COURT OF APPEALS OF WISCONSIN
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2016AP000185

KEITH M. KUTSKA,

Defendant-Appellant.

Appeal from a final judgment and order denying post-conviction relief entered in Brown County Circuit Court, Honorable James T. Bayorgeon, presiding

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ISSUES PRESENTED FOR REVIEW

The trial court, expressly or impliedly, answered the following issues in the negative:

1. Was the Defendant denied and prejudiced by the ineffective assistance of counsel who failed to (a) consult with and present testimony from an independent forensic pathologist to refute the autopsy testimony of the State's forensic pathologist; and (b) investigate and present the evidence of suicide?

2. Was the Defendant denied due process and prejudiced by the State's reliance on (a) the erroneous testimony of its forensic pathologist; (b) perjured testimony of its key fact witnesses; and (c) the State's failure to comply with *Brady/Giglio*?

3. Did the trial court erroneously apply the Wisconsin hearsay rules and the Due Process Clause in denying the admissibility of trustworthy evidence central to the Defendant's case?

4. Does the totality of the evidence establish a reasonable probability of a different result if the case were retried?

5. Is there "sufficient reason" under Wis. Stat. §974.06 why the grounds for relief presented in this motion were not presented at all or were presented inadequately in the Defendant's 1997 motion for post-conviction relief?

6. Is Kutska's conviction manifestly unjust?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented follow a five-week trial, defendant Keith Kutska's prior post-conviction motion, his direct appeal to this Court, a federal habeas proceeding, and the post-conviction, appeal, and habeas proceedings involving the five co-defendants.

This appeal presents important issues, including: (1) the duties of trial and post-conviction defense counsel to investigate facts and circumstances that are actually or potentially relevant to the defense of the accused in a first-degree intentional homicide prosecution before formulating a defense strategy and making other critical decisions; (2) the sufficiency of a conviction based on erroneous forensic pathology testimony and perjured fact-witness testimony; (3) the lawfulness of coercive police interrogation techniques and other tactics; and (4) the State's *Brady*/*Giglio* obligations.

The case of the "Monfils Six" has generated continuing public concern that six innocent men were wrongly convicted twenty years ago. Significantly, each of them has continually maintained his actual innocence over the decades, although they know that such insistence prejudices their early release requests.

For these reasons, we respectfully request that the Court consider granting each side 30 minutes for oral argument and that it also publish its opinion.

STATEMENT OF THE CASE

On October 28, 1995, Keith Kutska and five co-defendants were convicted of the first-degree intentional homicide of Thomas Monfils. The trial court sentenced each of them to life in prison, subject to an early release eligibility date.

The trial court denied Kutska's motion for post-conviction relief on September 23, 1997. This Court affirmed Kutska's conviction in its decision dated September 22, 1998. (App. 30) The federal district court denied Kutska's habeas petition on April 1, 2002, and the Court of Appeals for the Seventh Circuit denied his request for a certificate of appealability on October 29, 2002.

On October 31, 2014, Kutska filed the instant post-conviction motion. Following motion submissions, an evidentiary hearing, and post-hearing briefing, the trial court denied the motion on January 12, 2016. Kutska filed this appeal on January 20, 2016.

STATEMENT OF FACTS

On the evening of November 22, 1992, Tom Monfils' body was found in a Green Bay paper mill vat that contained approximately 20,000 gallons of water and pulp particles and was equipped with large rotating propeller blades. One end of Monfils' jump rope was tied around his neck and the other end was tied to the handle of a 49-lb. weight. The question was whether his death was a homicide or suicide.

The discovery of his body came shortly after Keith Kutska, a mill worker, obtained a tape-recording of Monfils' anonymous phone call to the police

reporting Kutska's impending theft of a piece of electrical wire from the mill. (R. 147: Ex. 1) When Kutska played the tape for Monfils at the mill at approximately 7:15 a.m. on November 21, 1992, Monfils admitted that he was the caller. (R. 147: Ex. 5)

With that admission, Kutska planned to file a union grievance against Monfils. That same morning, Kutska also played the tape for other workers to expose Monfils. (R. 147: Ex. 5; R. 232 at 123-25) Within approximately 25 minutes of admitting that he had reported Kutska to the police, Monfils disappeared and was not found until his body was discovered in the vat.

1. <u>The Autopsy</u>

Dr. Helen Young, a forensic pathologist, began her autopsy of Monfils' body approximately 42 hours after police theorized that he became submerged in the vat liquid. At the time of the autopsy, his body was in a state of advanced decomposition, putrefied, discolored, swollen, bloated, and unrecognizable. (R. 147: Ex. 16; R. 284: 7/18/15 at 26) Nonetheless, Dr. Young rejected any possibility of suicide and determined on the basis of her autopsy that Monfils had been beaten with one or more blunt objects and, while still alive, placed in the vat where he drowned. (R. 240 at 178, 200)

Her homicide determination rested on the following assumptions (R. 147: Ex. 18 (10/12/94) at 26, 45, 57 and (11/2/94) at 14-15):

A. Monfils could only have been injured in the vat by coming into contact with the rotating propeller blades;

B. Because the consistency of the liquid was similar to that of "thick oatmeal," Monfils would have been too buoyant to come into contact with the blades while he was still alive. Consequently, all of the injuries that he suffered while alive could only have resulted from a beating before he was placed in the vat.

C. She could identify each beating injury suffered while he was alive based on apparent bruising and hemorrhaging at or near the injury site.

2. <u>The Investigation and Bubbler Theory</u>

Following the autopsy, Sgt. Randy Winkler theorized that immediately after Monfils disappeared from sight at approximately 7:45 a.m., Kutska and others confronted Monfils at a particular water bubbler. There, they had verbally harassed Monfils before brutally beating him. To conceal their bloody attack, they then tied a 49-lb. weight to Monfils using his jump rope and carried him to the vat where they disposed of his body. (R. 263 at 56, 74, 87-88; R. 147: Ex. 103)

a) <u>The Search for Witnesses and Physical Evidence</u>

Winkler assumed that there had been multiple witnesses to the purported confrontation and beating at the bubbler. (R. 232 at 19-20, 267, 273; R. 235 at 58-60, 64, 118-19; R. 236 at 102-05.) When he and other detectives could find none, Winkler presumed that a union-inspired "conspiracy of silence" was protecting the murderers. He then resolved to employ interrogation and other tactics that would overcome this "obstruction" and validate his homicide theory. (R. 235 at 121-22)

