

1 STATE OF MINNESOTA

DISTRICT COURT

2 COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

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4 State of Minnesota,

5 Plaintiff,

File No. 19HA-CR-14-2677

6 vs.

MOTION HEARING

7 Brian George Fitch,

8 Defendant.

9 -----

10 The above-entitled matter came duly on for Motion  
11 Hearing during Jury Trial before the Honorable Mary J.  
12 Theisen, one of the judges of the above-named court, on the  
13 13th day of January, 2015, at the Stearns County Courts  
14 Facility, St. Cloud, Minnesota.

15 APPEARANCES:

16 MR. PHILLIP PROKOPOWICZ and MR. RICHARD DUSTERHOFT,  
17 Assistant County Attorney for Dakota and Ramsey Counties,  
18 appeared on behalf of the State of Minnesota.

19 MS. LAURI TRAUB and MR. GORDON COHOES, Assistant  
20 Public Defenders, appeared on behalf of the defendant.

21 ALSO PRESENT:

22 Brian George Fitch, the defendant, appeared in person.  
23  
24  
25

1 THE COURT: This is the State of Minnesota  
2 vs. Brian Fitch. Counsel, would you note your  
3 appearances, please.

4 MR. PROKOPOWICZ: Phil Prokopowicz appearing  
5 on behalf of the State.

6 MR. DUSTERHOFT: Richard Dusterhoft on  
7 behalf of the State.

8 MS. TRAUB: Lauri Traub on behalf of Brian  
9 Fitch who's present before the Court.

10 MR. COHOES: And Gordon Cohoes on behalf of  
11 Brian Fitch.

12 THE COURT: And we're here for the jury  
13 trial, we are about to start with jury selection; and  
14 last night the defense filed some motions, so we're  
15 going to address those. And also yesterday we did  
16 have a meeting with Counsel, or I had a meeting with  
17 Counsel, and we agreed to release certain jurors for  
18 cause; and I asked Ms. Traub to make a record with her  
19 client about his waiver of being present at that  
20 meeting.

21 MS. TRAUB: Certainly.

22 Brian, what the judge is talking about is  
23 yesterday afternoon we met, the judge, the  
24 prosecutors, Mr. Cohoes and I, and we went through  
25 certain jury questionnaires that we thought were going

1 to be problems; for example, people that have  
2 vacations planned, that have sick relatives, a few  
3 people that had expressed very strong opinions about  
4 this case; and we made the determination that rather  
5 than bring those people in, and I think there were  
6 less than 10 of them, rather than bring them in we  
7 would just excuse them. And you were not present when  
8 we did that, and I told the judge I thought you would  
9 be fine with that; and the judge just wanted me to ask  
10 you on the record, are you okay with the fact that we  
11 struck those people without you having any input into  
12 that?

13 THE DEFENDANT: Yes, I am.

14 THE COURT: Any questions about that, sir?

15 THE DEFENDANT: No.

16 THE COURT: Okay. Any further inquiry you  
17 think?

18 MR. PROKOPOWICZ: Your Honor, I just would  
19 like the record to reflect that during our review it  
20 was strictly based on the questionnaires, that no  
21 juror was present or appeared in the courtroom; it was  
22 just a paper review of the questionnaires in the case.

23 THE COURT: That is correct.

24 All right. Then we have some motions that were  
25 filed by the defense, and could we address number 3

1 first concerning the witness list?

2 MS. TRAUB: Yes. Judge, I don't think  
3 there's much to say. We cited it in our motion. But  
4 we brought it to the Court's attention yesterday. We  
5 last Friday, Mr. Cohoes and I, Mr. Dusterhoft, Mr.  
6 Prokopowicz and you met in chambers in Dakota County,  
7 went through the questionnaire, and we pointed out at  
8 that time that our investigator Randy Goeke was --  
9 behind his name it said "First Judicial District  
10 Public Defender's Office," and we told the Court at  
11 that time that his name needed to be listed just as a  
12 citizen witness because there is case law out there  
13 that says it's not appropriate to refer to attorneys  
14 as public defenders.

