

1 MR. MCCANN: We so stipulate.

2 MR. MOSES: So stipulated, Your Honor.

3 THE COURT: You may proceed, Mr.  
4 Racicot.

5

6 STATE'S REBUTTAL CLOSING STATEMENT

7

8 BY MR. RACICOT: Thank you, Your Honor. The Courtroom is  
9 designed to produce the truth. The Courtroom is designed to  
10 protect the innocent, but not to supply a refuge for the  
11 guilty. Not to provide a sanctuary to be used for legal  
12 maneuvers for those who kill other people. We attempt to  
13 produce the truth, to provide you with the truth. Now there  
14 was a comment that the prosecution doesn't care about the  
15 rules. That we ignored the rules. Now, nothing could be  
16 further from the truth. We don't ask you to single out one  
17 instruction over another, or one rule over another. It has  
18 been suggested to you that you must reach a decision, must  
19 govern your decision on the evidence that was presented here  
20 in this court and not by rank speculation, about what the  
21 other side might have done, or what they could have done, or  
22 what they could have produced, but to base it on the evidence  
23 produced in this courtroom as to whether this defendant is  
24 guilty or innocent. It was suggested to you that this is a  
25 circumstantial case, based on circumstantial evidence. Now,

1 under the Court's instructions, it gives you the definition  
2 of an eye witness case. That is direct evidence. The  
3 testimony of the killer -- he is the eye witness to this  
4 killing. That would be direct evidence. Now of course, you  
5 are not to give your own personal opinion, or to speculate  
6 on things that are not supported by the facts that are now  
7 before you or might be before you. There was even a  
8 suggestion to you about all of the holes, the defects in the  
9 evidence. You were further informed that it was quite unusual  
10 for a prosecutor to stand up and say that the investigation  
11 was all screwed up. Well it may be unusual, but that is the  
12 truth, it was all screwed up. Just as Sheriff Mahlum testified.  
13 Not ignored, but screwed up, and therefore the palm prints  
14 which were compared has no probative value. Why? Because of  
15 the fingerprints that were taken of Kimberly Nees, after the  
16 autopsy, they were <sup>not</sup> taken correctly, but they were not complete,  
17 and no comparisons could be made, and ---

18 MR. MOSES: Your Honor, I am going to object to that, because  
19 there is no evidence of that in the record, to that effect.

20 MR. RACICOT: That was gone over and over and over throughout  
21 the course of his argument here. You see, we didn't ignore  
22 the physical facts, and that is one of the reasons why the  
23 defendant has remained free for three and a half years, because  
24 there were no physical facts with any integrity to it, any to  
25 be relied upon that pointed specifically to him. What kind

1 of ofset prints were they? A man's print or a woman's print?  
2 What is the difference? Only a qualified examiner could  
3 make that determination, and we told you what the problems  
4 of that were. Blood type, well, all of the blood was that  
5 of Kimberly Nees. What clue did that provide as to who the  
6 killer was, no clue at all. All the blood was that of  
7 Kimberly Nees. And, the blood on the towel, was not that of  
8 hers. It is totally a strange piece of evidence and has  
9 nothing to do with this case, picked up by someone at some  
10 point in time, and documented. That was one of the strange  
11 things in this case. A crime occurred. The police officers  
12 go out and investigate and when they go out there, there are  
13 beer cans spread from one end of the area to the other. Pieces  
14 of paper all over the place; several different kinds of  
15 footprints, and turf, and urine and -- urine stains and  
16 blood stains, pieces of metal, bolts and they collected all  
17 of that; do they know whether it is relevent to this case  
18 or not, no; do they know that it is relevent when they collect  
19 it, of course not. They have no idea, but they do have a  
20 young girl, dead, lying in the water, and they wanted to  
21 contribute some dignity of what is left of that young girl  
22 so they rush, they had a tendency to rush. This young woman,  
23 she is dead, and when they found something, the collected it  
24 up try to determine if it had anything to do with it. Now then,  
25 they get court with all of that stuff, those papers and garbage

