248/18 250/4
 252/21 253/2 253/5 253/7 253/15
 257/21 260/25
opinions [8] 141/5 141/14 213/15
 213/17 242/2 246/13 248/16
 251/12
opportunity [2] 169/16 247/11
opposed [1] 175/11
opposing [1] 18/19
option [1] 127/9
options [2] 4/9 127/8
order [38] 4/10 4/14 4/20 5/1 5/11
 6/4 6/5 6/16 6/19 6/21 9/7 10/1
 10/8 10/25 10/25 11/2 11/11 20/3
 20/19 21/3 21/12 21/24 22/2
 58/13 82/7 84/6 156/13 159/17
 167/14 167/15 167/17 168/13
 184/13 186/5 190/22 191/6 194/11
 219/9
ordered [4] 20/5 21/4 247/19
 255/15
orders [1] 21/13
organization [3] 76/7 76/10
 175/20
organizations [2] 75/22 76/17
original [11] 19/24 44/5 94/7
 94/10 123/21 149/21 222/25
 228/19 252/15 252/23 261/5
originally [5] 24/14 24/22 30/19
 43/20 47/12
originate [1] 199/17
other [106] 7/14 9/2 9/2 12/7 13/9
 17/19 24/8 28/20 30/9 34/6 35/2
 35/4 36/2 36/11 40/6 41/22 42/19
 46/18 47/19 48/23 49/1 49/2
 61/22 65/16 65/17 65/20 66/24
 67/22 70/10 70/14 70/22 81/12
 82/24 84/18 88/10 88/11 92/23
 96/21 117/14 127/20 130/11
 130/23 130/25 131/12 131/16
 137/15 147/25 155/13 155/18
 156/16 156/17 156/19 156/19
 157/11 157/14 162/16 162/18
 165/17 166/16 169/3 173/20 175/7
 175/8 178/24 184/6 187/1 187/7
 189/17 189/24 189/24 191/24
 192/9 194/21 195/13 200/7 204/4
 204/21 208/24 211/5 211/5 216/8
 216/15 220/7 222/11 224/23 228/2
 228/3 228/22 229/6 230/4 230/19
 230/22 232/8 232/12 235/9 242/6
 247/5 247/5 248/24 248/25 249/2
 250/1 256/12 256/17 257/17
 259/22

O

others [2] 137/7 149/6
otherwise [2] 3/25 188/15
our [114] 16/18 17/14 17/16 18/8
 20/17 22/9 22/20 25/1 25/9 25/12
 25/14 25/15 26/4 26/11 26/14
 26/18 26/19 33/7 34/3 34/16 35/8
 51/14 52/16 73/22 73/25 74/3
 74/8 74/9 75/6 76/18 77/17 78/1
 78/3 78/3 79/13 80/9 80/9 83/5
 84/16 91/24 92/1 92/18 92/19
 92/20 92/21 93/4 94/13 96/1
 97/14 98/7 99/1 99/2 99/13
 100/14 102/11 104/12 106/11
 107/10 108/20 110/2 110/11
 111/19 112/20 117/6 117/11
 118/10 118/11 121/2 124/17
 124/19 124/25 125/18 128/11
 128/15 128/16 128/17 128/19
 129/6 129/25 131/3 132/17 134/4
 135/9 144/11 145/18 149/9 149/14
 149/16 153/13 160/7 163/10
 163/11 168/23 170/4 170/17 171/3
 176/23 183/21 186/14 187/24
 189/16 193/6 193/14 208/22
 208/22 209/6 215/13 223/2 224/12
 238/5 249/7 249/18 256/4 257/12
ourselves [1] 249/17
outside [8] 3/4 3/15 61/1 65/8
 70/3 77/23 137/13 240/21
outstanding [1] 260/1
over [35] 9/21 26/20 34/11 34/12
 45/5 45/8 46/18 49/10 49/12
 50/20 50/23 54/18 66/10 87/16
 88/6 88/13 88/15 88/16 94/11
 108/15 115/13 135/15 145/1
 158/21 186/14 189/17 190/6
 190/21 190/22 191/6 195/19 197/3
 219/14 249/10 256/25
Overruled [1] 145/3
oversee [4] 16/13 16/16 16/18
 73/19
oversees [2] 100/21 186/16
oversimplify [1] 231/25
oversimplifying [1] 233/9
own [7] 96/4 143/21 144/11 186/9
 214/23 254/21 260/12
oxalate [1] 91/15

P

p.m [2] 14/2 14/3
pack [2] 116/19 116/20
package [5] 27/10 27/10 27/15
 27/20 28/5
packaged [2] 105/25 106/4
packaging [6] 69/18 70/4 96/2
 98/2 98/8 241/13
packed [1] 106/3
packs [1] 116/24
pad [1] 26/9
page [14] 2/2 19/17 152/14 162/7
 176/16 200/9 201/10 201/10
 201/15 204/8 205/19 205/20 219/2
 220/12
paged [1] 37/19
pages [4] 13/19 176/6 176/9
 216/20
paper [16] 24/4 47/22 47/25 48/2
 126/3 128/13 131/8 132/9 132/12
 158/6 199/2 221/16 223/11 223/11
 223/18 224/19
papers [1] 64/25

paragraph [7] 153/7 205/18 205/19
 205/20 205/21 216/16 217/5
paragraph two [3] 205/18 205/20
 205/21
paralyzing [1] 242/22
parent [5] 243/17 245/12 253/4
 256/9 257/23
parenthesis [1] 22/16
part [33] 8/14 10/12 24/4 26/18
 26/22 29/3 33/7 37/3 48/20 51/10
 54/13 56/17 77/17 86/5 88/19
 107/14 132/17 132/21 145/12
 148/6 152/3 154/19 163/11 166/4
 167/8 179/21 186/23 189/3 194/8
 206/11 218/8 241/19 244/12
partial [1] 10/7
particular [62] 15/4 17/10 24/7
 29/13 31/17 32/13 32/16 39/23
 42/9 48/4 49/17 50/14 51/21
 79/19 82/9 93/9 107/11 107/14
 108/21 110/11 112/17 112/20
 118/21 123/7 123/13 124/20
 126/21 128/20 129/16 130/4
 131/11 131/15 132/8 133/2 141/1
 158/1 158/15 164/7 164/12 166/23
 176/14 177/14 182/16 189/19
 198/1 200/16 202/4 206/4 215/16
 219/18 227/20 232/12 233/16
 238/23 242/21 243/6 244/18
 245/24 246/4 248/20 249/14
 255/15
particularly [4] 32/21 107/12
 131/7 227/13
parties [13] 3/5 3/14 6/16 9/6 9/10
 10/4 11/5 12/6 14/21 15/8 62/21
 72/4 105/11
partition [5] 48/10 48/14 48/16
 48/24 49/10
partitioned [1] 25/15
partitions [2] 48/18 68/13
parts [3] 9/16 130/2 130/3
pass [4] 35/19 136/8 218/22 219/2
passed [2] 78/6 242/19
passenger [8] 7/4 96/11 98/3
 98/22 111/4 111/8 111/22 113/17
passes [3] 123/20 179/2 196/20
past [8] 17/3 25/23 40/1 56/12
 68/11 87/13 166/19 257/2
pathologist [1] 254/16
Pathology [1] 22/11
Patrick [1] 1/9
pattern [1] 84/5
peer [10] 78/17 78/23 119/1
 122/23 123/2 123/3 123/24 156/12
 183/24 219/25
Pennsylvania [7] 75/17 255/2
 255/18 256/1 256/6 256/18 257/10
people [25] 25/19 26/20 28/14
 32/8 38/6 38/7 38/13 38/22 40/7
 40/7 43/2 47/20 48/23 50/18
 55/21 64/23 119/5 138/7 139/6
 163/5 182/1 182/14 189/5 198/20
 200/6
per [5] 22/4 130/2 130/3 205/6
 207/19
percent [5] 54/21 121/2 131/22
 177/17 222/20
perform [4] 81/2 96/3 118/9
 124/21
performance [2] 146/15 146/16
performed [14] 3/25 80/22 106/13
 128/14 128/18 133/10 133/20
 134/7 143/7 159/16 179/8 194/7

212/13 212/15
performing [2] 100/13 212/16
perhaps [14] 6/21 9/9 9/16 54/12
 65/20 83/13 83/15 112/19 156/25
 164/23 175/5 178/12 228/11 233/9
period [1] 233/13
permission [1] 58/25
permits [2] 64/4 65/2
permitted [1] 65/9
perpetrator [1] 119/8
person [25] 1/22 3/11 13/7 13/9
 13/11 13/16 31/9 31/13 34/10
 37/21 139/4 166/24 173/20 180/22
 181/1 187/19 191/20 192/7 192/8
 192/12 192/16 193/19 225/15
 225/21 245/13
personal [2] 61/5 93/11
personally [6] 39/2 102/1 111/6
 112/11 142/14 213/24
personnel [3] 26/12 73/24 146/11
persons [1] 247/6
pertaining [1] 75/22
pertains [1] 107/1
petroleum [1] 164/19
petty [1] 25/1
PH [4] 210/22 211/1 211/4 211/6
Ph.D [4] 74/23 149/6 149/7 194/1
Ph.D.s [1] 100/18
pharmaceutical [2] 84/23 165/4
Pharmaceuticals [1] 164/24
photo [2] 50/5 71/15
photograph [30] 23/17 47/5 52/6
 68/1 108/14 108/17 108/23 109/1
 109/4 109/10 109/17 109/18 110/3
 110/18 110/22 111/3 111/10
 111/10 111/20 112/8 112/23 113/8
 113/14 113/18 113/21 232/2 239/5
 239/16 241/7 241/8
photographs [6] 23/10 59/4
 107/25 108/13 239/17 240/18
photography [2] 237/6 237/7
photos [1] 226/2
phrased [1] 54/9
phrasing [1] 51/21
physics [2] 157/8 157/9
pick [1] 192/15
picked [1] 229/23
picking [2] 52/21 64/24
pickup [2] 64/25 113/25
picture [9] 24/10 26/4 32/15 32/16
 44/18 48/11 49/24 202/24 240/4
pictures [1] 58/7
piece [6] 60/21 74/3 158/24 159/2
 159/4 221/16
pieces [2] 83/23 203/3
place [9] 47/16 47/21 61/4 64/25
 104/12 171/21 219/3 235/22 258/2
placebo [1] 192/7
placed [5] 79/1 96/2 99/1 234/16
 234/22
PLAINTIFF [1] 1/4
plans [1] 9/4
plant [7] 68/20 176/21 178/4
 210/22 214/15 225/13 225/20
planted [10] 39/22 40/13 126/14
 127/2 127/18 173/5 174/2 230/12
 230/15 230/21
planting [7] 79/21 79/25 135/13
 135/22 174/12 174/25 229/16
plants [1] 210/20
plastic [7] 23/17 24/20 29/10 47/2
 106/3 106/6 132/24
play [2] 34/5 59/9