15 The purpose for that is it's prejudicial to our  
16 client, people have a lot of prejudicial ideas about  
17 public defenders. They think we're not real lawyers.  
18 They think that if you are innocent you would spend  
19 the money and hire private counsel. They think  
20 that -- there's a natural prejudice sometimes towards  
21 people who are in poverty and people that don't  
22 understand the system don't believe in public defense;  
23 they don't believe that people, I think, who are  
24 impoverished are entitled to a lawyer; they're angry  
25 about the fact that the taxpayers are paying our

1 salaries for criminals. All of those things are  
2 reasons that the Minnesota Supreme Court has said it's  
3 never appropriate for someone to say that the defense  
4 team is public defense.

5 Now, I know it's been in the media, they refer to  
6 us as public defenders all the time. Quite frankly I  
7 think that's ignorance; and usually I say to them, I'm  
8 an attorney and I would prefer you refer to me as  
9 that. But we're operating under the idea that these  
10 people in this district haven't had the exposure that  
11 people in Dakota County have, although I -- quite  
12 frankly given a lot of the responses yesterday I think  
13 people have. But we believe it's important that we  
14 begin again with a new venire panel because every  
15 single juror went through that list and every single  
16 juror saw on that list that Mr. Goeke was with the  
17 Public Defender's Office.

18 And I do anticipate that he will be called at  
19 trial. He's been doing some investigation for us;  
20 he's been timing some routes because of the question  
21 about who could have gotten from where in a certain  
22 amount of time; he's been serving subpoenas for us.  
23 He's done a lot of things that we may need to call him  
24 for and probably will call him for; so it's not a no  
25 harm, no foul because he's not going to show up on the

1 stand and people aren't going to remember because it's  
2 going to be three weeks from now.

3 And I think the case law is in our favor on this.  
4 You know, Bernardo is not about this issue in general;  
5 it's about the fact that the most important thing is  
6 that our client is guaranteed a fair trial in the  
7 United States and Minnesota Constitutions; and when it  
8 becomes a question of whether they're going to get a  
9 fair trial because of things that come in that  
10 shouldn't, we err on the side of the defendant and his  
11 rights. That is above all now what is important in  
12 this case.

13 And I'm not saying that the life of Officer  
14 Patrick wasn't important in saying that my client's  
15 rights are important right now. I think I've been  
16 very clear about what I think about that loss. But  
17 what is the most important right now is Mr. Fitch's  
18 rights, and Mr. Fitch has the right to a jury that  
19 hasn't been told that he has public defenders for his  
20 lawyers.

21 THE COURT: Counsel.

22 MR. PROKOPOWICZ: Your Honor, Mr. Goeke's  
23 name in reference to the Public Defender's appeared on  
24 a list of 84 witnesses in this case. I think it's  
25 clear on the record that it was an inadvertent error,

1           it wasn't done intentionally by our office or the  
2           Court or anyone else. The State does acknowledge that  
3           discussion we had last Friday. It was just a simple  
4           error, inadvertent; not done with any malice or guilt,  
5           intent. On the list it doesn't indicate what purpose  
6           Mr. Goeke is going to be called for. In fact, we have  
7           just heard now for the first time the potential  
8           purpose. We haven't received any reports from Mr.  
9           Goeke so I assume he's done some investigative work.  
10          We have no idea what it's about. He's not referenced  
11          on a particular side, whether he's a State witness or  
12          a prosecution witness. Although I suspect it may be  
13          implied if he is in fact called by the defense, if he  
14          is in fact called by the defense later on during the  
15          course of this trial two or three weeks from now,  
16          we're going to get to that particular point, I suppose  
17          some indication they could recall back to this week  
18          and say, that's right, he was on the witness list and  
19          referenced as a public defender.

20                 The bottom line is there's really been no showing  
21          of prejudice at this particular point in time  
22          warranting a new panel to be called into session in  
23          this particular case. We are still at the point of  
24          voir dire. Any potential prejudice or issues  
25          surrounding that could potentially be addressed on the

1           voir dire.

2           As defense counsel has noted, I think it's been  
3           pretty well published that the defendant is  
4           represented by the First Judicial District Public  
5           Defender's Office. As defense counsel has indicated,  
6           a lot of jurors have read a lot of accounts about this  
7           particular case and obviously may bring that to the  
8           table. Looking at the case law cited by defense  
9           counsel in their motion, it doesn't necessarily -- it  
10          -- my reading of the case law is it should be avoided,  
11          but absent a real showing of prejudice in a particular  
12          case at best it amounts to harmless error; and I think  
13          at this point in time that's where we're at.