1 that they collected from the crime scene and we're expected  
2 to tell them where all of that stuff came from. Where did  
3 this blood come from? Whose was that? Where is this piece  
4 of evidence from? Whose was that? Who was drinking this  
5 beer? Who wasn't? Well obviously if we had some type of  
6 devine talent we could tell you all of that. The best thing  
7 that we can do is give to you the evidence that we've got  
8 that has got some integrity to it, that has probable value  
9 we give it to you, if not, we don't give that to you, it is  
10 as simple as that, and we guard that evidence, and we make  
11 that all available to the other side. Everything that we have  
12 got, we have provided to the other side. Every document,  
13 every photograph, every piece of evidence has been provided  
14 to the other side. We do have the burden of proving, proved  
15 it beyond a reasonable doubt, and we have no problem with that,  
16 no problem at all, we are willing to assume that burden, and  
17 we have provided competent evidence in this courtroom. If you  
18 don't believe it, fine, then find him not guilty. Let him  
19 free if you don't believe it. That's the bottom line. I go  
20 home tonight, one way or the other, back to my wife and five  
21 children ---

22 MR. MOSES: Not quite six.

23 MR. RACICOT: Back to my wife and my five children and it  
24 makes no difference at all, personally, but it is the principle  
25 of the thing, in this case. What is the right thing to do here?

1 How much of the fact finding process are you going to allow  
2 to be subverted, deleted, to be deflected? While you are  
3 watching this hand, what is being done with the other? We  
4 speak of hair classification, and I promised you in my  
5 opening statement that we would have something to tell you  
6 about that classification. You heard Sheriff Mahlum that in  
7 the interim he found there was a problem with those exhibits.  
8 We couldn't account where they were for a period of five  
9 years. You see, in order to bring a piece of such evidence  
10 before you, we have to prove where it has been for every  
11 minute from the time it was received until we bring it here  
12 into court to show it to you, and if we can't do that, then  
13 we can't let you see it. Makes a lot of sense, doesn't it?  
14 Now there are those occasions where evidence is tampered with  
15 and the rule is designed to protect against those kinds of  
16 occasions; and that same rule is designed to bring in that  
17 kind of evidence, if it can be accounted for, protected, to  
18 come into Court and try a person and convict those persons  
19 who have invaded the sautuary of another. Mr. Moses knows  
20 perfectly well what happened to those hair samples, but he  
21 still asked you to speculate about it. I did not ask you to  
22 speculate about those hair samples and had I asked you to do  
23 so, I can tell you it would not be against our interests to  
24 have you do that, ---

25 MR. MOSES: Your Honor, I am going to object to that line

1 of argument or questions, it is a comment based on his  
2 part, and him saying "it would not be against our interests  
3 to have you do that" ---

4 THE COURT: Well this is argument.

5 MR. MOSES: It is his belief that the evidence would do  
6 that and I want to make an objection for the record as to  
7 that.

8 THE COURT: Fine, it's in the record.

9 MR. RACICOT: The question was raised "what the hell are we  
10 talking about footprints for" by mr. Moses. I had the same  
11 question. What the hell are we talking about footprints  
12 for when nobody could establish from whom they came from,  
13 whose it was, what kind of shoes were worn. Did I speculate  
14 that the defendant was barefooted. How about the rubber  
15 soled shoes that he mentioned in his statement or confession?  
16 No. I didn't speculate about that. I gave you the facts  
17 and that was all. But nobody can establish where those came  
18 from. What if some drunk walked through there, after the  
19 murder, after it was dark, when it was dark, looked at the  
20 pickup sitting there, and a young girl lying in the river  
21 there? Why would he stop? We can't explain all of those.  
22 Who can? Do you want to continue on with that kind of  
23 speculation of what is, and what if, and then in the middle  
24 of all this, the Queen of Spades pops up? It is wrong to  
25 suggest to you to speculate like that. You have to confine