Winkler told one worker that "if he wasn't going to tell us what he saw then he was going to be against us, and a suspect." That worker could be tried for first-degree intentional homicide, be brought into Susan Monfils' wrongful death suit, and lose his job if he were arrested. (R. 147: Ex. 65) Winkler similarly told others that they were either "a witness or a suspect;" they would lose their jobs if he told the mill that they were withholding information; and they could be arrested for obstructing justice. (R. 235: 27-28, 31-32, 58-60, 84-85; R. 257: 38; 18 at 165-166; R. 147: Exs. 61, 66, and 67)

These and other threats violated accepted "Reid Technique" police interrogation methods and posed the serious risk of coercing false statements and testimony. (R. 263 at 28; Police Interrogation and Confession, Inbau, Reid (5th ed. 2013))

Because Dr. Young determined that Monfils had bled profusely from his beating injuries, police searched the mill for blood or other trace evidence of the attack. Despite comprehensive efforts that included the use of black lights and luminol, they found no such evidence, as well as no evidence of any attempt to destroy, remove, or conceal it. (R. 240 at 225) They also failed to locate any blunt object(s) matching the size and dimensions of any of Monfils' alleged beating injuries.

Consequently, no trace evidence, other physical evidence, and/or eyewitness testimony ever directly corroborated the theory that Monfils had been

beaten at the bubbler or anywhere else in the mill, for that matter. (R. 261 at 212, 215-20, 255-56)

b) Evidence Pointing to Suicide

What Winkler and the police did learn, however, was the following:

After hearing that Kutska intended to obtain a recording of the phone call reporting Kutska to the police, Monfils repeatedly contacted the police and, on one occasion, the District Attorney's Office, to plead with them not to release it to Kutska. (R. 147: Ex. 7) In the days just before his death, Monfils was sleep-deprived, emotionally isolated, and anxiety-ridden. (*Id.*)

After Kutska played the tape for Monfils and others on November 21, Monfils saw the looks and finger-pointing of his co-workers and heard their condemnation. He would be shunned and his future job prospects and social standing at the mill would suffer immensely. He had damaged the Monfils' name at the mill where his father and other family members had spent their careers. (R. 147: Exs. 10, 26, 31, 34, 38)

While he was missing, his wife learned that he had been exposed as the person who reported Kutska to the police. When asked whether her husband was capable of harming himself, she answered affirmatively because, she said, his "life is in the mill." (R. 147: Ex. 29) Susan Monfils' response confirmed the concerns of those workers who, upon learning of Monfils' disappearance, had searched for him along the Fox River behind the mill. Her own search included visits to local hospitals and a psychiatric facility. (R. 240: 32-33)

One mill worker told police that Monfils was "ingenious" and "the type of person who would kill himself and make it look like someone else did it." (R. 147: Ex. 32) He stated that "Monfils was in the Coast Guard & knows how to tie knots concerning the weight tied to him…[H]e fully understood the need to tie the weight to his body in order to overcome the instinctive resistance of a fully conscious person to drowning himself." (R. 147: Ex. 33) "Monfils was smart enough to know that he would have to sink to the bottom & that's why he used a weight and not attempt stopping the suicide." *Id.*

Another worker told police about the occasion when Monfils requested a weekend off because of depression and other problems. Monfils had also spoken about his Coast Guard service and told stories "about pulling bodies out of the water." "Monfils had two different personalities, and it would be like him to commit suicide." This worker asked whether police had checked at Brown County Hospital for any medical records. (R. 147: Ex. 26)

Others told police that Monfils had been hospitalized for a mental breakdown; Monfils was not himself and "in one of his moods" just before his death; after Kutska played the tape for him, Monfils had "snapped" and appeared defeated, resigned, pensive, and "deep in thought." (R. 337 at 76; R. 147: Exs. 36-42; R. 232 at 165.); and Monfils' had emotional problems and needed psychiatric help. (R. 147: Ex. 34)

Some 25 minutes after Monfils admitted to Kutska that he had reported Kutska to the police, Pete Delvoe saw Monfils walking toward an airlock entrance.

(R. 147: Exs. 8, 9, 11; R. 232 at 275-77; R. 235 at 4, 80.) On the floor near that entrance lay the same 49-lb. weight later found tied to Monfils in the vat. (R. 147: Ex. 103; App. 130) That airlock entrance, in turn, led either to the No. 7 control room ("coop") or the storage area where Monfils' jump rope hung on a railing (R. 147: Exs. 8 and 9). When he saw Monfils approaching the airlock, Delvoe assumed that Monfils was about to enter the coop. (R. 147: Ex. 11; R. 232 at 275-77; R. 235 at 4, 80)

Because Monfils indisputably did not enter the No. 7 coop where other workers were then present, the conclusion follows that he picked up the weight laying on the floor near the airlock entrance, went through the airlock to the storage area where he took his jump rope, and then walked unseen through an isolated area of the mill to the vat where he took his life. (R. 147: Ex. 103)

c) <u>Anthony Cicero's Engineering Testimony</u>

In May 1993, Susan Monfils commenced a wrongful death suit against Kutska and other publicly-named suspects. Kutska retained Attorney Royce Finne, who was then representing him in the criminal investigation, to defend him in that civil case.

At a deposition in that litigation (R. 147: Ex 14), the mill's chief engineer, Anthony Cicero, testified that the vat liquid was approximately 96% water and 4% finely ground pulp particles and that Monfils would have been essentially as buoyant in it as he would be in a similar volume of water. With the weight tied to him and the propeller blades rotating, Monfils would have sunk to the bottom of

the vat and not remained suspended in the liquid. Cicero confirmed that Monfils would almost certainly have come into contact with the propeller blades.

Cicero also made clear that, even as a highly-experienced engineer, he could not know where Monfils' body would have been at any moment in the vat. (Id. at 84-87)

Cicero's testimony refuted Dr. Young's assumptions that the liquid had the consistency of "thick oatmeal" and that, therefore, Monfils' body (even with the weight) would have been "too buoyant" to suffer any injuries in the vat while he was still alive. It further confirmed why, as a physician, Dr. Young was unqualified to make the engineering and fluid dynamics assumptions on which she based her beating/homicide conclusion.

d) <u>David Wiener's "Repressed Memory"</u>

A mill worker, David Wiener, learned soon after Monfils' death that he was among the homicide suspects. Indeed, a State Crime Lab document authored just days after Monfils' death identified Wiener as one of nine such suspects (R. 147: Ex. 114; App. 239). At a March 1993 John Doe hearing appearance, Wiener accounted for Kutska's whereabouts during the time that police theorized the beating and drowning occurred; affirmed that he had not seen anything relevant to Monfils' disappearance; and denied seeing Dale Basten or Mike Johnson (both of whom were suspects) on the morning of Monfils' disappearance.

