

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF CONTRA COSTA
3 HONORABLE BARBARA ZUNIGA, JUDGE, PRESIDING
4 DEPARTMENT 2

5
6 THE PEOPLE OF THE STATE)
7 OF CALIFORNIA,)
8 Plaintiff,) No. 060254-0
9 vs.)
10 SCOTT DYLESKI,)
11 Defendant.)
12 _____)

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15 REPORTER'S TRANSCRIPT OF PROCEEDINGS
16 June 26, 2006
17 COURTHOUSE, MARTINEZ, CALIFORNIA

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19 A P P E A R A N C E S

20 For the People: ROBERT J. KOCHLY,
21 DISTRICT ATTORNEY
22 BY: Mr. Harold Jewett
Deputy District Attorney
Contra Costa County

23 For the Defendant: DAVID COLEMAN, III,
24 PUBLIC DEFENDER
25 BY: Ms. Ellen Leonida
Deputy Public Defender
Contra Costa County

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28 Reported by: Stephen W. Broscheid, CSR #9541

1 June 26, 2006

2:05 p.m.

2 THE COURT: Okay. We are going on the record in the
3 case of People versus Dyleski, Docket 060254-0.

4 The record should reflect that the defendant
5 personally appears, represented by counsel, Ms. Leonida. The
6 People are represented by Mr. Jewett.

7 Good afternoon, counsel.

8 MR. JEWETT: Good afternoon.

9 MS. LEONIDA: Good afternoon.

10 THE COURT: Good afternoon, Mr. Dyleski.

11 THE DEFENDANT: Good afternoon.

12 THE COURT: Counsel, I apologize, I keep pushing
13 your hearings back, but as you know, this is a homicide case,
14 we couldn't get it out.

15 I think we are ready to proceed. The first thing we
16 need to do is, informally, off the record, approximately a
17 week ago, perhaps longer than that, because there is a motion
18 to exclude a dispatch tape, I indicated to both of you when
19 we were in chambers that I needed to hear the dispatch tape.

20 You both agreed that I could listen to it without
21 having the tape actually marked, and that we will take care
22 of it at this hearing.

23 So let me have this marked. I'll put it in a nice
24 package, Mr. Jewett, as opposed to this tattered
25 envelope you gave me.

26 MR. JEWETT: Rube Goldberg was a hero of mine, Your
27 Honor.

28 THE COURT: I want to distinguish evidence for the

1 motions. I will have my clerk mark on the exhibit tag "M"
2 for motions, so we will know it is for motions.

3 The record should reflect, I did listen to that disk
4 of the dispatch tape, actually Friday night.

5 The record, as you can tell, counsel, this is the
6 first motion I wish to address. The record should reflect I
7 have read and considered the moving papers, those filed in
8 opposition or response, the motion to exclude the dispatch
9 tape.

10 Mr. Jewett, if I understood your papers, sir --
11 let's go off the record for a minute.

12 (Discussion had off the record)

13 THE COURT: Back on the record.

14 If I understood your motion papers correctly, your
15 response, what I call the opposition, Mr. Jewett, you feel
16 that the dispatch tape is relevant for two reasons, it may
17 all be going to the same reason, is one with respect to Mr.
18 Horowitz's credibility and to counter any possible argument
19 or inference the jury could reach that he is somehow
20 responsible for his wife's homicide?

21 MR. JEWETT: That's true, Your Honor.

22 THE COURT: Okay. Let me tell you what's troubling
23 me about the tape, Mr. Jewett, is the issue that Ms. Leonida
24 raised in her papers. I know you indicate in your papers,
25 sir, aside from some yelling at the beginning of the tape,
26 that the rest of the tape is really concerning comments from
27 him regarding God and the love he has for his wife. That
28 tape is pretty horrific, Mr. Jewett, in terms of the

1 emotional response that one has when you listen to it.

2 You certainly know, sir, that I have been around
3 more than a few years, sir, and I found it difficult to
4 listen to, sir.