1 yourself to the evidence. Not the why didn't you do that,  
2 why don't you do that, or this, but based on what we did  
3 present to you, what we did bring into this courtroom, and  
4 from that evidence, you are to find this defendant either  
5 guilty or not guilty. That is the only question. We talked  
6 about a bloody towel and the suggestion that I was supposed  
7 to have made about a police officer being barefooted, I don't  
8 recall suggesting that to you, but it did cross my mind, I  
9 will admit, after judging the rest of the investigation, but  
10 I never suggested that to you, Mr. Moses did that. I don't  
11 know who left that footprint, those footprints, and neither  
12 does he. I don't know where that bloody towel was found, or  
13 even if it was found in Poplar. He said that it was very  
14 strange that a lawyer should get up and tell you that this  
15 investigation was screwed up, and I did tell you that, and it  
16 is true, that investigation was all screwed up I am sorry  
17 about that, I wish that I had all of the things, with some  
18 integrity to them, and which I knew would stand up in court,  
19 and which I could vouch for but I can't do that. Then we  
20 talked about the statements taken by the FBI. More rank  
21 speculation, and how they record their statements. What  
22 happened here is that you go out, or the agent does, and  
23 interviews people. That is not the witness's handwriting on  
24 that statement, that is the FBI agent's handwriting, and so  
25 when the witness tells the FBI something, he writes it down.

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1 Not the witness. It is not the witness that writes all of  
2 that down. It is the agent. It is not a verbatim statement  
3 like the one taken by Sergeant Via. Now you heard Shannon  
4 O'Brien, and I don't know why he called her, but he did and  
5 she was asked if Greg Norgaard had called her. It was in the  
6 statement. And as you can recall, do you remember I asked  
7 her if there wasn't another girl there with you and she said  
8 yes, Cathy Moe. And as you can recall, Greg Norgaard testified  
9 that he did call Cathy Moe, and so what has happened here is  
10 that the agent who is trying to do 85 interviews, taking  
11 down every rumor in Poplar, writes that down, and we all  
12 expect that what he wrote down is what the witness said, and  
13 they get up here on the stand and say, "well I didn't say  
14 that?. That is just another rank statement that shouldn't  
15 belong here. The consideration of the facts belongs here.  
16 It appears that there are a lot of people with a forked tongue.  
17 Now the photographs. All of the photographs that we have  
18 got, he has got that. As you well know, they are in four  
19 different sizes. Look at this investigation into this  
20 homicide, nobody took charge. Everybody was picking up stuff,  
21 and some of it went to Wolf Point, some of it went to Poplar,  
22 and some of it went to the FBI and when I first talked to Mr.  
23 McCann about this, I asked him what in the hell happened?  
24 We would have never gotten to Barry Allan Beach if it hadn't  
25 got to him inside. There is in all of us, inside, in regard

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1 to our actions, some morale quality, some small pool of  
2 morality, in some of us it is large, in some it is small,  
3 and at some point after a time, it works over and over and  
4 over in us, it gets to you. Sure he talked to the Louisiana  
5 police officers. No question about that, and do you know why?  
6 Because he couldn't keep it any more. It got to even him.  
7 It was right that he should talk to someone about it, and he  
8 did, and you are asked to speculate about this Mutt-Jeff  
9 routine. He asked Commander Calhoun about that. Which one  
10 do you feel Commander Calhoun was? It all comes down to the  
11 question of motive here; to get a free trip to Wolf Point and  
12 Glasgow? Well that is no reason to do anything illegal. You  
13 have been sitting here listening to that for three hours.  
14 Now are you operating under any coercion and duress? He is  
15 asking you to speculate about his mental instability. There  
16 is not one iota of evidence regarding the mental instability,  
17 nothing. Then he is asking you to speculate about it. The  
18 context of the conversation with Sgt. Via and what he testified  
19 about, was suggested by his family. Hey, look, we are only  
20 talking about underlying charges in Louisiana. We feel that  
21 there is a family problem. We feel that some psychiatric  
22 help would be appropriate. Then he said that I don't have  
23 that power to get you that help, but you would have to go  
24 through the courts and try to convince the Judge to do that.  
25 Is that evidence of mental instability? No evidence of that.