After Wiener offered that testimony, the District Attorney responded by letting him know that he was a suspect and by cautioning him about perjuring himself. (R. 147: Ex. 72 at 659, 667, 675-78)

Two months later, Wiener attended a wedding reception where he drank, cried, and became emotionally distraught. He was then under psychiatric care, heavily-medicated for acute anxiety, and had previously taken a lengthy "stress" leave from the mill. (R. 252 at 174) After leaving the reception, Wiener told police that, while there, he heard the name "Rodell."

Although that name was wholly irrelevant to the Monfils investigation, he told police that his hearing it had triggered a "repressed memory" of seeing Basten and Johnson on the morning of Monfils' disappearance. He now recalled seeing them walking together, "hunched over," and carrying something heavy and/or cumbersome toward the room where the vat was located. (R. 147: Exs. 23-25) Despite claiming that he had not seen what they had purportedly been carrying, the presumption was, of course, that it had been Monfils' body.

What police still lacked, however, were one or more witnesses to connect the suspects to the alleged beating.

e) Brian Kellner's Bar "Re-Enactment" Statement

By late November 1994, Winkler knew that Brian Kellner, a mill worker, was an acquaintance of Kutska's; was in the midst of a divorce from his wife, Verna; had custody of their two minor children and both Kellner and the children

desperately wanted that custody to continue; and Verna was purportedly having one or more affairs.

On November 29 and 30, Winkler interrogated and threatened Kellner for several hours. (R. 147: Ex. 39) On November 30, Kellner signed a statement that Winkler prepared for him asserting that Kutska had "re-enacted" the bubbler confrontation and beating one evening in early July 1994 at the Fox Den Bar. (R. 147: Ex. 27; App. 204)

According to that statement, Kutska had cast himself, his wife, Ardie, and Brian and Verna Kellner at the bar as stand-ins to demonstrate the relative positions of Monfils and certain others at the bubbler. It further alleged that, during the re-enactment, Kutska told Kellner the names of four workers who had witnessed the beating. It also asserted that Kutska told Kellner that, after they had beaten Monfils, Kutska and the others left Monfils laying on the floor because they had to attend to a work-related problem. When Kutska returned about 25 minutes later, Monfils was gone.

After securing that statement, Winkler prepared and procured a similar one from Verna Kellner. Her statement, however, included the additional assertion that one of the two bar owners had also participated in the "re-enactment." (R. 147: Ex. 24) Verna signed that statement after Winkler detained her for several hours, threatened to make public her private phone conversations (which he claimed to have recorded) and threatened to have her jailed for contempt. (R. 147: Ex. 62)

Winkler next approached the two bar owners. Each of them denied witnessing or participating in any such "re-enactment," despite threats if they did not sign statements to that effect. (R. 145: Ex. 60)

Winkler then confronted and threatened the four workers whom Brian Kellner's statement claimed Kutska had identified as witnesses to the confrontation and beating. Each of them denied witnessing any such incident. (R. 147: Ex. 65; R. 246 at 37, 39-41, 65)

3. The Arrests and Jailhouse Snitches

On April 12, 1995, the State charged Kutska, Mike Piaskowski, Rey Moore, Mike Hirn, Mike Johnson, and Dale Basten with first–degree intentional homicide and held them in the Brown County Jail to await trial. (R. 1) A paid police drug-informant, James Gilliam, learned that Moore was one of the "Monfils Six" and later told police that Moore told him that Moore and Kutska had each struck Monfils. Another inmate, James Charleston, told police that Dale Basten and Mike Hirn made incriminating statements while he was with them at the jail. (R. 261: 128, 131-132, and 159)

4. The Trial

The essence of the State's case rested on the testimony of four witnesses. Dr. Young testified that Monfils' death resulted from a beating and drowning. (R. 240 at 164, et. seq.) Kellner related a version of his bar "re-enactment" story. (R. 240 at 239-40; R. 246 at 6-17, 20, 25-26, 30-31, 41-42, 103, 133-36) Wiener offered his "repressed memory" account of seeing Basten and Johnson carrying

"something" toward the vat. (R. 251 at 94-102, 144) Gilliam presented his alleged "conversation" with Moore during which Moore admitted that he and Kutska had struck Monfils. (R. 261 at 168-69, 178-79, 181-83)

Each defendant testified and denied any involvement in or knowledge of the murder. Kutska specifically denied that any bar "re-enactment" had ever occurred. (R. 265 at 23) Kutska's counsel, Royce Finne, told the jury that Monfils had been brutally beaten and murdered, as the State alleged, and he would not be "foolish enough" to suggest that the death was a suicide (R. 266 at 113). Nonetheless, someone other than Kutska—Finne did not say who—had killed Monfils.

On October 28, 1995, the jury convicted each of the six defendants and, on December 12, 1995, the court sentenced them to life, subject to specified early release eligibility dates.

5. Prior Post-Conviction Proceedings and Appeals

a) Kellner's Perjury Admissions

In an October 1996 affidavit, Kellner began revealing the coercion to which Winkler had subjected him before Kellner signed the bar "re-enactment" statement and again before Kellner testified. (R. 147: Ex. 55) Kellner's affidavit stated that, before he signed the statement, Winkler interrogated him for more than eight hours; accused him of lying; threatened to have Kellner treated as a hostile witness; told Kellner that he could be subjected to a long and unpleasant time at a John Doe hearing; stated that Verna was having an affair with Kutska that would

be disclosed in court; and repeatedly threatened Kellner with the loss of his job, loss of child custody, and jail. *Id.*

At a February 1997 post-conviction motion hearing, Kellner confessed to perjuring himself at trial. (R. 147: Ex. 58 at 56-74) He testified that Kutska, while at the bar, had not placed himself and the other defendants at a confrontation with Monfils. Rather, Kutska had only posed questions about what might have happened to Monfils if the then-prevailing police theory was correct. Kellner had perjured himself because of Winkler's threats, particularly those relating to his loss of child custody and job. (*Id.*)

According to Kellner, Winkler had "slammed his fist down on the table and made everything jump, and just told me: 'Listen, I'm not going to play with you any more [sic]. I'm tired of your fuckin' lies.'" (*Id.* at 68) Winkler demanded that Kellner "agree to this because this is the God-damn truth, and if you're going to be a God-damn liar, you're going to jail for obstructing a police investigation." Winkler told him that his testimony would be "what was written down on that, that statement...And that there was no area outside of what was on that statement." (*Id.* at 75)

The prosecution challenged the credibility of Kellner's recantation and argued that Kellner had not denied that Kutska re-enacted the beating. Rather, it argued, Kellner had now merely described it in terms of Kutska's speculating about how the beating might have occurred. Only if Kellner denied that the re-enactment had ever happened would his recantation strike at the "core" of its case.