5 MR. JEWETT: Your Honor, it's not easy to listen to
6 a man screaming. I mean, he had a very emotionally basic
7 reaction to finding his wife dead, murdered on the floor. No
8 question about it.

9 However, if, as I understand it, and the defense can
10 correct me if I am wrong, if the defense in this case is ID,
11 that I didn't do it, which from everything -- I'm trying to
12 read the tea leaves leafs a little here, seems to be the way
13 the defense seems to be heading.

14 Then just by virtue of that fact alone, there is no
15 question that the husband of a deceased woman, last to see
16 her alive, with his DNA inside the residence, including a
17 broken cup, which has her blood on it, is going to be raised,
18 whether the defense specifically brings out third-party
19 culpability or not.

20 The question of whether or not it's possible that
21 Mr. Horowitz had anything to do with his wife's death is
22 going to be implicated in the minds of the jurors by the
23 defense strategy in this case.

24 The very thing that this Court characterized as
25 horrific, I would not characterize it as horrific. I would
26 characterize it as gut-wrenching perhaps. It's that very
27 aspect of this tape that, at a very human level, will make
28 absolutely clear in a way that, Your Honor, no other piece of

1 evidence, no other single piece of evidence will, that Dan
2 Horowitz had absolutely nothing to do with the death of his
3 wife. And finding her dead body at the front door of his
4 home was an absolute and complete surprise to him.

5 This tape is the single best piece of evidence,
6 precisely because of the gut-wrenching, almost primordial
7 scream that we hear at the very beginning of the tape,
8 followed by the, "No, Pamela, no," that must have been said
9 20 or 30 times, is extremely strong evidence of Mr.
10 Horowitz's true and complete innocence here.

11 But there is also -- and it is important, I don't
12 know, we heard we are going to be litigating DNA evidence in
13 this case. The defense has brought, for instance, their
14 motion to limit or exclude photographs of the body, and I'm
15 not going to be arguing the People's point with respect to
16 that particular motion now. But the point is, physical
17 evidence is relevant here for a lot of different reasons.
18 Physical evidence is going to help us understand what
19 happened in those critical few moments that Pamela Vitale was
20 killed.

21 The fact that Mr. Horowitz, despite his best
22 recollection now, was in there for some period of time, and
23 we can hear him moving around, and we can hear his voice up
24 close, and we can hear his voice in the background, and when
25 he comes back to the phone, I believe one more time, and then
26 it's pretty much silent and then after -- I think it's a 12
27 minute tape and then it's done.

28 Well, 12 minutes is a long time. That's 12 minutes

1 from the time that Mr. Horowitz made the telephone call to
2 the time it was cut off. He could have done a number of
3 things that he may or may not remember now during that 12
4 minute time period.

5 This tape also tends to show there are things going
6 on in there that Mr. Horowitz -- they may well be, in one
7 sense, innocuous things. Moving, for instance, a pair of
8 glasses might be one of them or, like I indicated, the coffee
9 cup, although the DNA on the coffee cup could well be from
10 him having had coffee that morning before he left for work.
11 But things like that.

12 This is a fairly -- it's a small, but it's actually
13 a fairly complex scene in terms of the boxes. Some of the
14 boxes are upside down. His clothing is still out. It
15 happens to be clothing he apparently wears when he feeds and
16 grooms the dogs because his wife is allergic. But it's
17 tipped over. We have, of course, the footprint in blood on a
18 plastic top that's right there in close proximity to the
19 body. A broken vase with pieces of shards near her head.
20 But a broken vase is actually removed. There are several
21 items with Ms. Vitale's blood on them. I mentioned the cup.
22 But there is also a water bottle. And I believe like a
23 cereal bowl sitting either in or immediately adjacent to the
24 sink. There is blood in the bathroom.