14                 THE COURT: I did have a chance to review  
15                 the motion last night, I did have a chance to think  
16                 about it as well. It was not supposed to be on the  
17                 witness list. We did -- we did agree that that was  
18                 not going to be on there that Mr. Goeke was with the  
19                 First Judicial District Public Defender's Office, and  
20                 it shouldn't have been on there and it was. I do not  
21                 find it prejudicial to your client. I think that  
22                 there was about, what, 70 or so witnesses on the list.

23                         MR. PROKOPOWICZ: 84, Your Honor.

24                         THE COURT: 84 witnesses on the list, and to  
25                         the extent that they may have seen that one is with



1 the First Judicial District Public Defender's Office I  
2 don't think is prejudicial. I think he's got two very  
3 talented, zealous lawyers; and I think that's what the  
4 jurors are going to see and it doesn't matter if  
5 you're a public defender or not.

6 So let's address 1 or 2 of -- Mr. Fitch, don't be  
7 making faces at me when I'm ruling on things, please.

8 THE DEFENDANT: I wasn't making no faces,  
9 Your Honor.

10 THE COURT: You did. Go ahead, Ms. Traub.

11 MS. TRAUB: Judge, just in regards to number  
12 1 and number 2. And, you know, as long as we're on  
13 it, let's address the late discovery again. Yesterday  
14 in court Mr. Prokopowicz assured the Court that if he  
15 sent this new discovery he -- or if he sent discovery,  
16 because yesterday he said it was essentially done  
17 except for things related to the new information about  
18 whether or not Mr. Fitch engaged in witness tampering,  
19 and he told the Court that as a professional courtesy  
20 when he sent us information he would indicate whether  
21 it was new or duplicate and whether they intended to  
22 use it. We got e-mail last night and it did not  
23 indicate either, and it was a lot of information. It  
24 looked like it was new to us; it was audios, it was  
25 interviews, it was some correspondence from the prison

1           which they're obviously not going to use; but it was a  
2           lot, everything else was stuff that looked like  
3           perhaps it would be used in court. So Mr. Cohoes had  
4           sent an e-mail back immediately and said, could you  
5           please tell us if this is new information, if you  
6           intend to use it? Mr. Dusterhoft answered about  
7           information that he had sent which he had already  
8           indicated in his e-mail whether it was new or not, and  
9           Mr. Prokopowicz finally answered at 10:30 last night.  
10          So yet again, when we're sitting here picking a jury,  
11          new information.

12                 On top of that, we got information regarding a  
13          handwriting analysis. Whether or not you believe  
14          handwriting analysis is forensic evidence or  
15          essentially hokum, the prosecution contends it's  
16          forensic evidence; and they've provided fingerprint  
17          evidence and handwriting analysis and -- which we got  
18          the fingerprint last Friday, the handwriting analysis  
19          yesterday, we still don't have the full underlying  
20          files on -- although I understand they're coming,  
21          they're working on that; I'm not saying they're not.  
22          It's come to the point, Judge, we called our managing  
23          attorney last night, we don't take this matter  
24          lightly. We had a very long discussion with her. And  
25          at one point I left a message for Mr. Dusterhoft on

1 his phone about, you know, let us know, if -- do you  
2 want to go forward with this new evidence? If you do,  
3 we're going to ask for a continuance. If you're okay  
4 going forward without that, we'll go forward to trial.  
5 And I didn't get a phone call back.

6 If the Court is not going to suppress this  
7 evidence, we need a continuance. We cannot go forward  
8 with new forensic evidence at this late date, and  
9 under Beecroft we are entitled to a defense expert of  
10 our choosing. I don't know how anyone could expect us  
11 in the midst of trial, I mean trial has started, we  
12 have a jury panel that's waiting to be spoken to, I  
13 cannot pick a jury and at the same time be in my  
14 office calling, looking for a defense expert to help  
15 us with this information. I cannot go to the BCA and  
16 meet with the scientist, which is a practice that I  
17 always have, can't do that because I have to be here  
18 picking the jury. If the Court does not grant us a  
19 continuance and requires us to go forward to trial,  
20 I'm going to put on the record right now, Mr. Fitch  
21 will have ineffective assistance of counsel; and  
22 that's not appropriate.