The trial court acknowledged that Kellner had perjured himself either at trial or at the hearing, but regarded his recantation as neither credible nor material. (R. 147: Ex. 57)

b) David Wiener's Deal Demands

In late 1993, some six months after he presented his "repressed memory" story to the police, David Wiener shot his unarmed brother to death. In May 1994, after he was convicted of second-degree reckless homicide, Wiener was sentenced to ten years in prison. On the day of his sentencing, Wiener publicly stated his refusal to cooperate in the Monfils case because the District Attorney had not given him a deal. (R. 147: Ex. 85; App. 235)

Wiener's cooperation was critical to the State because Kellner's bar "re-enactment" statement could only establish a beating that, as Dr. Young would testify, Monfils would likely have survived if he had not been put in the vat. (R. 240 at 201) To convict Kutska and the others of first-degree intentional homicide, the State needed Wiener's testimony to connect the alleged beating to Monfils' drowning in the vat.

At trial in October 1995, Wiener testified for the prosecution and denied receiving any benefit or consideration for his testimony. At a February 1997 post-conviction motion hearing, Wiener again denied receiving any benefit or consideration for his testimony. (Id. at 251; R 147: Ex. 119 at 3)

By the time of Kutska's August 1997 post-conviction motion hearing, however, Wiener was about to be released after serving only 39 months of his

original 120-month sentence. (R. 147: Ex. 120.) At that hearing, Kutska's counsel, James Connell, contended that Wiener had received, or anticipated receiving, a benefit for his trial testimony. Both Wiener and the State again denied any such arrangement.

To support its argument that Wiener had not received a deal, the State noted that Wiener had told his "repressed memory" story to police before he killed his brother and had any reason to seek a deal. (R. 147: Ex. 120 at 60) That statement, however, ignored Wiener's realization that he was a Monfils case suspect when he first gave his "repressed memory story and had every motive to disassociate himself from the other suspects and point an accusatory finger at Basten and Johnson. (R. 251 at 94-96, 98-102, 117)

After Wiener killed his brother and faced ten years in prison, the Monfils case was still in its investigative stage. Wiener and his counsel fully understood that his Monfils' trial testimony was a powerful bargaining chip to play whenever the Monfils suspects were charged.

At the August 1997 hearing, the District Attorney denied having had any dealings with Wiener regarding any benefit. (Id at 36, 38, 59). What the State did not then disclose, and had not done so previously, was the following:

1. On October 17, 1994, Wiener's lawyer wrote to Winkler and an Assistant Brown County District Attorney confirming Winkler's recent visit to Wiener in prison during which Winkler suggested to Wiener that his "current

status" could be affected by "cooperation" in the Monfils investigation. (R. 147: Ex. 87; App. 240)

2. After Wiener testified at the Monfils case preliminary hearing, he wrote to his attorney on May 25, 1995 stating that "it seems to me, that [the DA]…has turned his back to me…I have made up my mind that I would be much further ahead to keep my mouth shut at any further court actions involving the Monfils case, rather than further endangering myself and family…. I feel I could be put back on D.I.S. or **released** in some way, if they wish me to testify." (R. 147: Ex. 106) (Emphasis added)

3. Wiener's attorney wrote to the District Attorney on June 12, 1995 and enclosed a copy of Wiener's May 25 letter. The June 12 letter stated that Wiener believed the District Attorney had "abandoned" him. (R. 147: Ex. 88)

4. The District Attorney later met with Wiener's attorney and requested a face-to-face meeting with Wiener before trial. (R. 147: Ex. 89)

5. Wiener testified at the trial in early October, 1995, the six defendants were convicted later that month, and the court sentenced them to life in prison in December 1995. In early March 1996, after public attention to the Monfils case had abated, Wiener's counsel sent the District Attorney a draft of an unopposed sentence reduction motion and stipulation. (R. 147: Exs. 91, 107) The District Attorney agreed to the stipulation and to not oppose the motion.

6. The order reducing Wiener's sentence made him statutorily eligible for release and described Wiener as a "crucial" Monfils case witness who (as both Wiener and the State had been at pains to affirm) had testified truthfully, voluntarily, and without any offer of consideration. (R. 147: Ex. 88; App. 241)

These communications and the chronology of events contradict the notion that the State never communicated with Wiener regarding any actual or implied deal and/or Wiener's testimony was unaffected by a desire to curry favor with the State to gain something of value in return.

c) <u>Trial Court and Court of Appeals' Decisions</u>

In its 1997 decisions denying each defendant's post-conviction motion, the trial court rejected the State's characterization of the Kellner and Wiener testimony as crucial to the convictions. Indeed, it called that testimony "hyped," "barely credible" and insufficient to get the case to the jury. According to the trial court, the convictions resulted from the jury's disbelief of the defendants' denials of involvement in the murder and the collective weight of all of the testimony during the lengthy trial. (App. 83)

On appeal, this Court rejected that assessment and affirmed the convictions on the basis of the Kellner and Wiener testimony. (App. 33-35) It found their testimony sufficient to establish a confrontation and beating that rendered Monfils "unconscious by a blow to the back of his head." Even if Kutska had re-enacted the beating only in speculative terms (as Kellner testified in post-conviction), the jury could interpret such as Kutska's admission of guilt. The Court further

concluded that Wiener's testimony was sufficient to prove that Basten and Johnson had carried something. The jury could infer that the "defendants intended to dispose of Monfils' body permanently to avoid being identified and suffering the likely consequences of their actions." The defendants never disputed that Monfils was brutally murdered.

In affirming Kutska's conviction, the Court also expressly referenced Gilliam's testimony that Moore had told him that Kutska punched Monfils in the face.