P	pre-trial [1] 51/22	52/16 57/6 103/3 132/25 169/2
played [3] 59/12 101/13 261/17	precaution [1] 106/9	171/9 220/15 223/9 223/12 235/14
playing [5] 60/7 60/24 62/8 62/20 63/1	preceded [1] 64/9	236/6 239/6 260/2
plays [2] 92/2 92/17	prefer [2] 69/20 70/6	problem [4] 132/10 158/7 209/2 217/22
plea [1] 259/10	prefers [1] 71/2	procedure [24] 29/12 34/14 34/16 117/17 118/9 120/11 120/16 121/6 121/15 124/13 129/13 130/15 187/7 187/23 188/3 203/12 203/16 204/9 204/19 205/24 219/11 220/12 231/23 245/1
pleadings [2] 16/24 50/9	prejudicial [1] 260/10	proceeds [1] 37/5 37/9 119/23 121/9 121/18 124/8 125/7 128/10 133/4 205/10
please [34] 15/22 16/1 16/1 21/11 22/16 23/16 27/7 28/7 70/18 73/1 73/1 96/14 105/6 108/15 111/25 112/13 112/24 113/11 113/18 115/7 116/13 118/18 121/23 126/11 128/8 140/7 148/22 176/5 204/8 213/1 234/6 241/8 250/9 254/6	prepare [4] 10/25 11/11 74/4 196/10	proceed [5] 15/17 71/1 97/8 102/7 105/16
pleasure [1] 142/1	prepared [5] 90/5 90/5 136/14 229/7 263/8	proceeding [1] 69/10
pled [2] 258/24 259/4	preparing [1] 114/20	proceedings [9] 1/23 9/21 9/25 16/15 41/14 41/16 156/24 262/7 263/13
point [25] 4/23 14/18 21/5 30/1 38/24 45/2 60/8 62/9 62/10 68/11 110/5 111/14 119/14 119/22 129/1 129/13 166/5 174/25 186/5 190/11 212/5 232/22 238/9 241/24 247/11	presence [38] 3/5 3/15 51/9 74/1 89/3 89/15 114/3 115/1 115/11 115/18 121/6 127/10 129/14 129/22 130/7 133/5 133/11 133/15 133/21 134/2 134/8 137/13 155/24 176/19 202/13 222/4 226/16 245/3 250/5 250/7 251/9 251/13 253/2 255/4 255/6 255/21 255/24 256/19	proceeds [1] 100/10
pointed [3] 105/12 153/8 215/20	present [23] 15/14 28/14 45/14 45/18 69/6 72/17 81/21 82/2 92/18 93/9 102/15 102/20 115/14 116/23 127/16 153/13 160/10 202/20 207/9 226/12 245/21 257/11 259/24	process [21] 5/16 5/17 88/1 100/9 101/15 114/11 126/6 126/12 135/22 167/17 178/25 179/2 179/15 179/17 186/7 186/9 186/23 188/13 189/8 192/3 237/11
pointer [1] 110/12	presentation [6] 70/13 90/6 115/3 126/8 140/22 260/3	processed [2] 107/18 114/13
pointing [1] 110/14	presentations [3] 139/10 140/5 140/11	processes [1] 92/20
points [1] 62/4	presented [8] 24/5 31/23 125/3 155/16 155/17 156/20 157/13 228/7	processing [1] 101/13
poisoned [2] 244/17 244/23	presenter [1] 141/1	produce [1] 189/5
poisoning [2] 242/20 242/21	presenting [1] 140/8	product [3] 101/4 127/14 209/1
police [5] 79/21 80/6 173/5 173/15 175/2	presents [1] 83/24	products [10] 85/22 86/13 86/20 87/18 107/16 164/21 208/25 236/22 236/22 236/25
policies [2] 16/17 35/3	preservation [3] 9/22 11/3 11/9	professional [5] 75/21 78/23 78/25 122/12 122/17
policy [2] 30/20 34/15	preservative [2] 90/24 92/6	proficiencies [1] 78/6
political [1] 80/11	preservatives [3] 92/12 130/11 130/12	proficiency [4] 77/16 77/19 77/20 78/5
politician [1] 80/5	preserve [4] 4/9 4/22 7/6 9/12	program [2] 187/25 188/6
poor [2] 242/25 253/3	preserved [17] 4/13 4/18 6/19 6/22 6/23 7/9 9/1 9/14 9/16 10/3 10/4 10/10 11/1 127/24 129/8 130/10 175/11	project [2] 185/1 185/7
portion [22] 82/17 82/17 83/6 85/4 110/8 110/15 111/17 112/19 145/9 146/14 152/13 153/20 153/21 153/24 154/18 154/20 226/10 226/22 227/1 233/24 234/25 235/8	preserving [1] 8/9	promise [2] 14/24 168/15
position [7] 80/12 80/12 97/1 175/19 190/24 196/25 196/25	press [1] 66/4	promoted [3] 194/2 195/10 196/16
positive [10] 107/6 107/21 129/4 158/18 204/21 204/22 205/2 226/16 234/13 245/25	pressure [2] 152/22 248/7	promotions [1] 183/17
positively [1] 37/23	presumably [1] 236/15	prompted [1] 215/10
possession [1] 34/3	presumptive [1] 226/8	prong [1] 4/8
possibilities [1] 135/10	presumptively [1] 226/16	properly [1] 248/1
possibility [1] 192/2	pretty [11] 26/12 34/25 37/13 39/3 39/17 42/24 48/2 57/16 60/19 64/18 76/17	properties [1] 81/19
possible [3] 40/10 40/14 82/12	prevalence [1] 87/14	proposed [1] 11/11
possibly [1] 24/23	prevent [1] 93/1	pros [1] 246/11
post [3] 5/15 41/13 249/22	previous [4] 65/12 97/2 112/19 158/20	prosecution [10] 116/5 143/12 157/18 160/20 163/20 246/8 246/11 252/10 252/11 255/16
post-conviction [3] 5/15 41/13 249/22	previously [7] 95/2 95/13 95/21 97/3 97/20 110/6 112/16	prosecution's [1] 244/22
posted [2] 48/11 52/17	primarily [2] 147/22 182/4	prosecutor [8] 1/11 1/13 1/15 250/15 251/20 251/22 252/22 257/16
postmortem [16] 138/17 138/18 138/22 139/3 139/6 139/13 139/16 139/21 140/1 243/16 243/23 244/10 244/11 245/15 245/16 257/13	primary [1] 169/4	prosecutors [2] 3/8 257/16
potassium [2] 91/14 91/15	print [2] 29/19 29/20	proteins [1] 130/22
potential [2] 127/7 220/22	prior [8] 73/14 110/11 111/18 190/10 226/23 250/6 251/13 255/14	protocol [84] 108/4 108/6 121/6 124/5 128/4 129/3 147/22 148/4 150/15 151/6 151/15 151/16 152/5 153/9 154/17 154/22 156/6 159/15 164/11 167/12 167/13 178/7 178/15 178/18 178/21 179/23 180/6 183/3 184/23 184/24 185/8 185/17 186/21 187/11 187/22 188/16 188/19 188/21 189/11 189/18 189/24 190/6 190/10 190/13 190/15 191/10 194/23 194/24 203/5 203/9 203/13 203/18 203/20 205/10 206/3 206/8 206/12 206/19 206/23 207/19 219/4 219/6
potentially [2] 119/8 203/24	private [2] 29/8 75/16	
pouring [1] 230/5	privileged [3] 141/8 141/13 141/17	
powders [3] 117/4 117/7 117/8	privy [1] 146/12	
PowerPoint [7] 90/6 103/1 103/6 137/2 225/13 260/3 260/15	pro [1] 151/13	
practical [1] 6/13	probably [22] 10/2 12/15 28/8 29/9 31/6 34/22 43/24 46/9 51/2	
practice [6] 31/12 67/5 122/18 162/25 163/4 232/7		
practices [1] 77/3		
pre [1] 51/22		

P
protocol... [22] 219/10 219/11
219/13 219/17 219/24 220/7 220/9
220/15 220/16 220/21 231/24
233/16 242/11 243/5 243/14
243/20 244/16 244/21 245/18
247/12 248/7 248/10
protocols [5] 168/3 182/5 182/12
186/9 187/3
prove [2] 135/23 226/15
proved [6] 250/6 252/15 253/3
253/7 253/11 253/14
proves [1] 251/12
provide [9] 11/3 17/15 65/13
65/15 77/25 79/18 116/3 196/11
206/15
provided [2] 77/20 135/5
providing [2] 19/15 218/11
prudent [1] 9/20
public [16] 17/15 26/24 29/14
29/16 30/20 40/12 41/23 42/25
49/8 80/4 80/5 156/8 156/14
171/25 172/5 173/14
public's [1] 80/14
publication [11] 123/1 125/7
125/16 147/16 150/2 153/19 184/3
185/3 217/6 218/18 220/5
publications [6] 78/25 88/14
122/20 139/11 154/16 155/6
publicly [2] 42/5 173/5
publish [4] 23/20 44/16 123/5
123/9
published [23] 78/24 119/1 122/2
122/7 124/1 124/3 124/13 124/15
125/1 139/4 139/19 149/12 149/18
155/7 156/11 183/25 209/20
209/25 210/24 217/4 217/23 218/4
219/10
pull [1] 27/13
purchase [1] 25/4
purchased [1] 29/11
purple [21] 69/13 69/19 91/16
92/13 93/2 93/10 93/12 93/17
93/20 94/24 127/19 128/2 134/9
134/12 208/1 221/10 228/15 229/8
230/6 230/15 241/14
purple-stop [1] 94/24
purple-stoppered [6] 91/16 92/13
93/2 93/10 93/20 134/12
purple-topped [11] 69/13 69/19
93/12 93/17 127/19 128/2 134/9
221/10 229/8 230/6 230/15
purport [1] 63/8
purpose [12] 31/14 31/15 51/25
70/4 86/14 176/16 176/18 176/23
177/4 178/1 250/25 261/14
purposes [8] 5/5 11/9 17/17 76/13
99/24 180/20 239/19 260/24
pursuant [1] 58/13
pursue [1] 4/6
push [1] 198/24
put [41] 34/10 44/20 46/3 46/9
47/2 47/10 57/3 68/16 76/20
81/20 83/4 88/21 88/22 89/23
91/18 94/15 101/6 106/23 117/16
120/17 125/11 126/21 129/9
130/13 150/4 175/13 184/2 185/9
203/3 205/13 206/16 207/8 217/1
233/4 233/5 233/10 233/10 234/9
240/23 256/11 257/17
putting [4] 61/9 130/22 164/21
218/10

puzzle [1] 203/3
Q
Q-43 [1] 193/13
Q-46 [1] 193/1
Q-47 [1] 236/2
Q-48 [2] 193/1 236/2
Q-49 [1] 236/2
qualified [14] 101/2 150/25 181/8
182/15 184/7 196/2 196/6 196/8
196/14 196/19 197/5 197/16 226/9
226/18
quality [14] 74/7 74/8 77/6 114/19
186/14 186/16 186/20 186/23
187/19 187/24 188/6 200/6 203/23
204/2
Quantico [1] 73/11
quantitate [4] 206/4 206/20 207/3
219/21
quantitative [1] 207/5
quarter [1] 160/12
question [63] 32/22 35/13 51/21
51/24 52/3 53/7 54/8 57/1 57/3
63/25 64/9 64/10 65/19 93/15
94/14 97/6 105/9 119/25 141/11
147/10 147/11 148/18 148/20
148/22 152/8 152/15 154/6 154/11
156/25 160/24 163/18 169/10
188/12 189/1 192/15 194/25 195/2
197/23 202/13 208/12 212/2
212/11 212/12 213/1 215/2 217/13
218/16 218/16 219/16 219/24
220/12 220/15 220/19 225/18
229/5 239/2 240/3 244/1 244/1
244/9 245/14 249/1 250/10
questioned [3] 13/12 56/7 202/20
questioning [1] 15/18
questions [8] 33/20 41/2 63/13
119/17 119/24 161/3 169/12 244/5
quick [3] 66/20 216/6 231/18
quicker [3] 162/6 168/16 169/25
quickly [4] 152/22 166/1 166/2
255/19
quite [14] 13/12 24/18 41/23 67/25
137/22 140/5 140/19 149/19
159/24 168/5 176/2 210/23 211/21
218/1
quote [6] 152/18 153/3 200/14
202/9 202/16 251/15
quoting [1] 211/19