23 THE COURT: Well, I don't think Mr. Fitch is  
24 going to have ineffective assistance of counsel  
25 because I think you are a very good attorney so -- I

1 do see that you've got a team here with you, however,  
2 correct, you've got a paralegal with you?

3 MS. TRAUB: I have a paralegal.

4 THE COURT: Uh-huh.

5 MS. TRAUB: I have a law clerk.

6 THE COURT: Uh-huh.

7 MS. TRAUB: Who is not here for the entire  
8 time because he's needed in our office. I do not have  
9 other people who can do my job for me. I -- I'm a  
10 good lawyer, I'll give you that, I think I am. I  
11 think I do a good job for my clients. And some  
12 forensic evidence I understand. I understand the  
13 science of drug testing. I understand DNA. I'm  
14 reasonably educated in firearms analysis. I don't  
15 understand fingerprint evidence. I don't understand  
16 handwriting analysis other than to note that it's not  
17 that widely accepted in the scientific community  
18 anymore. I cannot learn that in a week while I'm here  
19 in trial, it can't be done.

20 THE COURT: Let me hear from the State first  
21 and then I'll hear more from you.

22 MR. PROKOPOWICZ: I don't know if the Court  
23 wants to hear all of our response or just regarding  
24 the two motions.

25 THE COURT: The two motions.

1 MR. PROKOPOWICZ: Okay. The two motions,  
2 Your Honor. Dealing with the motion to exclude the  
3 fingerprint and the handwriting analysis, I think  
4 first of all there is no late disclosure or any  
5 intentional delay or bad faith on the part of the  
6 State in disclosing this information.

7 THE COURT: Well, now you have to remember  
8 that I don't even know what we're talking about.

9 MR. PROKOPOWICZ: Let me give you a recap.

10 THE COURT: Okay.

11 MR. PROKOPOWICZ: On December 29th of this  
12 year investigators from the Bureau of Criminal  
13 Apprehension and the West St. Paul Police Department  
14 spoke with an inmate at the correctional facility at  
15 Oak Park Heights. That inmate indicated to the  
16 officers that he was housed in the same medical unit  
17 at Oak Park Heights as Mr. Fitch, that while housed in  
18 that medical unit Mr. Fitch approached him regarding  
19 the possibility of contacting individuals on the  
20 outside in order to murder two key witnesses in this  
21 particular case. They are witnesses that place or  
22 indicate that Mr. Fitch was the owner and driver of  
23 the green Grand Am, they observed him in the green  
24 Grand Am shortly before the murder of Officer Patrick.  
25 One of the witnesses indicated and provided a

1 statement, as the Court is aware of, I think during  
2 the grand jury process that Mr. Fitch had indicated to  
3 that witness the night before that if he's ever  
4 stopped by a police officer he would shoot him. Those  
5 two witnesses were named to the inmate. In addition  
6 to that the inmate reported to investigating officers  
7 that he received a map, a handwritten map from Mr.  
8 Fitch that he kept and kept in his personal property.  
9 Upon receiving that particular statement officers  
10 secured that map from the personal property of the  
11 inmate. That map according to investigating officers  
12 accurately described the location of one of the  
13 witness's residences, an apartment of one of the  
14 witnesses in the particular case. That was to happen  
15 on December 29th of 2014.

16 Officers continued their investigation to  
17 determine whether or not any other individuals may  
18 have been involved in this particular threat, any  
19 other inmates, and in any of the steps that  
20 necessitated security and to notify potential  
21 witnesses in the case. A decision was also made on  
22 December 29th to continue investigation and secure  
23 security surveillance from the medical unit as well as  
24 Mr. Fitch's cell, as well as the inmate's cell. That  
25 security video was collected and downloaded. The

1 officer spent 10 hours reviewing that particular  
2 video, and at one portion of that video Mr. Fitch is  
3 observed sliding a piece of paper underneath the cell  
4 door to that inmate; that inmate is observed going  
5 back to his cell block, taking that piece of paper and  
6 putting it into his personal belongings or files.  
7 Those videos have been shared with defense counsel.