25 If Mr. Horowitz gets up here and says, "I just went
26 in, I checked Pamela, I called 911, I checked Pamela again,
27 then I went outside and I remained outside thereafter on the
28 cell phone," that suggests -- people have no doubt for a

1 moment, if assuming he says that, that he is going to, in his
2 own mind, be telling the truth.

3 But time may have done some interesting things in
4 Mr. Horowitz's mind and those moments before six o'clock on
5 October 15th of last year. He may not have a very good sense
6 of time.

7 If there is one piece of evidence that would
8 demonstrate the mental state that he had that would render
9 understandable, perhaps, Mr. Horowitz's lack of full
10 appreciation for time, his being a criminal defense attorney
11 notwithstanding, that tape demonstrates it.

12 So it's relevant for Mr. Horowitz's credibility, not
13 so much for the truth, as for ability to perceive, recollect
14 and relay about matters which he testifies, because that tape
15 is a very good piece of evidence about his state of mind with
16 respect to his credibility as a witness. But it is also
17 extremely important in the context of a defense, where the
18 defendant is going to be asserting, "I didn't do it."

19 So, yes, it is gut-wrenching, particularly the
20 first -- and, Your Honor, it's the first 15 seconds, and,
21 yes, he yells, perhaps three times, I think. Then the
22 yelling is over. After that, it is some information, but
23 there is also a lot of "No, no, no."

24 Now, perhaps, Your Honor, the People would have no
25 objection to this, the jury could be admonished, be given
26 some kind of instruction that this evidence is being offered
27 solely for the purpose of the jury addressing the mental
28 state of the witness, Mr. Horowitz, or if -- it wasn't my

1 intention to play it when Mr. Horowitz was here, I was going
2 to call a dispatcher for that purpose.

3 If we had an instruction that said this tape is
4 being considered solely for the extent to which it has a
5 bearing on a subsequent witness, Daniel Horowitz's state of
6 mind, and could be considered for that purpose and that
7 purpose alone, we would not object to that. That is why we
8 are seeking to have it introduced. Perhaps some additional
9 language should be included about time, you know, and the
10 element of time or something to that effect.

11 But I would submit to the Court that, yes, like most
12 911 tapes which are frantic, they are almost invariably
13 frantic, that in and of itself may say something about the
14 person who is making the call.

15 So we submit that this 911 tape, in conjunction with
16 a cautionary instruction, would remove any potential
17 prejudice. I should also add, as I think I indicated in my
18 moving papers, that particularly where the defense here is,
19 "I didn't do it," there is almost -- this is not a situation
20 where there was provocation and the defense might be
21 self-defense or something like that, and so this could be
22 prejudicial to the question of whether this is murder. It
23 was a murderous primordial screaming or something.

24 Here, the fact of this being a murder scene, does
25 not sound like it's being disputed. Therefore, we are at a
26 loss to understand logically how this could be prejudicial to
27 the defendant if the defendant's defense is, "I didn't do
28 it."

1 Murder is bad. Murder provokes extreme emotional
2 responses, particularly by the loved ones of people who were
3 murdered. None of that is contrary to the defense in this
4 case, as far as the People know. Therefore, there is very
5 little prejudice inuring to this defendant. For all those
6 reasons, we would ask the Court to admit the 911 tape.

7 THE COURT: I think, Mr. Jewett, I used "horrific."
8 I think it's a question of semantics, sir. It's disturbing.
9 And, yes, I have heard many dispatch tapes, sir, with respect
10 to individuals reporting on a homicide or some other tragedy
11 that has happened to a family member or friend. This one is
12 disturbing, very disturbing.

13 Ms. Leonida?

14 MS. LEONIDA: Addressing the arguments in reverse
15 order. The tape does not shed any light whatsoever on what
16 Mr. Horowitz did upon arriving home. He doesn't -- sometimes
17 his voice is clearer than others, but he doesn't say on the
18 tape that he is going into the house, that he is moving
19 anything. It doesn't shed any light on that whatsoever and
20 isn't relevant to refute that point.