At a post-conviction hearing in November 2009, Gilliam's testimony was so demonstrably false and self-contradictory that trial court not only described it as incredible, but also as dependent on the "wind direction" when given. (R. 147: Ex. 94)

6. The Motion's Newly-Presented Evidence Challenging the State's Homicide Theory and Supporting A Suicide Defense

a) Dr. Sens

Dr. Mary Ann Sens is Chair of Pathology at the University of North Dakota School of Medicine and Health Sciences and is a Board Certified member of the American Board of Pathology, Anatomic and Forensic Pathology. Before testifying at the July 2015 evidentiary hearing, Dr. Sens studied the Monfils autopsy examination materials, Dr. Young's report, and Dr. Young's pretrial and trial testimony.

Dr. Sens testified that there was no basis in forensic pathology for Dr. Young's autopsy conclusion that Monfils' death resulted from a homicide and not a suicide. In Dr. Sens' opinion, the manner of death, to the extent it was based on an autopsy examination, could only be "undetermined." To explain why she rejected Dr. Young's homicide conclusion, Dr. Sens stated the following:

1. A forensic pathologist is unqualified to make assumptions regarding the consistency of the vat liquid, the relative buoyancy of a body in it, and the movements of Monfils' body and the weight in the vat with the propeller blades rotating. (R. 284: 7/8/15 at 63-64)

2. The vat had a propeller, side walls, and a floor, and Monfils had a weight tied to him. All of these factors could cause or contribute to his injuries. Because Monfils' body would have moved in the vat, Dr. Sens concluded that "there would have been propeller blade injury potential, injury caused from landing on the bottom, landing against the weight, propelled against the weight, propelled against the side. There were a lot of areas in that vat where injury could have occurred." (*Id.* at 56)

3. Because Monfils was unquestionably alive when he entered the vat, he could have suffered all of his injuries in it**.** (*Id.* at 62) Monfils' injuries were "not specific enough to definitively assign to a traumatic event, such as an assault outside of the vat" and there was no reason "to believe that they couldn't have occurred inside the vat." (*Id.* at 90)

4. The advanced decomposition, discoloration, and deterioration of Monfils' body made it impossible for a forensic pathologist to reach any reliable homicide conclusion based on an autopsy. (*Id.* at 76) Indeed, determining the manner of death in any drowning case is among "the most difficult medicolegal problems" in forensic pathology. (*Id.* at 58) Any such determination depends "largely on the history and investigative reports." (*Id.* at 58-59) Whether Monfils' death was a homicide or suicide could be determined, if at all, only after a complete investigation into Monfils' history, condition, relationships, and actions leading up to his death. (*Id.* at 56) An autopsy alone could not serve as the basis for determining whether the death was a suicide or a homicide.

b) <u>Steven Stein</u>

Steve Stein testified that he told police that Monfils had long needed psychiatric help. While the Steins' prematurely-born daughter was struggling to survive, Monfils' response to a newspaper article describing the heroic medical efforts to save her life had been to post a mocking version of the story at the mill. The mill then told Stein that it was prepared to terminate Monfils. (R. 147: Ex. 34; R. 284: 7/9/15 at 89-91) Stein, however, requested that the mill get Monfils mental help instead of firing him. Monfils then went on a long leave for what Stein understood was to receive that help. (R. 284: 7/9/15 at 91-92)

Stein recalled Monfils' stories regarding his Coast Guard experiences recovering the bodies of those who committed suicide by tying heavy objects, including weights, to themselves. (R. 147: Ex. 34; R. 284: 7/9/15 at 93-94)

Monfils had once told Stein how much additional weight Stein would need to have on his body to remain submerged while scuba-diving. (R. 284: 7/9/15 at 96-97) Stein also attested to Monfils' obsession with the act of dying. (*Id.* at 95)

Just before Monfils' death, Stein had seen him handling the same weight found tied to Monfils' body in the vat. (*Id.* at 102-103) In the days leading up to his death, Monfils was noticeably quieter than usual and left the mill quickly after his shift ended. (*Id.* at 103) Stein confirmed there had been rumors that Monfils and his wife were about to divorce. (*Id.* at 105) Stein understood the emotional impact on Monfils of being exposed as the person who reported Kutska. For Stein, Monfils' death was always a likely suicide. (*Id.* at 103)

c) <u>The Rope Knots</u>

The significance of the rope knots tied around Monfils' neck and to the weight handle was never lost on the police. Had it been able to attribute those knots to any of the defendants, law enforcement would have trumpeted that evidence as powerfully incriminating.

After the State Crime Lab failed to find any fingerprints or human tissue on these knots, it directed the police to have the Navy or the Coast Guard examine them, a clear indication that it regarded them as potentially nautical in type or usage. (R. 147: Ex. 43) There is, however, no evidence that the police ever did so.

During the investigation, Monfils' brother, Cal, told Winkler that the rope knots "looked familiar" and were of the type that Tom could have tied. (R. 284:

7/9/15 at 55-56) Cal also noted the care with which they had been tied and how they seemed inconsistent with having been hastily tied to a body lying on the floor. He believed that an expert should examine them, but Winkler told him that the matter had already been looked into. (*Id.* at 74 and 55-57) (There is no indication that Winkler documented this conversation and/or that it was disclosed to defense counsel pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

At the July 2015 hearing, George Jensen, a former Coast Guard and Merchant Marine seaman, testified that each of the knots tied around Monfils' neck and to the weight handle was a "two half-hitch knot." Jensen confirmed that the Coast Guard taught seamen to tie this type of knot, and he explained its nautical uses. (R. 284: 7/9/15 at 80-81)

Next, Jensen examined photos of other knots that Cal Monfils obtained from his brother's home after his death and that were of the type that Cal had seen him tie. (*Id.* at 55; Exs. 143-146 (received in evidence on 7/9/15; App 291-294) Jensen also identified each of them as a "two half-hitch knot." (R. 284: 7/9/15 at 83-84)

This evidence confirms that Monfils learned to tie a "two half-hitch knot" in the Coast Guard and had the propensity to tie that type of knot at the time of his death. As between Monfils and the six defendants, only he had that proven ability and propensity. This evidence is particularly critical in light of how closely Monfils' death with a heavy weight tied to his body mimicked the deaths of the suicide drowning victims about whom he spoke.

d) Family Conversations

Members of his family publicly stated that Monfils would never have committed suicide and expressed relief when the Coroner announced that the death was a homicide and not a suicide. (R. 147: Ex. 22) Given the family's strenuous denials of suicide and the social and religious stigma commonly associated with it, a family member's statement acknowledging Monfils' actual or possible suicide would be against that declarant's social interests. Moreover, any such statement by Susan Monfils would be contrary to her civil litigation and other financial interests.