8 Officers then made a decision to conduct a search  
9 warrant of Mr. Fitch's cell block or cell in the  
10 medical unit. That was conducted on Friday,  
11 January 2nd. On Friday, January 2nd we had not  
12 notified anyone in order to preserve the integrity of  
13 the investigation, out of fear if we notified defense  
14 counsel or Mr. Fitch of immediate threats he may  
15 destroy evidence. That search warrant was concluded I  
16 believe on Friday, January 2nd.

17 On Friday afternoon, or Friday, I notified both  
18 the Court and the defense counsel of the general  
19 allegations. I had not received any police reports at  
20 that particular point in time. I indicated to the  
21 Court there was no threat to court personnel or any  
22 other witnesses we are aware of or the attorneys in  
23 this particular case.

24 A number of documents were seized from Mr.  
25 Fitch's cell, basically handwriting exemplars to see

1 if we could compare the handwritten notes on the map  
2 to other writings that were present in Mr. Fitch's  
3 cell. Also we were looking for consistent stationery.  
4 Officers did seize a number of documents from the  
5 cell. Those documents have all been disclosed to  
6 defense counsel and the reason for it as well as the  
7 search warrants have been given to defense counsel.

8 On Monday, which would be I believe Monday, the  
9 5th, later in the afternoon when I got back to my  
10 office at approximately two o'clock I received an  
11 e-mail I believe from Ms. Traub indicating whether or  
12 not I had received any additional reports, could we  
13 get reports, we need the reports as soon as possible  
14 so we could explore this. Later in the day, I think  
15 it was about 4:30-ish or so, after I had reviewed the  
16 reports, these additional reports were reviewed -- or  
17 were reported to defense counsel at that particular  
18 point in time, namely the search warrant,  
19 transcriptions of the statement of the inmates and  
20 other documents associated with it.

21 THE COURT: That was on the 5th?

22 MR. PROKOPOWICZ: That would be on Monday,  
23 the 5th.

24 THE COURT: Okay.

25 MR. PROKOPOWICZ: The following week the



1 document we questioned, the map in question which was  
2 seized from the inmate's personal belongings, was sent  
3 to the Minnesota Bureau of Criminal Apprehension for  
4 two purposes; one to do a questioned document analysis  
5 as well as to do a fingerprint analysis. That is very  
6 tedious work where you're looking at fingerprints and  
7 you're looking at writings. That was completed, first  
8 the questioned document analysis, as well as the  
9 fingerprint analysis was completed this past week. As  
10 the Court may or may not know, the BCA, Bureau of  
11 Criminal Apprehension, does peer review, supervised  
12 reviews, so there a couple of eyes that take a look at  
13 that. I know the questioned document analysts worked  
14 through the weekend to complete her analysis of the  
15 documents.

16 We received -- we began receiving those reports,  
17 which we disclosed I believe yesterday, the  
18 fingerprint analysis as well as the questioned  
19 document analysis. The results of that we are  
20 receiving this afternoon, the entire BCA file, which  
21 we'll be turning over regarding those two particular  
22 documents, which we'll be turning over to defense  
23 counsel as soon as we receive them; they're going to  
24 be delivered to the Stearns County's Attorney's Office  
25 late morning or over the lunch hour is what we have

1           been advised in this particular case.

2                   THE COURT: Do you know, I mean is there a  
3 conclusion, are you aware of what the conclusion is?

4                   MR. PROKOPOWICZ: Yes. The conclusion is  
5 regarding the handwriting analysis that the writing on  
6 the map is probably, probable created by Mr. Fitch.  
7 They have identified fingerprints of Mr. Fitch on the  
8 map. They have also identified fingerprints of the  
9 inmate on the map.

10                   The State had notified, we filed a previous  
11 notice with the Court citing the State vs. Holt case  
12 where similar type circumstances occurred in the case.  
13 Defense Counsel has filed a motion to oppose the  
14 admission of that. The Court has not ruled one way or  
15 another on that particular admission of the evidence.

16                   The situation here, I know this places the Court  
17 in a difficult situation especially at the late stages  
18 of the trial. We could certainly understand that  
19 particular process. The State also understands that  
20 the defendant does have a right to have access to this  
21 particular evidence. He also has a right to retain  
22 potential expert witnesses to review this particular  
23 evidence. Now, whether they do that or not. That's  
24 up to the defendant and up to defense counsel. They  
25 have indicated in their motion they want a continuance

1           for the purpose I believe to explore the possibility  
2           or take a look at obtaining an expert in this  
3           particular area. I don't know if anybody has reached  
4           out, I don't know where they are. The Court has  
5           already noted the resources here by the First Judicial  
6           District Public Defender's Office, there are two  
7           attorneys here, there is a staff here as well. I  
8           don't know if they've got list of names. I have  
9           nothing to that effect.