R
radar [1] 68/18
raise [1] 15/22
raised [2] 105/10 215/3
raises [1] 183/17
ran [6] 130/12 130/14 181/14
235/25 256/12 257/3
ranking [1] 150/10
rape [2] 138/2 138/15
rarely [1] 202/11
rate [3] 191/1 209/22 210/1
rather [7] 6/20 12/19 104/14 218/1
238/19 242/12 248/13
RAV4 [27] 4/12 6/15 6/25 94/21
95/7 95/23 97/23 98/22 99/8
99/18 103/15 103/17 109/3 111/5
111/8 112/7 113/17 113/25 133/12
133/18 133/23 134/5 134/23 135/4
214/15 228/23 230/11
RBL [1] 22/16
reach [5] 133/10 133/20 134/7
203/4 222/7

reached [1] 129/4
react [2] 233/13 237/12
read [10] 27/24 46/7 95/15 145/6
145/9 146/13 147/5 159/9 176/15
250/23
readily [1] 210/23
reading [7] 153/1 153/4 158/17
250/9 250/12 258/15 258/16
ready [3] 15/8 15/16 71/19
reagent [1] 86/23
real [7] 42/23 47/17 47/21 77/24
82/24 140/15 225/10
realistically [1] 168/25
realize [1] 151/4
realized [2] 160/23 161/9
really [31] 33/6 34/24 38/11 38/12
41/17 41/18 42/18 47/15 54/15
65/1 65/4 66/10 68/6 82/15
105/15 144/1 150/1 156/4 156/5
176/6 179/10 182/10 187/10
194/21 207/25 217/20 224/5
229/23 240/10 260/7 260/19
rear [7] 7/4 96/11 98/22 111/4
111/7 111/22 113/17
reason [11] 18/10 37/19 38/16
58/5 86/2 90/25 141/21 177/14
218/2 218/5 260/18
reasonable [6] 134/21 229/10
242/3 246/13 246/16 253/15
reasonably [1] 5/18
reasons [4] 30/9 52/18 165/6
191/25
rebut [1] 4/5
rebuttal [3] 4/4 4/24 11/24
recall [26] 14/16 15/2 33/3 33/3
33/16 57/1 57/8 59/1 59/3 59/24
70/2 94/18 104/22 116/4 143/12
150/10 152/25 153/4 158/5 158/19
161/5 167/24 171/22 226/3 245/17
250/11
recalled [1] 56/24
recalling [1] 12/16
receipt [1] 101/17
receive [13] 73/25 94/16 94/18
95/9 95/23 97/11 98/4 99/9 100/9
103/21 103/23 107/24 193/15
received [13] 19/3 19/4 22/9 27/15
94/19 94/23 103/13 108/8 109/10
110/1 113/5 240/12 240/13
recent [3] 139/19 182/7 251/1
recently [3] 118/2 118/7 194/1
Recess [3] 45/17 102/19 160/14
reclosed [1] 60/21
recognize [8] 23/14 96/1 104/7
104/9 104/10 106/11 108/17
108/20
recollection [11] 14/7 29/6 31/16
60/4 63/9 145/14 145/25 152/16
162/9 168/17 239/1
recommendation [2] 10/6 132/11
recommendations [1] 123/23
record [19] 3/6 10/23 16/2 16/15
16/16 16/17 29/3 29/16 30/10
63/2 71/18 71/24 73/2 80/19
102/22 105/9 161/12 162/15
259/17
records [3] 16/19 16/21 23/6
recovered [2] 231/3 231/8
recreate [1] 15/8
Recross [4] 2/7 2/12 66/21 259/2
Recross-Examination [4] 2/7 2/12
66/21 259/2
rectangular [2] 18/7 24/16

R		
<p>red [9] 60/16 91/10 91/23 91/25 92/3 92/7 92/15 221/11 241/21 red-stoppered [2] 91/10 91/23 red-topped [1] 221/11 redirect [7] 2/6 2/11 63/23 64/1 160/25 254/1 254/4 reevaluated [1] 236/20 refer [8] 138/22 151/20 161/11 179/6 193/5 208/7 213/9 240/8 referee [1] 77/25 reference [5] 22/17 156/17 156/19 162/11 209/18 referenced [1] 21/12 references [2] 210/24 211/19 referred [10] 21/13 61/2 61/13 74/23 82/3 118/14 124/22 155/6 161/6 162/13 referring [12] 5/3 46/20 47/8 139/24 152/13 161/1 166/12 179/21 211/20 214/1 226/2 228/17 refers [2] 152/10 153/25 reflect [1] 6/22 refresh [2] 152/16 162/9 refused [1] 189/14 refuting [1] 217/23 regard [2] 62/7 64/17 regarding [6] 19/15 21/3 33/20 34/2 195/14 196/11 regardless [2] 4/7 5/20 regulations [1] 165/1 reimbursed [1] 25/1 rejected [2] 78/14 255/14 relate [1] 120/3 related [3] 192/19 216/20 251/4 relayed [1] 168/11 released [3] 74/5 259/5 259/9 relevance [7] 40/23 40/24 51/15 51/20 119/13 119/21 259/14 relevancy [3] 144/25 148/18 190/15 relevant [6] 51/18 189/20 190/17 218/10 258/12 259/16 reliability [2] 3/24 4/8 reliable [2] 3/20 4/23 relied [5] 122/11 122/16 153/21 221/19 251/8 remain [3] 88/25 106/8 235/6 remaining [6] 4/11 10/12 13/21 13/22 82/25 236/11 remains [2] 14/7 243/2 remember [5] 12/23 14/21 15/3 127/13 158/14 remind [3] 102/12 160/8 259/21 remove [2] 85/19 192/1 removed [4] 8/15 9/17 110/9 111/18 removing [3] 61/21 68/20 88/7 rendered [2] 246/13 246/15 renewed [3] 11/18 13/23 14/4 repeat [8] 52/4 95/10 143/1 213/1 225/18 228/9 231/6 243/19 repeated [1] 211/14 repeatedly [1] 100/1 rephrase [2] 151/5 174/6 rephrased [1] 229/16 rephrasing [1] 217/16 replicate [1] 107/3 reply [1] 14/18 report [37] 74/4 74/4 74/6 78/2 78/3 101/6 101/21 101/22 114/20 136/10 136/13 145/7 145/10</p>	<p>145/10 146/14 147/6 159/9 159/11 159/17 160/12 171/17 183/13 189/22 193/6 197/11 207/13 207/14 207/20 213/12 213/20 214/22 216/19 217/9 217/17 218/6 218/12 239/2 reported [27] 1/24 93/14 94/19 98/20 99/7 99/17 103/23 109/2 111/3 112/5 113/2 113/15 113/23 134/5 134/13 144/10 144/11 226/5 226/7 226/19 227/23 231/3 241/15 249/15 249/17 257/15 263/6 reportedly [1] 231/8 reporter [5] 1/25 59/14 211/14 263/5 263/19 reports [2] 64/20 196/10 represent [2] 165/3 229/21 represented [3] 59/12 59/15 169/1 represents [1] 189/16 reputation [1] 184/3 request [18] 12/2 20/18 22/4 115/24 116/4 117/18 118/4 150/18 150/24 167/25 176/13 176/17 176/18 176/23 177/4 189/4 190/22 248/4 requested [11] 7/5 7/9 8/24 11/22 19/1 21/16 120/8 215/6 218/12 249/8 250/1 requesting [2] 215/5 261/8 requests [7] 17/15 42/17 54/17 120/25 121/3 189/4 256/17 require [2] 31/13 169/11 required [8] 30/17 31/18 32/9 37/23 38/13 77/17 128/14 187/24 requirement [2] 128/15 163/11 requirements [8] 74/8 128/16 128/17 129/2 171/4 171/6 222/3 222/18 requires [2] 186/10 204/5 requiring [1] 38/23 rerun [1] 237/20 research [24] 123/4 123/5 149/16 149/17 150/11 157/2 181/18 181/20 181/23 182/3 182/4 182/11 182/17 183/2 185/1 208/14 208/18 209/10 210/15 210/17 253/6 253/7 253/9 255/10 researched [2] 208/16 259/7 researcher [1] 183/1 researchers [2] 149/11 149/19 reserve [1] 59/22 reserved [2] 12/6 14/5 residence [1] 29/7 residual [3] 107/19 132/5 236/7 residues [2] 85/2 85/3 resisting [1] 119/9 resolution [1] 258/11 resolve [2] 11/25 12/18 resolved [7] 11/16 12/8 104/25 254/9 258/6 258/10 258/22 resources [1] 70/13 respect [4] 19/17 26/8 33/15 150/12 Respected [1] 151/23 respond [3] 11/23 243/19 244/2 responded [1] 64/15 responding [3] 14/16 154/8 167/24 response [5] 14/5 161/3 167/23 168/20 169/22 responsibilities [2] 17/24 29/2 responsibility [1] 123/10 responsible [3] 55/10 80/3 114/17 rest [3] 49/19 148/15 148/24</p>	<p>restored [1] 80/21 result [9] 16/25 74/6 78/3 114/17 158/17 199/1 199/2 221/2 259/10 resulted [1] 144/20 results [33] 13/24 74/3 77/22 77/23 77/25 78/1 78/2 101/4 101/5 101/19 107/23 114/18 114/20 127/15 134/17 135/10 143/2 143/3 143/11 167/6 168/12 171/1 171/11 176/2 191/21 195/14 196/12 197/10 200/24 201/20 203/25 217/19 236/16 resume [8] 45/12 45/16 45/19 79/5 102/14 102/22 160/15 198/10 resuming [1] 102/24 resumé [1] 195/17 retain [1] 6/2 retained [1] 7/23 retention [1] 34/16 retest [1] 167/12 retested [1] 236/12 retesting [1] 232/8 rethink [1] 201/12 retired [1] 146/9 retirement [1] 146/10 retracted [1] 252/21 retrospect [1] 152/23 retry [1] 54/9 return [4] 22/18 27/22 140/4 163/18 returned [1] 7/19 returning [2] 22/20 52/22 returns [1] 53/2 reveal [1] 238/11 reverse [1] 204/24 reversed [3] 105/21 246/24 247/3 review [32] 14/22 25/20 37/15 74/6 109/16 119/1 123/3 123/12 145/12 152/7 152/12 156/12 178/25 179/2 180/3 180/23 180/25 181/1 182/19 183/2 183/11 183/15 183/24 184/6 187/7 187/20 187/21 188/2 211/18 216/6 220/1 220/17 reviewed [15] 29/24 37/17 78/18 78/23 101/22 109/13 122/24 123/2 134/19 161/7 163/9 163/10 185/9 187/14 194/6 reviewers [5] 123/14 123/16 123/17 123/24 184/11 reviewing [4] 114/18 123/11 180/17 194/8 right [438] rights [1] 4/9 rigorous [1] 220/17 ring [1] 242/14 ripe [1] 14/7 river [1] 87/22 robbery [2] 116/18 143/21 robbing [1] 116/19 Robert [3] 19/14 20/15 21/23 Roche [2] 22/14 27/23 rocking [1] 62/21 Roger [2] 146/1 149/5 role [7] 92/3 92/16 100/19 114/12 114/12 254/25 261/17 roles [1] 101/12 Rom [2] 103/5 137/11 room [7] 32/4 32/6 43/8 43/9 43/10 47/18 88/24 rooms [1] 55/16 rounded [1] 110/6 routine [18] 116/9 116/9 116/11 116/11 116/15 116/25 117/3</p>