21 The time lapses that are on the tape could easily be
22 established by some other way, as the *Farmer* case points out
23 at Page 907. In that case, to the extent that the
24 information on the tape was probative there, it could easily
25 have been admitted in the form of a transcript, thus avoid
26 inflaming the passions of the jury by so visibly recreating
27 the aftermath of the shooting. The Court goes on to say,
28 absent good reason, there was no reason to fill the courtroom

1 with the victim's groans.

2 In this case there are many other ways to establish
3 the time lapse. It can be established by stipulation. It
4 can be established by a dispatcher testifying when the call
5 came in, when the police arrived, and how long Mr. Horowitz
6 remained on the phone, without having them play the tape.

7 The cases are uniformly clear that evidence has to
8 be relevant to some disputed issue. In the *Moore* case, the
9 defense was consent and the tape was of the woman that they
10 said consented being obviously distraught. In that case, it
11 was relevant because the defense put that at issue.

12 In the *Farmer* case, the defendant claimed that the
13 shooting victim was incoherent, his coherence on the tape was
14 relevant to that issue. In *Roybal* (phonetically spelled),
15 the most on point here, the defendant was blaming the murder
16 on the victim's husband, so his reaction was relevant. But
17 even in that case, the Court went to great lengths to point
18 out that the tape was descriptive and not highly
19 inflammatory, that the husband did describe the scene, and
20 that's the exact opposite of the tape that's at issue here.
21 There is no description whatsoever. The tape is nothing but
22 emotional and inflammatory. The fact that Mr. Dyleski is not
23 blaming Mr. Horowitz doesn't make this tape any more
24 relevant.

25 The idea that because we're saying -- we're entering
26 a plea of not guilty and denying responsibility for this
27 crime, that the district attorney can then put in evidence
28 that everybody else that he can possibly think of is innocent

1 is absurd. This isn't a trial by process of elimination.
2 This tape does not become relevant because the district
3 attorney thinks that a juror might think that Mr. Horowitz is
4 responsible. That's not relevant.

5 While the tape may well be, as Mr. Jewett claims,
6 the most compelling evidence of his innocence, his innocence
7 is not at issue in this case; it's Mr. Dyleski's innocence
8 that's at issue.

9 We are not blaming Mr. Horowitz, and his emotional
10 state is not material, and certainly is not in dispute. We
11 all heard the tape. I won't go into great detail describing
12 what's on it. But it's, I think, exactly the type of
13 evidence that the courts talk about when discussing Section
14 352, evidence that would motivate the jury to use information
15 not logically to evaluate the point upon which it's relevant,
16 but to reward or punish one side because of the jurors'
17 emotional reaction.

18 It's impossible to listen to this tape without
19 having an intense emotional reaction. Given its lack of
20 relevance, I think that a Section 352 analysis clearly
21 dictates in favor of excluding the tape.

22 MR. JEWETT: Well, she is saying 352. It's almost
23 like this is an acknowledgment that his mental state is
24 relevant, whether or not he had an innocent state of mind,
25 whether or not he is truly surprised at the time he finds his
26 wife's body is relevant. Then it's a question of prejudice.
27 So it's logically relevant, but they are saying it's not
28 legally relevant because any probative value is substantially

1 outweighed by either undue consumption of time, misleading
2 the jury, or some other kind of prejudice to the defendant.

3 Well, it's certainly not an undue consumption of
4 time. It's not misleading the jury. So what is the
5 prejudice to the defendant, Your Honor? That's what I'm
6 seeing here.

7 How is the fact that you have a man who is reacting
8 emotionally to discovering his wife's body, beaten and
9 bloodied, how is that logically prejudicial to the defendant
10 in this case, under the facts as we know them right now?