Cal Monfils testified regarding two conversations that he had with his mother shortly after Tom's death. In the first, his mother told him that Susan Monfils had been "at the kitchen table saying that Tom had committed suicide. [Susan] kept repeating it." His mother regarded Susan's statement as "foolish." (R. 284: 7/9/15 at 68)

On another occasion, his mother told Cal that Susan mentioned having "found some notes above the ceiling tiles in their bedroom. Didn't exactly say what the notes said, but it was implied that they were notes that Tom had written possibly, but I don't really know the subject of the notes." (*Id.* at 69-70) His mother again rejected Susan's comments about the notes as "foolish" and was upset by them. (*Id.*) Susan's statements regarding suicide were well-known within the family. (*Id.*)

e) More Evidence of Winkler's Coercion and the Kellners' Perjury

Amanda Williams testified that Winkler pressured her father, Brian Kellner, to lie. She described her father as "stressed" and believing that he and his children were being surveilled. (R. 284: 7/9/15 at 20) At school one day, a woman confronted Amanda, then about 13 years old, with threats that Amanda believed were intended to force her father to "cooperate" in the Monfils case. The woman then took her to a police station where Amanda sat alone before going home. (*Id.* at 21-22) After Amanda told her father about this incident, he "got quiet." (*Id.* at 22)

On another occasion, Winkler questioned Amanda alone inside the Kellner home where he asked whether she wanted "to stay living at my home" with her father and brother. (*Id.* at 13-14) Winkler told her that "if my dad didn't cooperate that he could be looking at a lot of problems." (*Id.* at 15) "The problem that he meant or that I assumed that he meant was jail…Like he was going to get involved in this to the point where he could be implicated as well with the six." (*Id.* at 16)

Steve Stein was a close friend of Brian Kellner's during the last couple years of Kellner's life. (*Id.* at 114) On five or six occasions, Stein and Kellner discussed Kellner's police statements and trial testimony which had weighed so heavily on Kellner that he sought professional help. Kellner told Stein that he lied because he feared losing his job and family. Kellner also feared what people would think if the truth came out. (*Id.* at 114-117, 119)

Gary Thyes, Kellner's barber, testified regarding several conversations that he had with Kellner concerning police efforts to force Kellner to sign a false statement. (R. 284: 7/22/15 at 29-30) According to Thyes, Kellner was "very upset" when detectives "day after day would question him, six, eight hours a day, and then finally they threatened to take his kids away. They would take his kids away, that he would never see them again unless he signed the statement. [Kellner] said, 'I signed it. I went right over to a lawyer's office.' [Kellner] told the lawyer he signed a false statement." (*Id.* at 33-34)

In February 2014, Attorney John Lundquist, a member of Kutska's current legal team, interviewed Kellner who was then terminally ill with cancer and understood that he had only 2 ½ to 3 ½ years to live. (R. 284: 7/9/15 at 39-40) **Kellner told Lundquist "that the Fox Den incident simply did not happen. There was no conversation by Mr. Kutska at all about Thomas Monfils."** (*Id.*) (Emphasis added.)

Lundquist subsequently prepared a memorandum summarizing his interview with Kellner. He also prepared a proposed affidavit for Kellner stating that the alleged bar re-enactment story was a fiction that Winkler coerced from him. (R. 153: Exs. A-C) Kellner died unexpectedly, however, on the same day in late March 2014 that he and Lundquist had arranged to meet for Kellner's review and signing of the affidavit. (R. 284: 7/9/15 at 42)

Jody Liegeois testified that she knew Verna Kellner at the time of the Monfils trial. (R. 284: 7/22/15 at 20) In late 1995, after the trial had concluded,

Verna and her then-husband came into the restaurant where Ms. Liegeois worked. When Ms. Liegeois spoke with them, Verna appeared "very upset" and told her that she and Brian Kellner had been forced to perjure themselves regarding "the reenactment at the bar." (*Id.* at 20, 24-26)

Kutska's former wife, Ardie, was at the Fox Den Bar with Kutska and the Kellners on the evening of the alleged beating re-enactment. Mrs. Kutska testified that no such event occurred and the Kellners had lied at trial regarding it. (R. 284: 7/8/15 at 224-228) She also explained that she had not testified at the trial because she was told that "no one would believe" her because she was Kutska's wife. (*Id.* at 228-229)

ARGUMENT

I. KUTSKA'S CONVICTION RESULTED FROM THE INEFFECTIVE ASSISTANCE OF COUNSEL, ERRONEOUS FORENSIC TESTIMONY, PERJURED FACT-WITNESS TESTIMONY, AND OFFICIAL MISCONDUCT.

A. The Decision Misstates the Effective Assistance of Counsel Standard and Ignores the Evidence of Deficient Representation that Prejudiced Kutska.

A defense lawyer denies the accused the right to the effective assistance of counsel when the quality of representation falls "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). To satisfy that objective standard, counsel must enable the adversarial process to work effectively by conducting a prompt and thorough investigation of all facts and circumstances that are or may be relevant to the issues of guilt or punishment.

State v. Pitsch, 124 Wis. 2d 628, 638, 369 N.W.2d 711, 717 (1985); ABA Criminal Defense Standard 4-4.1 (counsel should "conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case").

The more severe the charged offense, the greater is defense counsel's obligation to investigate all actually or potentially relevant facts. Wisconsin Code of Professional Responsibility, SCR. 20.1: 1.2, ABA Comment [5] ("The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence"). The defense of a first-degree intentional homicide charge—the most severe in the Wisconsin criminal code—imposes on counsel the highest possible duty to investigate and evaluate all relevant facts before formulating a defense strategy.

If defense counsel decides not to investigate a particular issue, such decision is objectively reasonable only if and to the extent that it is based on knowledge of all of the facts and circumstances relevant to it. *Strickland,* 466 U.S., at 690-691*; Rompilla v. Beard,* 125 S. Ct. 2456 (2005). There is no strategic reason for a lawyer not to study all of the pretrial discovery materials and investigate the issues that such discovery raises. *State v. Thiel*, 2003 WI 111, ¶¶37-38, 264 Wis. 2d 571, 595, 665 N.W.2d 305, 320 (Wis. 2003). Unless a defense decision is based on an understanding of all relevant facts and

circumstances, it is not entitled to "deference," no matter how tactical counsel regards it. *Wiggins v. Smith,* 539 U.S. 510, 528 (2003).