R	says [19] 27/21 32/6 32/7 46/7 95/17 99/24 152/9 156/21 176/23 196/1 196/13 197/4 199/2 200/10 200/20 200/21 204/19 205/21 205/24 scenario [16] 126/15 126/25 127/1 127/20 135/7 135/23 169/1 174/3 175/2 175/8 175/8 225/23 229/17 229/20 230/4 230/4 scenarios [6] 126/13 128/6 135/9 135/21 175/15 229/18 scene [4] 104/13 126/16 126/20 127/3 schematic [1] 49/5 scholarly [2] 122/19 151/20 science [16] 4/22 5/19 74/14 123/8 123/19 153/24 154/18 157/5 181/18 181/23 183/2 187/4 191/16 198/20 242/9 253/14 Sciences [1] 76/9 scientific [30] 75/21 78/24 87/6 87/9 118/25 121/17 122/20 134/22 148/15 148/25 153/21 156/10 156/17 157/1 157/10 183/25 204/15 208/14 217/24 229/11 237/25 242/3 246/14 246/17 248/15 248/19 250/6 251/1 251/13 253/16 scientifically [4] 124/3 156/13 223/12 248/1 scientist [15] 101/23 123/4 173/22 179/20 180/3 183/1 183/20 184/6 184/7 187/21 187/21 218/22 219/1 219/25 225/22 scientists [9] 88/11 88/13 100/14 124/16 149/6 182/10 183/21 187/7 192/1 scope [2] 68/23 205/22 scotch [1] 60/22 screen [15] 23/23 26/6 27/14 28/2 35/25 91/11 109/5 109/25 111/12 112/9 113/9 216/4 229/20 240/23 241/12 screening [1] 205/25 screw [2] 142/18 149/1 screwed [2] 142/16 148/16 seal [6] 19/18 19/23 60/20 61/17 61/23 63/3 sealed [5] 60/16 235/21 240/15 240/18 240/20 search [8] 14/2 53/2 116/1 156/2 156/8 156/14 156/24 157/4 searched [2] 156/10 157/1 searches [1] 13/24 seat [1] 98/3 seated [10] 15/15 16/1 45/15 69/7 72/18 73/1 102/16 136/7 160/11 259/25 second [13] 4/25 55/9 59/8 60/8 127/1 130/6 147/3 177/6 178/20 181/1 210/13 217/8 232/16 secondary [1] 106/8 seconds [1] 83/15 secretly [1] 119/6 section [5] 47/19 200/10 201/11 202/4 226/15 sections [1] 25/16 secure [9] 34/8 37/10 42/18 42/21 42/24 42/24 47/21 50/24 61/19 secured [3] 25/11 25/12 60/11 security [10] 37/4 37/8 42/10 42/13 52/18 55/7 55/11 58/12 65/13 182/18	seeing [8] 33/3 33/16 49/20 53/16 53/18 56/24 57/8 87/18 seem [1] 47/21 seems [1] 40/18 seen [10] 32/14 33/6 35/4 35/10 64/18 109/17 195/17 250/19 258/20 260/22 seeped [1] 241/22 sees [1] 83/18 send [3] 123/19 123/24 252/19 sending [1] 69/19 sends [2] 123/9 123/14 sense [3] 9/24 188/4 256/22 sensitive [5] 249/11 253/9 253/12 256/4 257/2 sensitivity [1] 130/4 sent [15] 8/5 20/20 79/7 101/7 107/2 108/1 126/7 126/23 127/5 127/6 133/6 133/23 176/13 215/5 239/25 sentence [2] 176/15 250/23 separate [7] 49/12 56/3 82/19 83/7 166/12 185/7 228/23 separated [1] 83/17 separates [1] 233/21 September [2] 73/13 196/16 sergeant [4] 33/1 33/4 56/24 57/8 series [2] 18/18 199/13 serious [3] 80/10 152/9 152/12 serologist [1] 226/9 serve [4] 76/2 76/6 86/22 100/20 served [2] 259/4 259/11 serves [1] 14/17 Service [3] 20/20 21/1 22/3 services [5] 21/14 75/18 176/17 251/2 252/4 serving [1] 31/15 set [16] 48/14 49/15 56/15 56/16 74/8 77/4 77/5 80/19 84/6 90/15 100/11 135/21 161/12 162/15 168/10 206/18 Sets [1] 204/11 setting [1] 86/22 settings [1] 128/12 settled [2] 14/1 166/23 Seventeen [1] 138/16 several [4] 14/4 39/14 62/4 250/14 severe [1] 89/10 sexual [9] 118/14 118/24 119/3 119/4 120/7 120/13 139/12 140/9 140/13 sexually [1] 119/9 shake [2] 91/19 225/8 shaken [1] 225/15 shaking [1] 81/12 shampoo [2] 85/23 86/9 shampoos [2] 86/3 236/24 shape [2] 26/22 110/7 shaped [3] 18/7 24/16 26/21 shares [1] 13/13 Shelf [1] 166/11 sheriff [1] 64/14 sheriff's [22] 7/16 7/20 7/23 10/14 33/2 33/14 33/19 34/6 34/12 34/19 40/11 54/2 54/9 54/10 55/4 55/10 64/3 65/16 66/25 67/3 67/5 68/19 sheriffs [6] 51/10 51/14 52/13 52/15 52/16 53/18 Sherry [6] 7/15 95/5 95/13 95/21 96/17 97/21 shipping [3] 27/20 106/1 240/15 Shirley [2] 20/23 21/21
S	s-u-c-c [1] 243/7 S-u-c-c-i-n-y-l-c-h-o-l-i-n-e [1] 243/8 s-u-c-c-i-n-y-l-m-o-n-o-c-h-o-l-i-n-e [1] 245/20 safe [5] 33/21 45/9 46/7 58/11 58/25 safety [1] 106/9 said [40] 4/3 14/17 17/17 39/2 39/19 57/14 57/18 92/16 93/3 97/2 114/7 127/13 142/6 153/2 153/12 162/12 164/14 170/10 171/24 174/22 175/1 178/19 179/14 179/18 179/19 181/21 183/10 185/19 197/16 197/18 198/14 210/9 212/2 226/25 230/9 230/12 241/14 247/23 252/25 263/13 same [29] 13/10 13/19 44/12 44/13 48/15 50/19 73/14 77/15 86/11 130/13 139/6 145/16 180/13 181/7 188/18 227/8 232/15 239/15 239/20 240/12 240/24 241/4 241/6 247/7 248/25 249/9 255/25 256/18 256/19 sample [31] 19/16 20/6 21/4 21/6 21/8 21/10 21/15 21/17 22/20 103/21 103/23 107/3 115/11 115/15 125/20 125/24 131/12 132/3 132/5 132/6 132/7 132/12 132/13 139/7 139/8 159/18 194/12 198/25 202/13 233/11 234/14 sampled [1] 112/15 sampler [5] 235/17 235/22 235/23 236/3 236/3 samples [26] 4/11 6/15 6/19 6/25 7/6 8/11 9/12 10/2 79/7 94/16 103/13 106/25 107/1 112/4 113/5 114/2 125/23 127/4 132/15 133/6 191/21 204/21 222/17 222/20 243/1 249/21 sampling [1] 235/20 sat [1] 144/14 satisfactory [1] 260/22 satisfied [1] 105/2 satisfy [1] 167/17 save [1] 236/11 saved [2] 8/21 9/7 saving [1] 114/16 saw [11] 62/17 68/1 70/24 96/23 109/8 109/12 109/24 192/25 240/7 250/20 250/21 saying [14] 37/25 67/4 83/2 144/4 185/5 188/4 203/19 209/1 209/8 227/9 227/20 231/1 249/22 259/8	

S		
<p>shoe [2] 205/13 205/14 shook [2] 225/21 225/24 shoot [2] 132/3 132/14 short [2] 26/22 69/4 shorthand [1] 263/10 shortly [3] 10/18 58/23 144/17 should [23] 6/22 6/22 6/23 9/6 9/10 10/1 12/17 34/5 38/20 64/9 83/12 96/22 97/5 100/4 105/8 148/25 190/23 201/1 205/18 231/11 248/24 254/24 260/2 shoulder [2] 45/5 46/19 shouldn't [1] 131/2 show [14] 23/9 23/10 119/18 119/23 125/24 132/6 161/24 176/3 176/22 217/20 238/18 239/5 239/7 250/13 showed [5] 52/5 69/12 70/7 225/13 232/2 showing [3] 44/3 195/22 216/1 shown [2] 18/17 113/9 shows [3] 28/21 44/18 60/11 sic [2] 194/22 198/13 side [16] 13/4 25/18 25/24 28/20 46/18 48/10 48/23 50/21 61/23 105/3 105/7 105/9 165/19 231/14 232/11 240/17 sign [11] 29/15 29/16 30/17 31/18 32/9 37/23 38/14 38/23 39/4 39/6 241/24 signal [8] 131/4 131/13 131/17 131/19 131/21 131/23 158/19 158/24 signals [1] 131/2 signature [7] 29/18 29/18 29/19 30/25 188/11 188/20 251/24 signed [4] 19/12 20/1 200/5 200/7 significant [7] 127/12 131/19 131/24 134/14 159/13 177/19 239/3 similarly [3] 20/8 52/24 202/16 simple [6] 82/16 87/3 199/5 199/6 205/16 220/14 simpler [1] 81/19 simplify [1] 234/5 simply [27] 77/1 77/6 77/20 82/11 82/18 85/15 85/17 88/22 89/20 90/20 91/6 91/22 93/8 94/12 101/8 107/3 115/24 123/3 125/19 126/12 149/11 174/1 188/5 204/4 205/13 234/8 245/2 Simpson [39] 115/21 116/5 142/4 142/17 142/19 142/20 142/25 143/3 143/4 143/10 143/14 143/19 144/18 145/17 146/6 146/17 148/5 148/8 149/1 149/10 150/15 150/22 151/7 151/17 152/6 152/10 153/10 155/10 155/19 157/15 158/7 159/10 161/7 161/11 161/19 162/11 162/13 189/12 190/15 Simpson's [3] 148/16 158/4 158/25 since [13] 16/10 37/21 37/25 70/6 73/13 73/16 84/16 115/25 116/4 130/9 167/9 214/19 218/20 single [2] 31/9 255/4 sir [82] 97/24 99/14 104/9 104/20 108/19 133/24 141/3 143/9 147/3 147/4 147/7 147/24 149/4 150/21 153/12 153/20 154/4 160/19 161/18 161/24 162/5 163/16 163/22 169/7 169/14 169/20</p>	<p>170/12 171/3 172/16 172/24 173/22 175/7 177/22 178/5 178/7 179/21 180/22 187/13 188/10 196/5 196/23 197/15 198/16 200/13 201/17 204/10 204/12 205/12 205/23 209/3 209/12 209/24 210/3 210/11 213/11 214/3 215/24 217/6 218/24 222/24 223/17 226/9 229/4 230/24 234/3 234/5 235/11 239/13 241/7 244/7 244/25 246/19 247/16 248/2 249/24 252/16 252/18 253/8 253/18 253/22 253/24 259/6 sit [2] 194/15 234/24 site [1] 230/1 sitting [7] 47/19 49/17 50/5 50/11 227/16 227/17 234/11 six [5] 103/18 108/12 140/9 140/11 243/25 size [2] 82/25 129/9 skipped [3] 187/10 188/13 188/17 slide [5] 90/11 90/15 94/1 129/10 129/21 slipped [1] 119/6 small [9] 9/13 82/24 83/8 83/23 158/19 158/24 235/20 257/6 257/6 smaller [1] 237/16 smoking [1] 85/7 so-called [2] 156/14 179/3 Society [2] 76/1 77/12 sock [6] 142/22 158/4 158/8 161/22 162/10 162/18 sodas [1] 85/25 sodium [1] 91/14 soil [6] 87/22 87/24 88/8 208/22 209/6 238/14 solid [1] 237/12 solids [3] 233/22 234/2 235/6 solution [7] 204/16 210/25 233/6 233/10 233/10 234/1 234/12 solutions [1] 128/23 somebody [18] 40/10 40/13 40/13 40/14 46/21 54/13 55/20 67/7 68/21 123/9 156/21 160/20 163/19 174/12 179/23 180/20 225/12 225/19 somehow [2] 70/12 199/8 someone [20] 47/10 49/18 50/13 53/20 58/9 65/23 65/25 66/14 119/6 126/17 156/9 157/18 166/17 169/23 174/25 177/13 181/4 181/6 186/13 230/5 someone's [2] 243/16 245/1 something [38] 3/14 25/20 30/14 46/7 46/12 55/13 62/10 66/14 71/22 80/7 80/13 86/25 96/21 105/14 108/4 116/17 118/5 120/1 129/3 130/20 162/24 163/13 165/21 166/20 169/24 170/8 171/8 174/11 178/10 181/18 198/24 213/5 215/20 222/6 222/10 233/5 233/7 233/7 sometime [2] 12/15 47/3 sometimes [8] 25/19 64/21 138/4 191/23 192/6 198/19 198/21 206/19 somewhat [1] 200/16 somewhere [2] 226/21 232/17 soon [2] 169/10 257/8 sorry [37] 36/9 44/2 44/16 53/7 54/5 57/20 74/18 91/14 93/14 95/10 95/18 97/25 97/25 114/6 138/22 140/10 144/1 145/16</p>	<p>157/21 169/14 185/18 193/10 198/2 198/17 198/18 199/19 201/12 210/6 216/3 216/13 218/25 219/5 220/11 234/16 234/19 241/3 250/18 sort [12] 43/14 49/6 59/6 62/21 144/20 184/2 187/10 192/2 195/7 197/19 233/5 242/21 sought [3] 140/17 140/25 140/25 sound [2] 156/13 233/8 sounds [2] 153/3 171/14 source [4] 230/22 256/8 257/22 260/9 South [1] 88/14 speak [4] 39/12 62/3 140/19 175/24 speaker [1] 76/21 speaking [2] 6/7 170/7 spec [3] 82/17 201/22 206/18 special [6] 1/11 1/13 1/15 3/8 57/24 75/2 specialized [1] 62/6 specialties [1] 140/15 specific [15] 54/24 58/4 79/18 81/24 82/2 82/10 84/7 117/21 158/5 176/13 192/14 206/4 207/8 218/16 220/19 specifically [16] 23/25 55/23 67/2 75/7 76/17 86/16 94/3 110/15 115/2 115/8 121/9 122/13 145/17 184/21 185/9 251/4 specificity [1] 10/3 specify [1] 21/9 specimen [2] 192/23 193/16 specimens [9] 130/10 172/25 249/5 249/25 251/10 252/24 252/25 255/3 257/13 spectra [2] 199/23 201/23 spectral [3] 202/3 222/15 222/17 spectrometer [5] 81/5 81/8 82/21 83/20 84/3 spectrometry [2] 154/2 154/2 spectrum [6] 200/12 202/10 202/11 202/17 202/21 202/24 speculation [3] 40/18 53/23 64/8 speed [1] 235/3 spell [4] 16/2 73/2 243/8 243/11 spelling [1] 243/12 spend [1] 100/13 spent [1] 252/14 spits [1] 199/1 split [1] 6/16 spoke [2] 166/25 173/19 spot [13] 42/18 88/22 88/23 129/16 212/21 213/4 221/3 221/16 221/23 223/1 223/2 223/20 224/2 spread [1] 47/16 spring [1] 34/21 square [1] 28/9 ss [1] 263/1 St [5] 74/17 74/17 74/20 75/11 75/12 stab [1] 13/3 stability [22] 87/7 87/10 88/4 88/18 93/11 93/16 208/12 208/13 209/14 209/17 209/19 214/4 214/23 215/8 215/19 216/3 216/5 219/6 219/14 220/2 220/3 220/20 stabilize [2] 86/19 86/24 stable [11] 87/1 87/2 87/15 87/20 166/22 213/22 215/22 217/20 217/25 220/9 224/6 staff [10] 16/14 26/11 30/22 38/13</p>