10           It may -- if the Court excludes this evidence,  
11           obviously the question becomes moot. This evidence  
12           will not be presented until, what, two weeks, two and  
13           a half weeks approximately, if we give this week for  
14           jury selection; it will not be presented right now,  
15           it's scheduled -- we could present it towards the end  
16           of the trial, which is according to the Court, I  
17           believe it's reasonable to assume it's going to take  
18           two and a half weeks to get to that point in this  
19           particular case, given the lengthy jury selection  
20           process and the other matters in this particular case.  
21           I guess we have to deal with it at that particular  
22           point in time, is what's going to happen in the case.

23           I can assert to the Court, and I asked Mr.  
24           Dusterhoft as well, as we've dealt with a lot of  
25           fingerprint evidence during the course of our careers,

1 and I know the Court understands our experience, I've  
2 never had an adverse witness on fingerprint  
3 examination.

4 Now, Ms. Traub is correct, there is -- you know,  
5 you can cross-examine and address those particular  
6 issues and there are issues may be associated with it  
7 that she could bring out during the course of her  
8 examination of the case. Same thing with questioned  
9 documents, I've had some adverse witnesses on  
10 questioned documents but never on fingerprint  
11 evidence. I guess what I'm saying to the Court, we  
12 just don't know based upon this motion right now  
13 whether a continuance is warranted in the particular  
14 case because we haven't heard from defense counsel  
15 anything regarding what are the steps they're going to  
16 take to secure an expert witness, how long is it going  
17 to take, what are their plans, what are their steps?  
18 Right now it's just kind of a blanket, we want the  
19 opportunity to explore this so let's continue this  
20 trial. How they explore it, what they explore, we  
21 don't have enough details in the particular case.

22 Thank you, Your Honor.

23 MS. TRAUB: I'm going to respond to a few  
24 things, and I want to start just by addressing  
25 something that Mr. Prokopowicz said when he started

1           that they didn't notify us of this prior to going and  
2           executing a search warrant because they were concerned  
3           that if they told defense counsel Mr. Fitch perhaps  
4           would destroy evidence. I want the Court to know that  
5           when I got the information and I had the names of the  
6           informants in this case, prior to going to see Mr.  
7           Fitch in prison to discuss this with him I called Mr.  
8           Dusterhoft and I said to him, have you taken care of  
9           those informants, are they no longer in Oak Park  
10          Heights, because I don't want to go and see my client  
11          today and tell him about this until I know that you  
12          have assured the safety of those people? And when Mr.  
13          Fitch asked me who these witnesses were, I told him I  
14          wouldn't give him the names. So I am offended that  
15          anyone would even entertain the thought that I would  
16          in receiving this information call Mr. Fitch and tell  
17          him to destroy evidence or disclose to him that  
18          perhaps they were coming to search his cell or  
19          anything of that sort.

20                   THE COURT: I didn't think that was the  
21                   implication, but go ahead.

22                   MS. TRAUB: We have the right to consult  
23                   with an expert of our own choosing. We don't have to  
24                   lay out to the Court today who we're going to call or  
25                   what steps we're going to take. And the fact of the

1 matter is, Mr. Fitch has the right to attorneys who  
2 are educated in the science and can cross-examine on  
3 it. It is not the role of my law clerk, as competent  
4 and spectacular as I think he is, to leave the  
5 courtroom right now and call around and find me a  
6 documents examiner. It is not the role of my  
7 paralegal to make phone calls and talk to a  
8 fingerprint person and then attempt to explain it to  
9 me. That is my job. And I cannot do my job and find  
10 experts if I am sitting here picking a jury. And Mr.  
11 Fitch is entitled to both his lawyers being here and  
12 picking this jury. I'm not going to leave and go call  
13 document examiners and leave Mr. Cohoes here to pick a  
14 jury. Mr. Cohoes is not going to leave and go call  
15 fingerprint experts and leave me here to pick a jury.  
16 That's not how it works. He's entitled to two  
17 lawyers, he's entitled to two good lawyers who are  
18 educated in the science.