If counsel's performance is not objectively reasonable, the accused is entitled to a new trial if there is "a reasonable probability" that, but for counsel's unprofessional errors, the result on retrial "in light of all of the evidence" affecting the strength and weaknesses of each party's case would be different. *Strickland,* 466 U.S. at 694; *State v. Sanchez,* 201 Wis. 2d 219, 232, 548 N.W.2d 69, 76 (1996). A "reasonable probability" of a different result exists if all of the evidence is sufficient to "undermine confidence in the outcome." *Id.*; *Rompilla,* 125 S. Ct. at 2465-67.

Counsel's failure to consult with an independent forensic pathologist when the state relies on its own forensic pathologist to prove an element of the charged offense is presumptively deficient and prejudicial. In *State v. Zimmerman,* 669 N.W. 2d 762 (Wis. App. 2003), the State relied on the testimony of its forensic pathologist to prove how the victim was murdered. Defense counsel failed to consult with an independent forensic pathologist to review that pathologist's determinations and allowed the State's expert to testify without challenge.

The defendant's post-conviction counsel, however, consulted with an independent forensic pathologist who challenged the testimony of the State's pathologist. This Court found that trial counsel had been ineffective in "failing to present available alternative testimony" that could have induced the jury to reject the State pathologist's testimony. *Id*. at 773.

In *Thomas v. Clements*, 789 F.3d 760 (7th Cir. 2015), rehearing en banc denied, 797 F.3d 445 (7th Cir. 2015), the State offered a forensic pathologist's testimony to prove that the victim had been intentionally murdered by manual strangulation. Defense counsel conceded that the defendant had caused the death, but argued that it occurred unintentionally and not as the result of manual strangulation.

Despite knowing that the State would rely on its forensic pathologist to establish intentional homicide, defense counsel failed to consult with an independent forensic pathologist. Without any opposition to the State's pathologist, the jury convicted the defendant of intentional homicide. Post-conviction defense counsel, however, presented an independent forensic pathologist who testified that the victim's injuries were as consistent with an unintentional application of pressure to the victim's neck as they were with intentional manual strangulation.

The Seventh Circuit held that trial counsel was "deficient in failing to consider and consult with a pathologist who would have reviewed the autopsy report and possibly testified." (*Id.* at 768) That failure "reconfirmed the one-sidedness of the expert opinion before the jury." (Id. at 770) The court noted that "counsel should have known there was reason to question a finding of intentional homicide." (Id. at 769) Reasonable counsel would, at minimum, have reached out to a "pathologist to see whether the medical findings could be reconciled with [the defendant's] versions of the events." (*Id.*) "To not even contact an expert,

however, was to accept [the state's pathologist's] finding of intentional death without challenge and basically doom" the defense. (*Id*.) That failure was prejudicial because "the state presented an expert whose testimony was used to strongly support its theory of intentional death, and defense counsel never pursued any rebuttal expert." (*Id.* at 771)

Zimmerman and *Thomas* confirm defense counsel's obligations to investigate and present, when possible, evidence challenging the testimony of forensic experts on whom the prosecution relies to prove an element of the charged offense. *Rogers v. Israel*, 746 F.2d 1288, 1294 (7th Cir. 1984); *Dugas v. Coplan*, 428 F.3d 317, 329-30 (1st Cir. 2005); *Hinton v. Alabama*, 134 S. Ct. 1081 (2014).

B. Criminal Defense Expert, Stephen Glynn, Esq., Explained Why Defense Counsel Were Deficient and Prejudiced Kutska's Defense.

Pre-eminent Wisconsin criminal defense lawyer, Stephen Glynn, Esq. testified that defense counsel's failures to consult with an independent forensic pathologist, challenge Dr. Young's testimony, and investigate the question of suicide were deficient and prejudicial. He based those conclusions on the following:

1. The principal obligation of a defense lawyer, especially in a first-degree murder case, is to investigate the facts and learn what the prosecution can and cannot prove. (R. 284: 7/8/15 at 184, 186-87)

2. Dr. Young's determination that all of Monfils pre-mortem injuries were suffered before he entered the vat was what "turned this case into a murder case." (*Id.* at 189-192) Defense counsel is obligated to consult with a forensic pathologist when "the case is likely to turn on what the forensic pathologist employed by the State has said" and to ascertain whether the pathologist's report is "strong," well-written, well-prepared, and "makes sense." (*Id.* at 187-188.) Here, Kutska's counsel were obligated to consult with and retain an independent forensic pathologist to review and, if possible, challenge Dr. Young's testimony (irrespective of counsel's personal respect for her work) and investigate whether Monfils committed suicide. (*Id.*, at 184-186, 190)

3. Defense counsel were also obligated to investigate any history of depression, anxiety, or other emotional and marital problems, Monfils' discussions about death and drowning, and his Coast Guard service, including Monfils' experience with drowning victims who had tied weights to themselves with knots. (*Id.* at 197-198)

4. Defense counsel could not reasonably concede that Monfils had been beaten and murdered until after they had "exhausted all efforts to try to determine that this was anything but a homicide." (*Id.* at 195) Without consultation with an independent forensic pathologist, it was impossible for counsel to make an informed decision whether Monfils was beaten and murdered. (*Id.* at 201, 218)

5. The evidence of suicide would have fit perfectly with the absence of any trace evidence or eyewitness testimony of a beating. (*Id.* at 199)

6. The "some-other-dude-did-it" ("SODDI") defense to which Kutska's counsel had resorted is "basically the weakest defense there is to start with. And under the circumstances of this case it was even weaker than that." (*Id.* at 194, 220) There was a limited universe of potential murderers in the mill and the "earlier confrontation between Mr. Kutska and Mr. Monfils with the tape recording" would have made the SODDI defense "very much" more challenging. (*Id.*) That event made Kutska "the clearest and easiest suspect in the case" if the death were a homicide. (*Id.*) The defense was further weakened by trial counsel's failure to tell the jury who had murdered Monfils. (*Id.* at 195)

7. The duties of post-conviction counsel are similar to those of trial counsel, but are affected by the available trial information and the obligation to investigate and determine whether the defendant received the effective assistance of trial counsel. (*Id.* at 203) It was unimaginable that a defense lawyer reviewing the trial record would not come away with "serious questions" about the forensic pathology. (*Id.* at 204)

As Mr. Glynn stated, presenting evidence of suicide would have altered every phase of the case. (*Id.* at 219) Law enforcement would have had to investigate that issue and the State would have to disprove it beyond a reasonable doubt. Had counsel investigated what they should have, they could have shown why the homicide theory was not merely reasonably doubtful, but wrong, and why

Kellner, Wiener, and Gilliam were not credible. (R.147: Ex. 138; R. 284: 7/8/15 at 200) Had defense counsel investigated the evidence of suicide and consulted with an independent forensic pathologist, they could never have conceded the homicide and subjected Kutska to the damning inferences that flowed from that concession.