<p>S</p> <p>staff... [6] 38/22 108/2 109/14 114/8 114/16 168/22</p> <p>stage [1] 60/19</p> <p>stages [2] 59/6 60/6</p> <p>stain [15] 8/5 8/15 89/1 107/4 116/20 116/22 127/4 127/5 219/18 225/3 227/16 227/17 228/18 232/12 232/17</p> <p>staining [1] 113/17</p> <p>stains [12] 8/25 10/21 10/22 93/19 210/2 214/4 214/15 228/3 228/13 230/10 232/3 238/2</p> <p>stairs [1] 43/4</p> <p>stand [4] 15/21 72/21 198/6 248/22</p> <p>standard [14] 84/14 124/12 125/18 167/21 167/23 168/6 168/7 169/22 200/18 202/11 202/18 219/11 232/7 234/12</p> <p>standards [3] 77/4 77/15 114/19</p> <p>standing [1] 48/22</p> <p>stands [1] 85/14</p> <p>start [8] 69/9 70/7 71/3 90/12 91/22 215/10 217/15 238/13</p> <p>started [15] 16/22 29/22 57/22 75/4 75/10 150/19 151/12 173/3 179/11 205/10 249/10 249/12 256/21 256/24 257/6</p> <p>starting [1] 170/9</p> <p>state [60] 1/1 1/3 1/12 1/14 1/16 3/2 3/6 3/8 4/6 4/15 4/20 6/1 6/8 8/8 8/9 11/2 11/9 11/23 12/16 13/13 14/5 15/20 16/1 17/7 19/10 20/3 23/18 29/4 37/2 69/3 69/10 69/14 72/9 72/19 72/20 73/1 74/13 95/14 97/21 104/4 104/15 117/16 118/3 136/19 177/6 177/11 177/13 177/18 177/20 177/23 178/2 200/14 229/7 242/18 251/17 254/12 260/8 261/11 263/1 263/5</p> <p>State's [3] 3/24 4/5 251/25</p> <p>stated [1] 6/12</p> <p>statement [9] 39/24 89/7 161/10 162/12 208/9 221/14 240/20 243/12 251/16</p> <p>statements [1] 40/12</p> <p>States [4] 88/15 118/22 144/21 248/3</p> <p>stating [1] 19/23</p> <p>stations [1] 49/14</p> <p>statistician [1] 150/9</p> <p>status [1] 12/10</p> <p>statute [2] 9/22 9/24</p> <p>stay [1] 76/18</p> <p>staying [1] 92/3</p> <p>stenographic [1] 263/9</p> <p>step [7] 81/7 177/6 188/13 194/24 204/13 210/12 243/21</p> <p>steps [16] 128/9 128/15 133/1 187/10 188/5 188/17 204/11 211/7 211/9 211/11 211/15 219/8 223/5 223/10 223/22 257/3</p> <p>stepwise [2] 187/22 220/12</p> <p>steroids [1] 85/5</p> <p>STEVEN [21] 1/6 1/21 3/2 3/10 17/7 19/11 20/3 23/18 24/3 29/4 44/7 50/15 94/25 103/21 103/24 106/21 128/1 134/9 134/14 134/24 241/15</p> <p>stick [3] 51/2 132/5 132/6</p> <p>still [18] 8/16 8/18 69/24 71/21</p>	<p>89/2 91/2 94/7 129/22 168/15 178/25 196/17 196/18 197/13 212/20 213/3 220/23 244/9 252/16</p> <p>stipulate [2] 13/5 59/16</p> <p>stipulation [13] 12/25 13/1 13/7 19/10 19/12 19/15 20/5 21/3 21/12 21/24 22/1 70/24 71/1</p> <p>stop [6] 60/8 62/10 94/24 147/3 160/4 259/14</p> <p>stopper [3] 91/6 241/21 241/22</p> <p>stoppered [11] 91/10 91/12 91/13 91/16 91/23 92/13 93/2 93/10 93/20 94/24 134/12</p> <p>storage [9] 23/17 24/9 24/25 25/7 29/10 29/10 33/20 35/3 43/10</p> <p>stored [6] 18/16 23/19 34/6 44/23 88/23 91/1</p> <p>straight [6] 25/13 31/15 67/17 80/19 161/12 162/15</p> <p>STRANG [7] 1/17 3/11 6/12 11/12 12/12 14/13 162/2</p> <p>street [2] 80/16 174/11</p> <p>stretch [7] 69/3 136/4 136/5 136/6 198/5 198/7 231/18</p> <p>stricken [1] 53/24</p> <p>strict [1] 31/8</p> <p>strongly [1] 80/8</p> <p>structure [1] 200/16</p> <p>studied [1] 209/21</p> <p>studies [19] 87/6 87/8 87/11 87/12 87/13 88/3 88/10 88/11 165/10 165/14 179/3 209/14 209/16 210/21 211/2 211/17 211/25 215/7 220/18</p> <p>study [36] 93/16 93/17 123/12 150/5 158/1 181/2 187/25 209/20 209/21 209/25 210/10 212/17 212/19 213/2 213/21 214/4 214/23 215/3 215/4 215/18 216/3 216/6 216/9 216/17 216/21 216/24 216/25 217/1 217/16 218/3 218/6 219/9 220/9 223/4 224/2 224/5</p> <p>studying [2] 166/8 166/9</p> <p>stuff [2] 185/13 185/18</p> <p>styrofoam [7] 28/12 28/20 61/13 61/15 61/18 61/21 61/23</p> <p>subject [1] 243/23</p> <p>subjective [2] 200/23 201/2</p> <p>submit [5] 20/6 123/6 217/3 219/13 220/6</p> <p>submitted [12] 6/25 21/6 22/13 22/19 27/24 107/24 109/21 111/7 116/10 134/3 192/17 250/16</p> <p>subset [1] 81/16</p> <p>substance [4] 81/23 82/2 82/8 210/2</p> <p>substances [1] 89/15</p> <p>substantial [1] 194/19</p> <p>substitute [1] 176/5</p> <p>substrate [3] 227/15 227/17 227/19</p> <p>succinylcholine [9] 243/7 246/5 246/10 250/7 251/14 255/9 256/10 256/14 257/24</p> <p>succinylmonocholine [12] 245/19 246/1 250/5 251/10 251/12 253/1 255/7 255/21 256/8 256/14 257/7 257/23</p> <p>such [19] 6/16 30/2 30/12 30/18 31/3 53/19 79/24 80/5 85/25 92/17 115/23 126/17 127/18 156/15 189/5 201/4 201/13 212/15 238/1</p>	<p>sucks [1] 235/23</p> <p>sufficient [2] 11/10 202/12</p> <p>suggest [2] 11/19 127/22</p> <p>suggested [5] 12/22 12/24 34/4 130/1 168/18</p> <p>suggesting [3] 9/20 112/17 126/2</p> <p>suggestions [2] 123/18 123/23</p> <p>suggests [3] 210/15 210/17 217/24</p> <p>suitable [1] 124/1</p> <p>summary [2] 216/5 242/23</p> <p>summer [1] 40/1</p> <p>supervise [1] 17/19</p> <p>supervised [2] 101/15 197/9</p> <p>supervisor [3] 100/23 150/12 163/9</p> <p>supervisors [1] 163/14</p> <p>supervisory [1] 181/3</p> <p>supplemented [1] 12/16</p> <p>supporting [1] 125/3</p> <p>suppose [2] 9/1 50/3</p> <p>supposed [9] 31/22 87/25 125/25 186/22 199/8 203/11 203/18 204/15 232/10</p> <p>suppress [1] 13/24</p> <p>suppression [4] 130/21 130/22 223/8 223/23</p> <p>surface [2] 227/20 227/21</p> <p>surprise [1] 4/2</p> <p>surrounds [1] 26/19</p> <p>suspected [1] 205/25</p> <p>sustain [4] 35/15 135/18 141/12 190/18</p> <p>sustained [7] 68/24 109/15 135/18 189/2 190/4 197/24 245/7</p> <p>sustaining [2] 135/19 190/25</p> <p>swab [44] 7/1 7/2 7/4 95/6 98/20 107/3 109/1 109/8 109/24 110/1 110/4 110/11 110/19 111/3 111/15 111/16 111/22 112/5 112/11 112/15 112/17 126/22 126/23 126/24 127/2 127/4 127/6 127/11 127/12 127/17 129/11 158/9 226/22 226/22 227/4 232/14 232/15 232/16 232/16 232/24 233/4 233/11 234/23 235/6</p> <p>swabbed [1] 129/11</p> <p>swabbing [1] 107/8</p> <p>swabs [70] 4/11 5/2 5/2 5/3 5/4 7/9 7/14 8/5 8/11 8/24 9/6 10/9 10/9 10/22 11/8 94/19 94/21 96/5 98/12 98/21 99/7 99/17 103/15 103/16 103/18 109/20 111/6 113/2 113/3 113/4 113/6 113/8 113/15 113/23 114/1 114/25 126/20 129/13 130/14 133/12 133/17 133/17 133/22 134/3 172/17 192/16 223/3 224/10 224/11 224/13 224/18 226/1 226/11 226/12 227/2 227/23 228/2 228/5 228/7 228/18 228/22 228/25 229/7 231/2 231/7 232/1 232/3 232/5 232/10 234/9</p> <p>switch [3] 85/11 99/19 113/7</p> <p>sworn [2] 15/24 72/24</p> <p>Sybers [20] 242/14 242/17 244/17 244/23 246/8 246/22 249/5 251/18 252/13 252/17 253/3 253/10 254/7 254/11 257/5 258/5 258/23 258/24 259/4 259/9</p> <p>Sybers' [4] 243/1 247/7 247/13 247/17</p> <p>syringe [1] 118/3</p> <p>system [4] 132/19 156/3 193/12</p>
--	--	--