11 I've asserted that it sounds like the defense is
12 going to be making the argument, it's ID. I haven't heard
13 Ms. Leonida say one thing that disputed that. I suggest to
14 this Court, for the purposes of relevance, this Court should
15 operate on the assumption, at least to the time of opening
16 statements, that, in fact, is going to be the issue. If
17 that's the issue, we are not asking this Court or anybody to,
18 by process of elimination, eliminate everybody else.

19 We are talking about her husband, the last person to
20 see her alive. A person who was at the scene, who had blood
21 on his clothing --

22 THE COURT: You need to speak slowly. You need to
23 slow down.

24 MR. JEWETT: This is not a fishing expedition. This
25 is not an effort to bring in the emotional responses that all
26 of the witnesses who heard about Pamela Vitale's death may
27 have had. This is the person who found her body, her
28 husband.

1 To the extent that there is this disturbing element
2 to it, it is precisely to that extent, Your Honor, that it is
3 probative of his state of mind, which is extremely relevant
4 and will be extremely relevant in this case.

5 Therefore, I would submit to the Court, as the Court
6 is objectively balancing prejudice versus probative value, it
7 cannot be said that prejudice substantially outweighs
8 probative value when the mental state of Dan Horowitz is
9 going to be extremely relevant in this case.

10 MS. LEONIDA: While I appreciate Mr. Jewett making
11 arguments for me, I do want to be clear I do not concede this
12 tape is relevant. I maintain in my papers and I maintain
13 today that there is nothing relevant about this, because the
14 mental state of Mr. Horowitz isn't at issue.

15 Only Mr. Jewett seems to be accusing him of
16 anything. It's simply not an issue in this case. Anything
17 he wants to introduce in terms of time lapse and evidence
18 being disturbed could just as easily come in with a
19 chronology given by the dispatcher as to when the call was
20 made and when police arrived.

21 To say there is no prejudicial effect from playing
22 this tape is not to have listened to it, frankly. The tape
23 is plainly inflammatory. It's highly prejudicial. It's the
24 type of evidence that elicits an emotional response unrelated
25 to reason, unrelated to the evidence and, frankly, unrelated
26 to this case where there is no material issue in dispute
27 regarding the emotional state of Mr. Horowitz.

28 MR. JEWETT: Your Honor, I understand defense

1 counsel did not bring a 995 motion in this case, which I
2 assume that she did not do so for tactical reasons. So I
3 don't know whether or not this Court has had an opportunity
4 to review the preliminary hearing transcript or not.

5 THE COURT: I would not have any reason to, sir.

6 MR. JEWETT: Right. But respectfully, counsel seems
7 a little disingenuous to the People under the facts of this
8 case to suggest that somehow the possibility that
9 Mr. Horowitz could be a suspect in this case is something
10 that is being suggested only by the People here today.

11 If this Court, through the things that we have
12 already said and the filings we have already made, has a
13 sense of what was going on in those first days and that
14 first -- particularly the first five days of this
15 investigation before Scott Dyleski came to light, there was
16 at least a motion filed with respect to dog tracking
17 evidence, and so this Court at least has some sense of the
18 various steps, the various places the dogs went, the various
19 things that were found inside the places that the dogs went.

20 It is not possible, in the People's judgment, for
21 this case to be tried without, at some level, some suggestion
22 being made that there was some effort exploring a number of
23 different avenues with respect to who was responsible for the
24 death of Pamela Vitale.

25 It absolutely defies credibility to even suggest
26 that Ms. Vitale's husband is not going to logically be a
27 person who is going to pop into a fact finder's mind when the
28 defense postures the defense, "I don't know who it was, but

1 he didn't do it." Absolutely, positively, without question,
2 one person who -- at least one person who is absolutely going
3 to pop in people's minds if Mr. Dyleski says, "I wasn't
4 there, I don't know anything about it, it's a terrible thing
5 that happened, but I didn't have anything to do with it,"
6 Mr. Horowitz is going to be one of those people. In fact, in
7 many people's minds, he is at the top of the list. Whether
8 that's right or wrong, fair or not, that's the way it's going
9 to develop.