19 And the appropriate way to deal with this,  
20 because I don't think the Court is going to suppress  
21 it, is to grant us a continuance so we have the  
22 opportunity -- we don't even have the underlying files  
23 yet. We couldn't even -- I could send Mr. Czarnecki  
24 (ph) out to call around and see if he could find  
25 somebody; and the first thing anyone would say is,

1 well, what do you have that you want us to look at?  
2 And the second thing they would say is, I'm really  
3 busy and I can't deal with this for a month or two.  
4 Because that's generally how it works with experts  
5 that are willing to work with defense. And we all  
6 know, you know, about past instances of witness  
7 intimidation with defense experts that have affected  
8 our ability to retain experts sometimes.

9 To sit here and question whether we're really  
10 going to call somebody or to say, well, in the past  
11 I've never had anybody, you know, bring anybody in to  
12 talk about fingerprints, well, you know what, in the  
13 past we didn't do a lot of things with the defense  
14 bar. We didn't question a lot of science that we  
15 should have questioned, and that's why we have the  
16 Innocence Project, because a lot of people have been  
17 exonerated because we finally started educating  
18 ourselves and question things.

19 I need to educate myself, Mr. Cohoes needs to be  
20 educated on this process, and we need to make a  
21 determination in consultation with experts whether we  
22 need it bring them in to testify; and we cannot do  
23 that and go forward with the trial, and we cannot  
24 start a trial and go for two weeks and then say, oh,  
25 yeah, I guess we really do need an expert. We have to

1 stop now. Now is the time to stop. Either suppress  
2 the evidence or give us a continuance, because if you  
3 require us to go forward we are ineffective and under  
4 Beecroft this case will be back on appeal.

5 THE COURT: I don't believe that the State  
6 has been delaying anything. From what Mr. Prokopowicz  
7 has set forth, which I'm taking as an offer of proof,  
8 they just learned of it on the 29th. That's not the  
9 fault of the State that the information was just  
10 learned then; and we're talking two weeks, and if  
11 there was surveillance video of your client kicking a  
12 document under the cell door and if that was just  
13 obtained, I think they've been trying to disclose that  
14 from what he's outlined to me.

15 MS. TRAUB: And, Judge, I want to make it  
16 perfectly clear, I'm not saying that they've been  
17 delaying this. I know that this is late. But when  
18 you get late disclosure and it's something of a  
19 scientific nature that -- I mean, if I got a witness  
20 statement and I wanted to send Mr. Goeke out to talk  
21 to him, I would call right now and he'd go talk to the  
22 witness and he could do that while we were here, but  
23 we're not talking about an ordinary witness. We're  
24 talking about scientific evidence that requires a  
25 specialty. I'm not saying they've been sitting on



1           this and finally gave it to us, I'm not saying that at  
2           all.

3                         THE COURT:    Okay.

4                         MS. TRAUB:   I'm saying we need a  
5           continuance.

6                         THE COURT:    All right.  I think that if you  
7           were to ask me to break off of jury questioning for a  
8           period of time so that you could do what you needed to  
9           do to see about retaining someone, that's something I  
10          would entertain; but continuing the entire trial, no.  
11          So once you have the documents, which I understand you  
12          will have this afternoon, then you can decide what you  
13          need to do as it relates to making calls yourself,  
14          personally doing, and then you can ask me if you need  
15          to take a break from the jury selection so that you  
16          can do that; but I'm not going to continue the entire  
17          trial.  So we should have two jurors available to us,  
18          is that correct?

19                        THE CLERK:    We should.

20                        THE COURT:    Okay.  Let's go off the record.

21                                 (A discussion was held off the record.)

22                                 (End of requested portion of proceedings on  
23           January 13, 2015 to be transcribed.)

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CERTIFICATE

I, RHONDA FRANKEN, a Registered Merit Reporter, do hereby certify that the foregoing pages of typewritten material constitute a full, true and correct transcript of my original Stenographic notes, as they purport to contain, of the proceedings reported by me at the time and place hereinbefore mentioned.

DATED: January 13, 2015

/s/\_\_\_\_\_

Rhonda Franken, RMR  
Court Reporter  
First Judicial District

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