S	227/24	thank [26] 15/20 23/20 32/19 36/16 45/21 52/1 62/12 63/12 66/18 69/8 102/23 103/20 105/17 135/25 136/18 160/16 169/21 179/10 198/11 224/5 231/21 234/21 245/5 253/24 258/25 262/6
system... [1] 204/17	term [6] 33/19 182/4 210/14 210/15 219/14 220/2	that particular [1] 248/20
T	terminology [1] 212/10	theft [2] 30/11 30/14
table [3] 47/8 47/9 144/15	terms [2] 11/14 18/1	their [27] 3/6 17/23 29/18 29/18 29/19 29/20 30/25 52/23 53/20 54/6 54/13 76/2 76/3 77/15 80/20 88/2 101/10 105/11 114/22 117/18 132/11 145/10 163/4 165/7 166/15 166/17 208/25
tailer [1] 231/4	terrorist [1] 169/6	theirs [1] 247/8
take [47] 3/14 13/3 29/7 31/21 34/11 35/23 42/13 45/11 53/9 53/20 66/9 69/2 69/4 82/18 83/6 85/17 102/10 102/11 107/25 108/14 112/22 113/11 118/11 136/6 151/14 151/16 160/7 162/2 162/7 166/17 167/4 168/23 177/15 180/20 188/18 190/9 201/6 211/7 211/9 231/18 231/25 232/23 239/8 247/11 258/9 258/14 260/1	Tesheneck [3] 1/24 263/4 263/19	themselves [4] 4/12 5/7 8/4 214/12
take [47] 3/14 13/3 29/7 31/21 34/11 35/23 42/13 45/11 53/9 53/20 66/9 69/2 69/4 82/18 83/6 85/17 102/10 102/11 107/25 108/14 112/22 113/11 118/11 136/6 151/14 151/16 160/7 162/2 162/7 166/17 167/4 168/23 177/15 180/20 188/18 190/9 201/6 211/7 211/9 231/18 231/25 232/23 239/8 247/11 258/9 258/14 260/1	test [73] 4/22 77/21 77/24 85/5 85/6 89/15 89/21 93/11 94/16 96/5 99/20 99/25 99/25 100/1 100/7 114/2 119/20 120/8 120/12 120/25 121/6 124/7 128/5 129/7 130/13 130/17 130/19 133/5 134/17 141/22 141/22 142/12 142/24 143/2 143/3 150/20 155/9 155/12 155/17 161/22 164/4 164/6 164/11 167/3 167/11 173/25 178/8 179/8 192/13 192/18 194/21 201/24 203/8 203/25 217/8 218/23 226/14 229/6 230/9 232/5 232/22 233/16 235/24 237/24 243/6 243/22 244/16 245/9 247/19 248/7 248/10 249/2 249/25	theory [2] 232/14 244/22
taken [22] 5/5 7/10 7/15 8/11 24/11 45/17 47/5 78/7 94/20 95/22 98/12 102/19 103/24 105/7 107/1 109/2 160/14 219/9 227/24 231/14 232/11 263/9	tested [35] 10/22 100/2 104/18 114/25 115/18 121/1 133/22 134/23 148/16 189/25 192/16 207/1 208/5 221/2 221/22 224/22 226/23 227/2 227/23 228/15 228/18 228/22 229/9 230/19 231/2 231/7 232/8 233/1 236/9 236/17 237/8 245/15 245/16 248/23 251/10	there's [46] 5/15 9/5 11/18 25/18 26/9 26/10 26/15 26/19 33/23 34/7 46/23 47/9 47/15 47/17 48/9 48/18 49/12 49/13 55/13 61/7 61/14 67/20 70/9 70/11 81/24 81/24 94/4 94/6 97/4 120/18 126/12 162/24 165/19 169/6 169/8 176/24 190/22 194/25 200/10 203/21 206/8 216/16 228/5 235/12 235/13 238/1
takes [5] 89/10 168/3 184/4 236/3 236/4	testified [23] 5/6 15/25 36/3 36/11 72/25 78/9 95/5 96/24 101/25 111/2 141/4 143/8 161/19 162/17 171/20 174/9 190/20 209/15 226/1 249/24 256/2 256/10 260/15	thereafter [2] 58/23 263/11
taking [6] 13/22 61/4 87/23 87/24 128/23 175/21	testify [17] 41/17 69/11 69/17 96/23 101/24 109/12 146/6 163/5 196/21 197/17 212/16 217/18 243/24 246/11 252/12 261/15 261/16	thereby [1] 176/19
talk [12] 44/17 67/8 82/16 87/9 138/1 150/14 155/4 198/12 209/18 211/2 217/7 242/10	testifying [9] 90/8 101/10 103/12 114/20 141/19 142/1 143/20 175/25 252/9	therefore [2] 135/7 135/13
talked [15] 24/13 39/23 89/16 132/10 138/10 144/12 144/15 152/3 157/23 158/6 183/23 191/13 208/10 208/11 223/5	testimonies [1] 163/10	thereto [1] 19/20
talking [18] 38/21 40/21 46/4 57/21 58/6 82/15 88/4 100/7 109/13 138/19 138/21 157/4 193/8 202/1 212/6 213/2 214/8 227/19	testimony [34] 8/6 12/13 12/20 13/6 15/17 70/8 70/21 102/24 103/3 143/19 143/21 144/2 160/22 161/18 162/24 162/25 174/5 175/17 175/18 190/3 195/14 196/11 197/5 197/14 217/14 228/19 239/18 244/3 246/7 251/5 251/8 259/16 260/12 261/17	these [91] 7/22 8/11 9/21 11/1 25/7 44/16 75/7 77/24 82/5 83/4 87/11 88/10 88/10 88/13 90/14 90/15 91/18 92/11 92/12 93/10 96/21 97/2 101/25 102/2 113/2 113/6 113/15 113/23 114/1 114/2 114/25 116/15 117/5 117/7 117/15 119/5 119/11 120/5 120/8 120/12 120/18 128/5 130/23 130/25 133/9 133/19 134/6 146/24 148/23 150/3 152/18 153/8 153/16 155/5 161/5 165/11 168/1 168/2 172/17 182/1 182/10 182/17 184/20 185/20 186/21 194/16 200/24 201/19 201/20 202/23 208/16 216/8 216/15 217/11 219/8 221/18 223/20 223/20 230/5 232/1 232/3 232/10 239/6 239/8 239/16 240/17 243/22 245/21 249/21 251/6 252/14
talks [2] 140/8 152/4	testing [67] 4/4 4/4 4/5 4/7 4/24 4/24 5/5 5/13 5/18 5/24 6/6 6/14 6/17 7/1 7/7 9/2 11/17 27/16 77/16 77/19 77/20 80/22 81/3 92/10 97/11 98/4 99/9 100/9 103/14 119/19 135/7 146/16 147/22 150/21 152/5 152/19 153/9 161/6 165/7 172/18 184/22 191/16 191/19 191/20 191/23 191/24 192/1 192/3 192/5 192/6 192/8 193/19 208/1 219/6 224/10 226/20 232/9 238/21 244/11 245/25 249/21 251/1 252/23 256/24 257/21 257/25 261/17	thesis [1] 252/15
tampering [1] 104/14	tests [21] 3/20 3/24 78/5 142/21 167/16 182/6 184/20 185/21 191/13 192/13 193/9 194/5 196/20 200/25 201/20 202/24 224/10 226/8 235/25 247/4 252/14	they're [2] 48/18 100/23
tandem [1] 81/13		thin [1] 229/24
tape [12] 28/22 60/16 60/17 60/20 60/22 62/10 63/3 104/13 104/14 105/10 240/19 240/21		thing [19] 27/25 66/2 91/21 101/9 117/10 125/14 130/6 130/20 131/25 150/12 157/22 165/23 166/3 169/3 201/4 201/13 214/2 232/2 238/1
taped [1] 28/22		things [27] 11/7 30/7 34/11 39/3 46/24 48/5 49/21 50/21 64/20 86/2 124/9 130/23 130/25 131/12 131/16 164/25 166/6 180/2 186/21 194/11 195/13 207/24 211/5 211/20 216/22 222/12 245/15
target [3] 81/25 82/9 146/15		think [73] 8/25 9/19 10/1 11/6 14/1 14/5 14/17 15/6 18/11 19/11 22/20 26/11 28/1 28/24 30/19 31/12 33/6 33/23 34/23 35/6 35/7 37/13 38/4 38/25 47/3 48/2 49/13 50/20 50/23 57/16 57/16 59/9 62/3 67/18 82/22 90/11 97/3 97/5
targeted [1] 145/18		
teach [1] 244/9		
team [3] 157/18 160/20 163/20		
technically [2] 179/1 199/12		
technician [16] 12/14 75/19 96/3 97/15 98/9 100/24 104/11 106/12 126/20 127/3 181/14 184/19 193/9 193/24 195/8 196/15		
technicians [5] 100/17 100/18 114/12 114/15 114/22		
technique [8] 81/9 117/21 126/4 131/8 134/18 154/1 154/3 191/15		
techniques [2] 126/5 165/5		
technology [8] 84/11 84/18 96/6 99/20 125/15 132/21 133/4 258/2		
telephone [4] 12/13 12/19 13/9 20/18		
telling [11] 27/20 39/20 96/20 144/6 147/5 150/3 156/7 163/16 202/5 209/4 228/21		
tells [2] 125/21 216/16		
temperature [1] 88/24		
temperatures [1] 89/12		
tend [2] 117/2 165/9		
tends [2] 115/13 117/7		
Teresa [14] 7/3 36/24 39/21 57/10 95/7 95/23 96/11 97/23 110/20 133/12 133/22 134/23 173/6		

T

think... [35] 99/24 100/2 102/8
 102/9 119/5 135/9 135/19 158/6
 160/3 164/24 170/10 171/13
 179/18 179/19 182/14 182/21
 190/23 198/21 208/11 208/17
 218/19 218/21 219/16 225/25
 230/8 239/18 241/10 244/13
 251/22 254/23 259/14 260/14
 260/17 260/19 261/10
thinking [2] 83/5 215/10
third [2] 130/20 131/24
THOMAS [1] 1/13
thoroughly [1] 75/5
those [101] 5/14 7/6 7/8 7/11 7/15
 7/17 8/9 10/22 11/16 13/2 22/23
 23/3 24/10 24/25 28/25 29/10
 34/3 34/4 36/6 39/3 43/25 66/2
 66/3 70/25 71/25 72/12 73/23
 75/24 76/16 77/5 77/25 78/1
 78/20 84/21 84/25 86/10 90/2
 92/3 92/7 92/19 92/22 93/6 93/21
 94/22 98/23 103/6 108/13 113/4
 113/8 117/2 117/8 121/9 122/17
 122/19 122/23 123/19 123/20
 124/8 124/23 125/13 129/13
 131/16 133/1 135/10 136/25 138/4
 138/14 138/17 140/9 146/23 149/4
 149/19 153/13 157/6 166/6 171/6
 172/20 175/14 182/7 187/9 193/1
 193/4 193/5 193/12 211/17 211/19
 216/6 216/11 222/17 223/10
 223/22 227/1 228/25 229/6 229/17
 230/10 238/2 252/25 255/3 256/3
 261/3
though [18] 58/4 68/2 68/11 129/7
 145/23 158/16 161/15 181/6 187/9
 190/19 206/18 210/12 222/5
 224/25 228/22 229/6 232/5 251/6
thought [21] 6/15 24/22 30/3
 30/10 30/12 30/22 30/24 31/11
 126/6 126/12 135/21 154/8 164/3
 164/4 164/11 167/18 169/1 170/24
 217/7 217/21 234/20
threat [2] 117/5 117/9
three [30] 13/14 16/21 76/16
 81/10 82/14 83/14 98/11 103/14
 103/15 118/4 131/22 147/25
 160/12 167/4 167/20 167/23 168/3
 168/16 169/2 198/14 200/9 227/23
 228/7 228/17 228/22 228/25 229/6
 230/10 232/3 252/6
threshold [2] 222/7 222/12
through [37] 5/14 18/13 22/19
 27/4 28/25 35/21 35/22 37/19
 47/11 47/18 49/18 49/19 50/18
 52/9 54/4 56/2 71/11 71/14 72/2
 72/3 72/5 72/7 103/4 130/13
 130/15 136/22 138/10 167/16
 179/15 184/19 187/22 189/10
 198/25 220/17 233/24 235/4
 261/20
throughout [4] 114/14 117/6
 118/23 225/2
throw [1] 105/22
thus [2] 74/25 102/4
tightened [2] 38/7 38/11
tightly [1] 223/18
time [111] 3/1 3/5 5/14 6/6 9/9
 9/10 11/18 11/22 11/22 12/6
 12/10 14/17 15/13 15/16 18/6
 32/21 34/4 37/4 38/19 38/20