10 This tape is perhaps the single best piece of
11 evidence to show that you better look elsewhere if you are
12 looking for suspects, because it's not him. Without that
13 tape, we won't have that ability to show that.

14 With Mr. Horowitz's recollection of what was going
15 on in those first few moments, that could, depending upon
16 cross-examination -- because, Your Honor, I just have a
17 feeling the defense is not going to waive their
18 cross-examination of Dan Horowitz in this case. I have a
19 feeling they may be asking him a few questions. And if they
20 do that, his credibility -- even if they don't, once he takes
21 the oath, his credibility by that act alone is going to be an
22 issue in this case for the jury to decide.

23 This is the single best piece of evidence that tells
24 us his emotional framework at the time that he is testifying
25 about it. It's the single best piece of evidence on that
26 point. Now, I'm starting to repeat myself.

27 THE COURT: Yes, you are.

28 MR. JEWETT: I don't know what more the People can

1 say. That's our position.

2 THE COURT: Counsel, Mr. Jewett, you have not tried
3 a case in front of me in many, many years. Ms. Leonida, not
4 so many years. But I let counsel make a full record for
5 purposes of appeal. But once I ask you to submit it to me,
6 it is submitted and I rule. I do not allow counsel to start
7 arguing with me if you do not like my ruling. Anything else
8 for your record, Ms. Leonida?

9 MS. LEONIDA: Yes. I would like to respond to the
10 last comments that Mr. Jewett made.

11 THE COURT: Sure.

12 MS. LEONIDA: I was at the preliminary hearing. I
13 have read the transcript of the preliminary hearing. There
14 is nothing at that hearing that suggested that Mr. Horowitz
15 was in any way responsible for this. I never suggested it.
16 None of the questions at the preliminary hearing suggested
17 that. Any suggestion that this tape needs to be played to
18 refute an attack on Mr. Horowitz's credibility is pure
19 speculation and, I submit, pure fabrication, because
20 Mr. Jewett is trying to get this inflammatory evidence in
21 front of a jury, despite its complete lack of relevance.

22 MR. JEWETT: Submitted, Your Honor.

23 MS. LEONIDA: Submitted.

24 THE COURT: Okay. What happened on that 911 call
25 may or may not be relevant. I won't agree with either one of
26 you, that it is relevant or is not relevant. It may or may
27 not be relevant.

28 What is relevant is clearly the time the call was

1 made and what time the police showed up. Even from listening
2 to the tape, it's not clear to me what time the police show
3 up, because the next thing I hear is Mr. Horowitz, I guess
4 it's on his cell phone -- as you know, there is a long
5 silence.

6 From one of his comments when he is talking to
7 dispatch, apparently the police have shown up. I just don't
8 know -- I can't tell what time that is.

9 Yes?

10 MR. JEWETT: I know I've submitted it. But if it's
11 not clear, it should be. Those are three separate calls.
12 The Court has three separate and distinct calls.

13 THE COURT: That was not clear.

14 MR. JEWETT: Let me, if I may?

15 THE COURT: Okay.

16 MR. JEWETT: There are three calls. There is a
17 call --

18 THE COURT: The original call --

19 MR. JEWETT: The original 911 call and then
20 Mr. Horowitz makes a second call and a --

21 THE COURT: There is a third call in the car, that
22 one I'm aware of. Because it's all on one disk, I didn't
23 realize that was the third -- I figured out that was another
24 phone call.

25 MR. JEWETT: The first call is the 911 call. The
26 second call is to the sheriff's office from --

27 THE COURT: Mr. Horowitz.

28 MR. JEWETT: -- from Mr. Horowitz and he is in the

1 car, and the third one -- actually, the second one, we don't
2 really know where he is. The third one --

3 THE COURT: Is from the car.

4 MR. JEWETT: -- is from the car. I've provided a
5 transcript of those.

6 THE COURT: Yes.

7 MR. JEWETT: So there are three calls.

8 THE COURT: Okay.

9 MR. JEWETT: Remarkable, frankly, is the difference
10 in tone and demeanor and control of Mr. Horowitz between the
11 first call and the latter two calls. But I've already
12 submitted the case, so I will speak to it no further, Your
13 Honor.