1 He asks you to speculate about Barry Allan Beach's mental  
2 state. He dramatically holds his notebook up. What is in  
3 here? Yet Barry Allan Beach in the statement, described in  
4 minute details what he did. Mean and crazy aren't the same  
5 thing. He remembers precisely what he did, exactly how he  
6 did it, and he remembered or knew things that no one else  
7 knew about. Only he could tell them. And he did with  
8 precision; he destroyed evidence in this case, and he did a  
9 very good job doing it, a very good job, and he would have  
10 still avoided trial today, had he not confessed to the  
11 crime. There is no question about that, none whatsoever. If  
12 you will recall there was a question put to Sergeant Via,  
13 on cross examination about the fact that the defendant was  
14 laughing, that he was laughing and crying in an effort to convey  
15 to you that there was something wrong with his mental state,  
16 naturally to be something to draw upon in his final argument,  
17 but there was no evidence at all about that. The only evidence  
18 of that is when a fellow comes clean and has this great relief,  
19 inside, then comes the denial part. Remember Richard Nixon?  
20 He may have gone out of office, but by God, he is not going  
21 to say that he is sorry. There is just no way, and then after  
22 he come clean, and he had that relief, then you try to figure  
23 out what to do under the circumstances, and under the circum-  
24 stances, the best way to minimize the damages was the plan  
25 that was concocted by the defendant and his lawyer, and

1 contrary to what had been suggested, that is one of the  
2 most stupid thing that I have ever hear a lawyer say. It was  
3 suggested to you that the information that the defendant gave  
4 concerning the three homicides in Louisiana was utilized to  
5 get a search warrant. That is specifically why we called  
6 Sergeant Via back yesterday, because if you will recall the  
7 chronology of the thing; the statement was taken on the 7th,  
8 the search warrant, based on that statement was executed on  
9 the 9th, and the second statement was taken on the 11th and  
10 during that statement is when the defendant said, "Yea, I've  
11 got to get this off my chest," and "that I feel that I have  
12 tell someone about it" and then he smiles at his lawyer. Then  
13 on the 20th of January, is when his lawyer comes out, not the  
14 defendant, but his lawyer, comes out and tells about the  
15 supposed cnnfession. We didn't go into this part about the  
16 supposed confession, because we knew that it was untrue. It  
17 was ridicilous. Is that the first time that someone has  
18 tried to dâvert the attention of law enforcement away from  
19 the crime, to confuse them? This is not some Gentlemen's game  
20 we play in this business. It is a competitive enterprise  
21 and it seems as though the lawyers becomes more important than  
22 the truth, where the rules become more important that the  
23 substance and evenutally we get a system where we start to  
24 realize we have to apply common sense. Now if you believe  
25 Sergeant Via and Commander Calhoun, and Joe Cumming, and Richard

1 Medaries committed perjury in this courtroom, then find the  
2 Defendant Not Guilty, because that is what you are saying by  
3 your verdict. If you believe they had that kind of interest  
4 in this case, this kind of a case, then do that. Because that  
5 is what you are saying, and that is really the bottom line.  
6 The bottom line is, if you believe that the confession was  
7 voluntary and that it is true, based on 25 odd points of  
8 cooperation, the testimony of Doctor Pfaff, then the  
9 Defendant is guilty. Those are the considerations, and if you  
10 want to get away from that, and involve yourself in this mucky-  
11 murky area of speculation, which you have sworn not to do,  
12 then you will have to come out with a different decision, but  
13 I am suggesting to you that the only way that you are going to  
14 be able to look at yourself six months down the road is by  
15 looking at the facts, eye ball to eye ball, and I know that  
16 that isn't easy, but I ask you to declare what is true here,  
17 not what is the best thing in town, not what is the best  
18 speculation in town, but to declare what is true; and then I  
19 am sure that the death of Kimberly Nees sparks emotions, and  
20 it hurts, to do that one to another, but I don't ask you to  
21 rule on that basis. I ask you to rule on what is true and  
22 what is right, and I really appreciate your patience. Thank  
23 you very much.

24 THE COURT; The case will now be  
25 submitted to you for your consideration,