38/21 41/19 43/21 45/12 47/21
 57/4 58/19 58/20 65/1 65/14
 65/21 65/22 69/15 69/25 71/24
 72/4 72/11 72/16 72/19 77/2 77/2
 77/21 77/21 82/21 83/19 88/6
 91/2 97/7 100/13 102/10 102/12
 102/21 103/7 104/1 104/20 110/3
 115/17 115/19 115/23 118/12
 120/5 120/7 120/9 120/19 125/23
 132/2 136/5 136/6 136/20 137/16
 141/18 150/10 151/25 152/22
 155/2 160/7 167/10 168/17 169/10
 171/4 171/6 172/23 182/19 182/21
 182/24 182/24 189/25 194/10
 194/15 194/18 194/19 196/23
 205/9 214/16 219/19 233/14
 234/24 241/17 243/18 247/23
 248/1 250/20 251/7 253/6 256/9
 257/5 257/21 257/22 259/4 259/11
 260/2
times [9] 52/25 66/8 78/12 78/13
 94/13 100/25 115/14 140/7 214/10
timing [1] 217/7
tipped [3] 110/7 223/3 224/13
tissue [2] 243/2 243/2
tissues [10] 245/16 245/21 247/5
 248/24 249/2 255/22 255/25 256/3
 256/12 257/4
title [4] 31/1 39/2 74/25 196/25
today [23] 5/14 11/19 11/20 11/25
 37/17 48/7 69/23 89/2 101/24
 132/19 157/12 163/8 191/2 191/7
 197/5 197/12 242/3 246/18 246/20
 248/22 253/20 259/20 261/19
today's [1] 69/9
toe [1] 229/22
together [8] 81/11 92/8 117/17
 125/11 198/14 203/4 217/1 218/10
told [17] 110/10 167/2 167/7
 167/20 168/8 170/17 170/23
 170/23 171/3 179/4 224/1 224/15
 231/17 247/21 248/2 248/9 248/14
Tom [1] 3/8
tomorrow [4] 12/15 12/15 259/23
 261/24
took [16] 12/1 18/6 36/22 37/3
 58/9 59/3 74/19 81/6 95/6 97/22
 101/19 112/19 128/9 129/7 146/10
 243/1
tools [1] 82/7
top [15] 18/9 32/6 48/3 50/11 63/4
 63/4 76/18 108/14 110/15 110/16
 176/15 234/4 235/6 240/18 241/25
topic [6] 118/21 140/12 141/1
 141/9 142/1 198/6
topics [1] 85/11
topped [14] 69/13 69/19 93/12
 93/17 127/19 128/2 134/9 221/10
 221/10 221/11 221/11 229/8 230/6
 230/15
total [2] 220/5 221/2
tote [2] 23/17 29/10
totes [2] 24/25 25/7
touch [1] 34/10
towards [1] 174/25
toxic [1] 165/21
Toxicologists [2] 76/2 76/6
toxicology [20] 74/17 75/9 75/16
 76/19 122/3 122/9 122/11 122/13
 122/14 124/23 125/5 125/9 128/14
 132/10 147/17 147/18 161/9 210/5
 214/3 257/18
Toyota [7] 3/22 4/12 5/2 5/3 5/8

9/4 94/21
trace [1] 257/11
traces [1] 253/11
track [1] 25/2
tracking [1] 30/13
traffic [1] 47/17
trailer [3] 13/25 231/5 231/9
train [2] 183/21 244/3
trained [1] 75/5
training [9] 75/3 118/22 134/16
 181/23 183/2 196/17 196/19
 197/14 197/19
transcribed [1] 263/11
transcript [4] 1/23 14/22 263/8
 263/12
transcription [1] 263/11
transfer [2] 204/16 257/3
transferred [3] 25/6 235/20 256/25
transferring [1] 34/18
transpired [1] 254/8
traveling [1] 47/20
treatment [3] 210/20 210/22 211/3
trends [1] 76/18
trial [31] 1/4 1/4 3/4 3/25 5/15
 5/21 11/4 11/16 17/1 51/22
 115/21 116/5 143/22 150/20
 150/22 151/8 151/10 155/18
 155/25 168/9 168/11 170/9 170/25
 171/2 247/13 247/13 247/14 252/8
 256/2 256/7 256/15
tried [3] 50/21 210/1 213/3
tries [1] 117/7
trigger [1] 31/5
true [15] 53/13 53/15 117/9
 135/23 150/7 155/20 156/1 163/15
 178/4 184/17 194/8 195/16 209/3
 229/10 263/12
truly [1] 80/11
trust [2] 80/14 80/21
truth [2] 163/17 197/20
truthfully [1] 244/7
try [13] 11/14 13/3 82/14 105/20
 124/14 164/6 168/18 169/12
 170/15 241/10 244/15 244/21
 255/20
trying [16] 15/3 68/16 81/18 81/20
 81/23 82/1 84/8 84/25 166/1
 169/14 173/25 192/15 243/21
 245/8 247/15 260/8
tube [63] 62/22 63/4 69/13 88/21
 89/19 89/20 89/21 89/22 90/19
 90/20 90/25 91/6 91/7 91/8 91/10
 91/12 91/13 91/16 91/20 91/23
 92/6 92/8 92/13 92/14 93/2 94/5
 94/23 94/24 94/25 106/2 106/5
 106/6 106/11 106/14 106/19
 126/15 127/2 127/18 127/19
 127/24 127/25 128/1 128/2 129/8
 134/9 134/12 134/12 135/5 135/12
 175/11 207/4 207/9 221/10 221/10
 221/11 221/11 221/15 225/8 230/6
 230/15 230/18 230/19 235/5
tubes [14] 89/25 90/12 90/16
 90/19 90/22 90/23 91/5 91/19
 92/12 93/9 93/10 93/13 93/18
 93/20
tubing [1] 132/22
tubs [1] 47/3
Tuesday [1] 27/4
turn [10] 108/14 189/17 190/21
 190/22 191/6 197/25 199/18 200/9
 201/15 204/8
turned [5] 56/11 129/15 190/6

T
turned... [2] 195/19 197/3
turning [1] 67/16
twice [1] 232/15
two [59] 4/8 18/20 22/5 23/17
 40/17 43/24 63/25 64/6 76/6
 82/16 83/2 83/11 98/21 100/14
 103/18 103/20 113/2 124/8 126/4
 126/13 127/7 128/5 128/22 135/10
 135/20 148/13 151/25 154/16
 155/5 163/23 163/24 175/14
 176/16 178/17 200/7 203/21
 205/18 205/18 205/19 205/20
 205/21 205/21 214/6 214/12 215/1
 217/9 217/16 218/6 219/3 220/13
 229/17 229/17 232/2 234/18
 234/21 234/22 239/7 239/8 261/3
twofold [1] 212/2
type [8] 81/2 90/19 125/14 150/19
 182/16 182/19 201/24 206/23
types [19] 34/3 34/4 73/21 75/5
 90/14 90/15 90/17 90/18 91/4
 117/2 121/3 133/9 133/19 134/6
 138/5 172/1 182/6 203/21 255/23
typical [2] 110/6 114/13
typically [8] 60/15 74/1 75/6
 100/11 117/16 119/5 168/3 177/10

U
U.S [3] 170/3 173/12 197/1
ultimately [4] 37/11 209/2 239/20
 258/10
unavailable [1] 92/25
unbiased [1] 183/22
unbound [2] 94/8 94/9
unclosed [1] 256/20
uncomfortable [1] 248/10
uncommon [2] 65/1 117/23
uncontested [1] 137/15
uncovered [1] 8/3
under [20] 4/1 8/22 9/24 12/1
 14/10 26/16 66/2 73/24 77/10
 89/4 152/22 155/2 163/17 182/15
 196/9 206/9 213/18 217/18 248/6
 248/13
under your [1] 206/9
undergo [1] 77/16
underneath [1] 48/1
understand [16] 3/14 11/1 36/12
 52/2 65/22 66/5 67/4 68/17
 158/15 162/23 212/11 212/12
 219/16 231/25 233/3 238/9
understanding [7] 6/24 7/22 18/3
 160/1 214/11 220/11 258/7
understands [2] 198/19 260/23
understood [2] 8/6 230/8
undertook [1] 133/2
unfair [1] 169/18
unfortunately [2] 104/12 105/14
unique [6] 116/23 117/22 121/3
 207/25 207/25 256/22
unit [68] 20/20 21/1 21/14 22/3
 22/14 27/22 52/24 54/24 73/8
 73/8 73/13 73/15 73/15 73/19
 73/20 73/22 73/25 79/13 100/12
 100/15 101/24 108/5 108/9 114/8
 117/20 118/10 128/15 144/18
 144/18 145/8 145/13 145/13
 145/15 145/19 145/24 145/25
 146/8 149/16 150/11 172/7 177/18
 180/12 180/13 181/4 181/6 181/7
 181/20 182/17 183/8 186/10

186/14 186/15 186/15 186/17
 186/18 186/18 186/20 187/18
 188/6 188/14 188/21 193/14 200/1
 200/1 204/2 215/13 218/17 221/5
United [4] 88/15 118/22 144/21
 248/3
units [5] 52/25 145/21 149/21
 182/8 212/22
universally [1] 200/18
University [7] 74/13 74/15 74/17
 74/18 74/21 75/15 152/1
unknown [6] 81/22 84/9 117/4
 117/7 202/10 202/17
unless [6] 64/8 163/15 177/13
 179/14 254/20 258/10
unpreserved [1] 132/14
until [15] 9/20 38/18 38/19 42/5
 46/21 47/2 57/3 57/9 70/21
 102/13 129/1 129/13 179/1 196/19
 196/21
unusable [1] 88/2
unusual [5] 51/11 52/12 53/7 53/8
 53/19
upcoming [1] 168/11
upon [17] 18/2 29/1 117/19 117/20
 122/11 122/17 124/8 128/16
 134/16 134/17 134/18 147/21
 153/21 156/14 173/4 251/8 255/18
upstairs [2] 43/18 43/22
urine [3] 139/2 139/3 139/4
usable [1] 91/2
use [32] 45/25 46/12 70/12 70/25
 81/2 82/7 85/23 86/24 87/17
 92/11 92/25 120/21 133/3 153/25
 155/9 155/12 164/19 165/4 165/6
 165/9 165/15 167/14 168/24 185/9
 190/7 193/12 194/12 198/2 206/22
 206/22 232/15 256/12
used [76] 37/4 44/20 46/15 47/12
 56/8 81/4 82/4 84/14 84/16 84/18
 84/22 85/1 85/5 85/6 85/8 85/9
 86/14 86/16 86/20 86/21 86/24
 87/17 94/5 94/6 107/15 115/4
 119/11 120/6 120/12 121/16
 121/19 124/15 125/14 125/16
 127/14 128/10 138/6 142/24 143/2
 143/11 151/6 152/6 152/20 159/15
 164/14 168/13 176/21 178/4 183/3
 188/4 189/11 189/18 191/11
 191/15 205/9 206/19 214/14 219/4
 219/10 219/17 220/3 220/7 220/12
 225/12 225/19 237/6 249/4 253/10
 253/12 253/13 256/5 256/23 257/2
 257/5 260/18 260/24
useful [3] 3/21 9/3 112/20
uses [2] 86/19 176/10
using [11] 65/5 83/23 84/6 96/6
 103/2 132/19 132/24 134/18 183/4
 211/3 256/24
usual [3] 64/14 160/8 188/13
usually [4] 54/18 54/23 54/25
 64/22

V
valid [2] 124/3 187/4
validate [6] 120/20 128/9 167/13
 224/2 249/4 256/11
validated [9] 120/17 125/11
 159/24 170/22 185/8 206/3 206/15
 207/5 223/2
validation [22] 128/14 132/18
 133/1 133/3 167/17 178/11 179/3
 179/8 180/3 180/17 181/12 183/3