14 THE COURT: I'm glad you clarified that it was three
15 calls because I actually thought the dispatch tape was just
16 running because I could hear dispatch in the back. But I was
17 aware that there was three different conversations. I was
18 aware the last one was a phone call made from Mr. Horowitz's
19 car. I assumed it was one long, continuous dispatch they
20 left running, so that was my mistake.

21 Yes, there is a marked difference from -- you've
22 called it yelling, whoever transcribed this called it
23 yelling. I would describe it as keening on the tape when the
24 911 dispatcher answers the phone. I call it keening, it's
25 just anguish.

26 As I was saying, before you clarified it for me,
27 Mr. Jewett, there are three separate phone calls. I still
28 couldn't tell from listening to the tape, and you can't tell

1 from listening what time the calls were or what time the
2 police showed, I can't tell.

3 Let me ask you a question, Mr. Jewett, and this is
4 my mistake, I need to make a better record here. Do you want
5 to get all three calls in or just the first call in, sir?

6 MR. JEWETT: I'm seeking the first call because
7 of --

8 THE COURT: The argument you previously made?

9 MR. JEWETT: Yes. Which aren't nearly as
10 significantly implicated in either the second or the third
11 call where he is talking about trying to logic this out, I
12 think is what he says.

13 THE COURT: I'm in a logical mode.

14 MR. JEWETT: Yeah. But I would submit that he is
15 going to come across -- well, my response to the Court's
16 question is that it had been my belief that this motion was
17 brought with respect to, I was responding to the
18 admissibility of the first 911 call.

19 THE COURT: Yes.

20 MS. LEONIDA: Yes.

21 THE COURT: Okay. As I was saying, there may be
22 some relevancy in terms of the timing of certain -- his
23 contact with the police. As I was starting to say, it's not
24 clear to me, based on three separate phone calls, it is three
25 separate phone calls, even though it's not clear there are
26 three separate phone calls, as to what time the police
27 showed up.

28 At the time of the second phone call, which I now

1 know is the second phone call, apparently the police have
2 showed up. I'm not sure if I agree with you, Mr. Jewett, I
3 don't know where Mr. Horowitz is calling from.

4 By the time of the third phone call, the police are
5 there and he is in his car, in his car, a police car, I can't
6 tell. He is inquiring, he wants to talk to the officers.

7 If, in fact, through the course of cross-examination
8 or the examination of other witnesses, a question as to what
9 Mr. Horowitz was doing in the house and his state of mind
10 during those 12 minutes, if that becomes an issue, then his
11 mental state at the time he made the phone call is extremely
12 relevant. It goes to his state of mind and his credibility.

13 However, at this point, Mr. Jewett, I'm assuming for
14 purposes of this motion that the tape is, in fact, relevant.
15 As I indicated, it may or may not have relevancy. I am going
16 to find that the prejudicial value is outweighed by the
17 relevancy. It's very inflammatory for the jury to listen to
18 this dispatch tape.

19 However, that is not to say that during the course
20 of the trial, based on the examination of Mr. Horowitz, the
21 examination of other witnesses, there may be an issue, if the
22 scene has been contaminated, who moved things around in the
23 house. Even after the defense, if they are going to put on a
24 defense by way of their own evidence, if, in fact,
25 Mr. Horowitz's credibility or state of mind is put into
26 question by the defense, I will reconsider this and I will
27 let you play it, sir. But I cannot let you play it until I
28 hear the evidence and we get to that point.