183/11 185/21 185/21 185/23
 185/24 187/25 220/18 223/24
 224/12 257/3
validity [1] 248/15
value [2] 84/2 207/8
various [5] 33/22 52/25 59/6 60/6
 85/9
vast [2] 114/15 114/22
vault [4] 43/7 45/8 46/3 46/4
vehicle [14] 8/14 8/15 8/16 8/19
 8/19 9/15 39/22 99/19 225/20
 227/25 228/3 228/6 228/14 228/24
verified [1] 257/9
verify [11] 58/22 130/25 153/2
 153/3 166/22 180/23 187/23
 239/15 240/11 245/23 255/17
verifying [1] 236/16
version [3] 45/24 59/17 60/9
very [59] 8/2 10/18 13/20 18/14
 24/17 28/16 33/18 34/22 43/2
 46/8 50/13 50/23 59/21 66/20
 72/22 80/10 82/11 82/25 83/23
 84/22 87/3 87/4 89/10 92/2 92/9
 103/9 106/3 116/23 116/24 117/10
 118/10 120/22 131/6 131/9 131/20
 131/22 131/24 136/25 153/4
 163/20 178/12 178/13 180/13
 193/7 193/15 205/9 208/17 210/16
 211/11 218/24 219/1 220/14 247/7
 249/13 254/12 255/10 256/22
 257/11 257/13
vial [58] 3/22 4/17 5/9 8/7 10/10
 10/11 10/12 10/13 11/8 27/12
 28/10 28/21 42/6 42/11 57/22
 69/13 69/13 69/19 70/6 104/18
 104/24 105/10 105/22 105/24
 134/24 176/19 176/20 178/3 207/2
 207/22 208/2 209/23 213/23 214/9
 214/13 225/12 225/15 225/16
 225/20 225/21 225/24 228/15
 229/9 233/5 235/21 235/21 239/11
 239/16 239/20 239/23 240/4 240/6
 240/11 240/13 240/20 241/13
 241/14 241/16
victim's [1] 246/1
video [1] 63/7
videotape [1] 59/9
videotaped [1] 59/3
videotaping [1] 62/17
view [6] 17/15 29/16 44/22 61/22
 175/21 175/25
viewed [2] 31/9 63/21
viewing [3] 44/21 62/3 68/3
Virginia [6] 69/23 73/11 137/21
 169/10 231/17 262/1
vis [2] 51/21 51/21
vis-a-vis [1] 51/21
vitae [7] 79/4 137/24 195/24 196/2
 196/6 197/3 261/4
voice [1] 12/3
volume [2] 129/17 129/21

W
wait [4] 9/20 26/20 40/7 160/25
walk [1] 25/11
walkway [2] 25/14 25/17
wall [1] 25/13
Walstad [1] 4/1
want [26] 10/5 10/8 25/19 27/24
 48/9 59/22 62/10 80/15 80/18
 90/11 91/1 110/20 132/4 163/12
 163/16 165/19 166/15 187/1
 189/23 198/5 198/18 201/12

<p>W</p> <p>want... [4] 201/12 203/19 216/1 239/5</p> <p>wanted [9] 30/19 31/8 32/18 39/5 119/18 130/25 161/12 199/14 229/12</p> <p>wanting [1] 14/6</p> <p>wants [2] 29/15 123/4</p> <p>warrants [1] 53/2</p> <p>Warrensburg [1] 74/13</p> <p>wasn't [18] 41/18 43/20 46/15 47/16 56/5 107/9 110/6 127/14 143/6 145/18 181/2 184/25 190/20 193/2 207/5 217/20 231/10 259/5</p> <p>waste [2] 210/20 211/3</p> <p>wastewater [1] 87/21</p> <p>watch [2] 60/3 144/3</p> <p>water [14] 86/5 86/6 87/22 87/24 88/8 131/14 144/14 208/22 209/6 210/20 211/3 211/8 235/1 238/14</p> <p>way [52] 4/19 10/24 24/20 41/4 46/15 47/2 47/6 48/13 48/14 49/6 56/15 56/15 60/15 64/12 67/18 70/14 87/3 91/5 100/11 114/13 135/15 154/25 155/4 159/14 166/19 172/10 175/17 175/22 186/22 192/9 215/10 224/23 225/12 225/19 225/25 226/11 227/9 227/9 227/20 230/10 232/1 232/18 232/24 235/9 236/15 237/23 239/11 240/3 240/6 243/23 244/20 252/4</p> <p>ways [3] 128/22 225/2 236/18</p> <p>we [417]</p> <p>we'll [22] 11/7 15/7 15/12 45/12 45/15 59/16 59/19 63/13 69/2 69/4 71/24 72/15 102/11 102/14 116/22 136/5 140/4 147/10 160/7 215/25 259/23 261/23</p> <p>we're [44] 3/3 13/7 13/18 31/14 32/19 45/11 58/6 59/24 60/25 61/22 62/13 70/5 74/1 77/17 77/20 77/21 82/15 84/8 84/8 87/18 87/21 100/11 102/21 116/16 116/25 117/19 117/20 124/9 124/10 124/20 125/20 125/23 132/2 132/24 167/22 169/4 176/7 182/25 184/24 197/8 206/7 231/15 259/19 262/4</p> <p>weapon [1] 33/24</p> <p>web [1] 229/25</p> <p>weed [1] 184/14</p> <p>week [7] 14/13 58/23 93/22 171/11 212/17 213/5 213/7</p> <p>weekends [2] 56/21 85/7</p> <p>weekly [1] 116/16</p> <p>weeks [1] 178/17</p> <p>weight [2] 84/4 234/10</p> <p>Welcome [1] 15/15</p> <p>went [5] 28/25 187/22 215/13 230/8 243/5</p> <p>weren't [6] 38/22 41/20 42/7 143/17 155/2 232/20</p> <p>west [2] 25/13 74/16</p> <p>what's [16] 22/5 53/20 86/14 91/7 95/16 119/21 125/17 129/5 176/3 195/22 199/18 203/12 210/4 216/2 234/9 250/16</p> <p>whatever [13] 48/5 60/17 156/18 157/8 157/10 158/24 179/4 206/14 212/6 215/25 221/19 259/15 261/3</p> <p>whatsoever [2] 133/16 213/21</p>	<p>wheel [1] 156/9</p> <p>Wheeler [3] 20/20 21/1 22/2</p> <p>whereby [1] 237/11</p> <p>wherein [1] 20/5</p> <p>whenever [1] 8/17</p> <p>whether [40] 9/11 12/3 13/4 53/7 57/7 74/2 79/17 85/6 88/20 109/12 109/13 109/13 116/7 116/23 117/9 123/25 125/21 134/22 152/20 156/22 157/13 173/11 173/16 174/1 175/5 175/8 199/10 212/5 212/19 213/21 221/9 225/14 225/21 243/15 244/17 244/22 245/11 245/12 245/18 245/23</p> <p>while [16] 13/22 18/4 18/20 50/6 54/4 90/7 101/10 143/20 144/3 151/10 154/17 170/25 183/23 194/16 247/14 252/6</p> <p>whirring [1] 194/16</p> <p>white [2] 58/9 60/16</p> <p>Whitehurst [2] 146/23 147/2</p> <p>whoever [3] 4/16 67/6 203/8</p> <p>whole [19] 27/25 45/9 55/11 56/10 61/13 81/17 86/7 86/13 108/6 117/5 117/14 125/22 145/24 146/22 166/5 186/23 194/23 199/7 208/12</p> <p>whom [1] 22/12</p> <p>whomever [1] 67/9</p> <p>whose [2] 20/11 242/18</p> <p>widely [2] 84/22 107/15</p> <p>Wiegert [7] 39/13 61/9 61/21 69/17 69/25 70/9 70/25</p> <p>Wiegert's [1] 70/21</p> <p>wife [5] 242/19 244/18 244/23 246/9 254/16</p> <p>Wilda [3] 20/17 20/24 21/22</p> <p>William [3] 242/14 251/18 254/11</p> <p>willing [3] 228/24 229/2 229/13</p> <p>Willis [1] 1/9</p> <p>Willow [1] 75/17</p> <p>window [2] 44/24 46/19</p> <p>windows [1] 25/24</p> <p>WISCONSIN [16] 1/1 1/3 1/12 1/14 1/16 3/2 9/21 17/7 22/17 29/4 86/6 104/15 177/21 177/24 263/1 263/6</p> <p>wisdom [1] 141/9</p> <p>wish [2] 37/11 137/12</p> <p>wished [1] 6/17</p> <p>wishes [1] 69/24</p> <p>withdraw [1] 162/14</p> <p>withdrawn [1] 11/8</p> <p>within [37] 16/23 28/16 42/18 48/19 55/17 61/15 73/14 76/7 76/10 76/12 76/18 91/20 91/24 92/8 100/14 101/23 108/6 114/8 115/19 132/22 145/15 145/18 145/21 146/21 150/11 153/24 172/2 176/12 180/11 181/4 186/16 188/6 188/19 193/6 197/1 229/10 246/16</p> <p>without [8] 5/12 6/5 49/19 119/9 135/17 214/22 231/22 260/10</p> <p>withstand [1] 89/12</p> <p>witness [36] 11/19 13/1 15/4 15/5 15/19 15/23 35/19 35/24 36/11 53/24 62/6 69/1 69/4 72/19 72/23 96/20 96/22 96/22 97/1 97/2 100/3 105/13 105/19 136/9 148/20 190/20 190/24 195/14 196/11 231/17 239/23 254/24 258/11</p>	<p>260/4 260/11 260/14</p> <p>witnessed [1] 28/15</p> <p>witnesses [4] 2/2 12/17 13/2 70/10</p> <p>woman [3] 49/1 50/3 50/4</p> <p>wondering [1] 6/18</p> <p>word [4] 37/10 86/24 162/8 162/10</p> <p>words [3] 24/8 166/17 175/13</p> <p>work [38] 11/5 49/11 49/14 73/24 74/20 79/15 81/12 88/19 97/15 98/9 100/21 101/1 101/3 101/9 114/16 114/23 116/1 123/12 125/25 149/15 149/25 159/10 159/16 168/9 171/4 175/20 177/17 180/18 180/23 181/8 182/1 182/15 183/15 185/23 197/9 220/4 222/8 249/17</p> <p>worked [8] 73/13 75/10 75/14 75/18 100/24 125/25 145/16 249/3</p> <p>workers [1] 85/6</p> <p>working [13] 13/8 13/18 34/14 34/15 143/13 146/8 149/14 149/20 166/16 181/22 182/8 192/20 252/7</p> <p>works [7] 49/6 49/16 50/6 82/13 101/23 114/11 196/18</p> <p>workshops [1] 76/20</p> <p>workstation [1] 49/17</p> <p>world [5] 88/13 88/16 118/23 148/15 148/25</p> <p>worried [2] 68/18 217/10</p> <p>worth [1] 13/5</p> <p>worthwhile [1] 184/4</p> <p>worthy [2] 220/5 220/5</p> <p>wouldn't [17] 50/13 51/6 53/8 56/11 65/25 118/3 141/17 146/12 175/7 180/19 190/9 215/24 217/22 222/24 224/5 225/23 229/21</p> <p>wrap [1] 119/18</p> <p>write [4] 123/6 176/11 216/19 220/6</p> <p>writers [1] 41/22</p> <p>written [12] 98/7 106/21 118/25 124/12 129/3 148/11 148/23 149/8 161/15 187/24 196/10 203/9</p> <p>wrong [11] 142/21 152/18 159/6 210/14 221/12 221/13 242/17 243/10 243/13 253/8 253/17</p> <p>wrongly [2] 80/18 80/20</p> <p>wrote [2] 101/21 129/12</p> <p>Y</p> <p>year [22] 31/7 32/21 33/5 33/5 33/15 33/16 33/17 34/22 35/1 140/6 140/8 143/16 151/1 168/23 186/3 209/22 210/7 210/9 220/25 222/21 225/15 225/16</p> <p>years [34] 43/24 46/8 74/19 75/13 78/7 87/16 88/25 118/4 142/7 142/7 142/8 142/9 142/10 148/13 163/4 166/18 182/7 208/2 212/23 214/6 214/9 214/12 214/16 224/7 238/24 242/19 245/10 246/25 248/23 249/6 250/14 252/13 254/17 256/15</p> <p>yellow [2] 91/12 221/10</p> <p>yellow-stoppered [1] 91/12</p> <p>yellow-topped [1] 221/10</p> <p>yesterday [4] 3/18 3/23 250/20 250/21</p> <p>yet [6] 10/11 68/5 106/5 168/14 189/14 237/8</p> <p>you'd [1] 213/17</p> <p>you're [9] 54/22 137/21 154/9 175/16 188/17 204/3 228/17</p>
---	--	---

Y

you're... [2] 228/24 244/20
yourself [15] 101/13 109/20
139/20 140/1 180/14 181/13
187/14 187/16 188/22 188/23
189/5 193/8 200/5 211/13 211/23
yourselves [1] 102/13

Z

Z-i-g-m-u-n-t [1] 16/3
ZIGMUNT [8] 2/3 15/21 15/23 16/3
29/6 36/19 45/23 64/3
zoomed [1] 241/20