1 Counsel, again, neither one of you have tried a case
2 in front of me in a long time. When things are exercised in
3 my 352 discretion, if you feel things have changed during the
4 course of the trial which would cause me to reconsider my 352
5 discretion, please ask to approach and we can talk about it
6 at sidebar. Please don't get into it in front of the jury.
7 This may be one of those instances, Mr. Jewett, where you may
8 be asking to approach and asking me if the door has now been
9 opened, through examination of defense witnesses, to allow
10 you to play the tape in front of the jury. But for now, sir,
11 the tape is precluded.

12 One thing we need to clarify, there was a motion --
13 not clarify, but state on the record with respect to dog
14 tracking evidence. I think I told you both in chambers at
15 some point how disappointed I was that, Mr. Jewett, you are
16 not going to be putting on dog tracking evidence.

17 MR. JEWETT: Not only am I not going to be putting
18 it on, Your Honor, but it's my understanding, or at least my
19 belief and assumption right now that, before the defense
20 should try to put on dog tracking evidence, they will meet
21 the same burden that they were calling upon the People to
22 meet.

23 THE COURT: I agree. Ms. Leonida, do you know if
24 you will be putting on dog tracking evidence? The reason is,
25 if you are, I want to address it now instead of at a 402
26 hearing.

27 MS. LEONIDA: I am not.

28 THE COURT: You are not. What a disappointment.

1 So that motion, as stated by the People to the
2 extent they do not wish to put on that evidence, Mr. Jewett,
3 you did make a notation in a footnote that if the defense was
4 going to use it, you wanted a hearing, and it sounds like the
5 defense has also conceded that they are not going to be
6 putting on that type of evidence.

7 Okay. Next is the photographs, the motion to limit
8 photographic evidence. Mr. Jewett, do you have those
9 photographs, just so I can look at them?

10 MR. JEWETT: I do not, Your Honor. As I indicated
11 in my motion, you know, typically I start the process of
12 putting photographs together and marking my exhibits. We are
13 here still in the month of June. I still have not mounted
14 them or made any final decisions about which photographs I
15 intend to introduce, which is why I was trying to implore the
16 Court to hold off making any final decisions about this, but
17 did offer some general observations about relevance in the
18 context of the defense argument that somehow seeing
19 photographs or wound photographs has no bearing on any issue
20 of disputed fact.

21 THE COURT: I did see in your papers, Mr. Jewett,
22 that you asked that this motion be deferred until the
23 photographs are compiled and mounted. And based on your -- I
24 thought you would have that done by now, sir.

25 Okay. Then we need to take care of this before you
26 do your opening statements.

27 MR. JEWETT: Yes.

28 THE COURT: Okay.

1 MR. JEWETT: I should indicate that there is
2 probably not going to be, certainly with respect to autopsy
3 photographs, there is not going to be more than perhaps eight
4 or ten, at the most, for the Court to examine.

5 THE COURT: I actually don't think -- that's Ms.
6 Leonida's problem. I don't know. I'm assuming her main
7 focus is the crime scene photographs.

8 MS. LEONIDA: I have 300 photographs.

9 THE COURT: 300?

10 MS. LEONIDA: Approximately. I'm not sure which
11 photographs Mr. Jewett intends to use. It seems like we
12 should have this argument --

13 MR. JEWETT: When we have the pictures, I agree.

14 THE COURT: I need to see the photographs. I'm not
15 sure, Mr. Jewett, that you want to mount them, and the reason
16 I say that is if I disagree with you, sir, I'm going to ask
17 you to pull one off, it will ruin your board.

18 MR. JEWETT: I have a way to handle that, Your
19 Honor.

20 THE COURT: Yes, I think you probably do. So you
21 know, counsel, what I'm going to require you to do,
22 Mr. Jewett, is if I, in fact, excluded some based on 352 and
23 let others in, what I would like to do is --

24 MR. JEWETT: Reconfigure them so that nobody knows
25 they were excluded?

26 THE COURT: No. For purposes of appeal, if Mr.
27 Dyleski is convicted, I need to mark all the photographs that
28 become an exhibit so that the Court of Appeal will know what