After challenging Young's testimony, Finne and Connell could have demonstrated Monfils' (1) mental, emotional, physical, and psychological condition and history; (2) obsessions with death and drowning; (3) fascination with rescuing suicide drowning victims who had tied heavy objects to their bodies; (4) ability and propensity to tie the exact type of knot found tied to him and weight; and (5) knowledge that he would need to tie a heavy weight to his body to drown.

They could have shown the truly remarkable similarity between Monfils' death and those of the suicide drowning victims about whom Monfils spoke so often and why such was tantamount to a suicide note.

They could have explained why suicide was the only theory that was fully consistent with the evidence that not only existed, but also the evidence that did not exist (but that should have if Monfils had been beaten and carried to the vat). (R. 147: Ex. 138) They could have presented a credible suicide defense that was far more compelling than the untenable SODDI contention that Finne adopted and Connell deemed "reasonable."

C. Defense Counsel's Testimony Confirms That They Denied Kutska Effective Assistance.

Attorney Finne admitted that he was obligated to understand the facts fully (R. 284: 7/8/15 at 105), but that he had never considered challenging Dr. Young and investigating whether the death was a suicide. He failed to do so despite the following facts and circumstances that he knew or should have known:

1. Kutska firmly believed before August 1994 that Monfils had killed himself. (R. 265 at 18)

2. There were no eyewitnesses or items of physical evidence supporting a beating at the bubbler or anywhere else in the mill. Suicide was the theory that most simply and completely explained why there was no direct evidence of a beating. (R. 147: Ex. 138)

3. Several witnesses, including Monfils' wife, attested to Monfils' ability to inflict self-harm, as well as his Coast Guard training, ability to tie knots, his obsessions with death and drowning, including suicide by drowning with heavy weights or objects tied to the victim's body, and past history of serious emotional problems. The police investigation files were laced with witness statements and police reports regarding Monfils' possible, if not likely, suicide.

4. Monfils was under enormous pressure before and after being exposed as the person who reported Kutska to the police. He faced certain loss of personal standing in the mill and community, as well as possible job loss at a time when he and his wife were apparently experiencing serious marital problems.

5. Dr. Young's homicide determination rested on engineering assumptions that the Cicero testimony exposed as wrong and that, as a forensic pathologist, she was unqualified to make.

6. No forensic pathologist on the planet could objectively warrant the degree of perfection that Finne accorded to Dr. Young. Moreover, he should have understood from reviewing her pretrial testimony that her conclusions were laced with speculation and assumptions that were wrong and beyond her competence. (R. 147: Exs: 18, 47)

7. Forensic pathologists will often differ with each other, as is evident not only from *Zimmerman* and *Thomas*, but also *State v. Edmunds*, 2008 WI App 33, 746 N.W. 2d 590 (Wis. App. 2008) ("shaken baby syndrome" case) and *State v. Plude*, 2008 WI 58, ¶20, 310 Wis. 2d 28, 750 N.W.2d 42, 45-47 ("a cacophony of disparate medical opinions" regarding whether the death was murder by drowning or, instead, a suicide). They may do so because their conclusions often reflect their individual professional judgments and experiences.

8. Indeed, Dr. Young's opinions had been disputed by other forensic pathologists long before the Monfils case in *Seidler v. State*, 64 Wis. 2d 456 (Wis. 1974) (cause of death); *Martin v. State*, 87 Wis. 2d 155 (Wis. 1979) (point of bullet entry); *State v. Kimpel*, 97 Wis. 2d 754 (Wis. App. 1980) (cause of death); *State v. Torres*, 107 Wis. 2d 742 (Wis. 1982) (timing of any sexual intercourse).

9. Finne had consulted with forensic pathologists and/or other medical experts in other cases because he could not otherwise know whether the opposing party's forensic pathologist was subject to attack. (*Id*. at 93-94) He could never know whether Dr. Young was subject to challenge in this case without consulting with an independent forensic pathologist. (R. 284: 7/8/15 at 95.) Likewise, he could never know, without investigating the matter in depth, whether he could establish a viable suicide defense.

10. Nothing precluded him from consulting with an independent forensic pathologist and investigating the manner of death and possible suicide.

11. The shape and dimensions of Monfils' skull fracture—a critical injury that Dr. Young categorically determined could only have resulted from a beating and not from contact with the vat's propeller blades—**matched** those of the blade edges. (R. 147: Ex. 16 at 21; Exs. 124-126, 136).

12. Brown County's rate of suicide dwarfed that of its homicide rate, particularly among men in Monfils' demographic group. According to the Center for Suicide Prevention, the leading suicide warning signs include impulsiveness and unnecessary risk-taking; anxiety and inner tension; pessimism and feelings of hopelessness; sleeping too little or too much; feelings of isolation; the desire for revenge; mood swings; preoccupation with death; sudden signs of happiness and calm; and/or putting one's affairs in order. Before and on the morning of his death, Monfils exhibited nearly each of them.

13. Finne could have used the wrongful death litigation discovery tools to develop the evidence of suicide and probe the accuracy and reliability of Dr. Young's homicide theory. Cicero's deposition in that case yielded testimony directly controverting Dr. Young's engineering assumptions.

14. Finne's homicide concession enabled the State to point to Kutska as the one person with a provable animus against Monfils and contend that Kutska's playing of the tape had incited the "mob" that murdered Monfils.

When asked why he had not consulted with an independent forensic pathologist, Attorney Connell candidly responded that "I will tell you that I didn't think of it." (R. 284: 7/8/15 at 168) He did not do so although he admitted that Dr. Young's testimony was basic to the State's case and Finne's homicide concession relieved the State of the burden of proving a homicide.

Connell also did not do so although he understood that a forensic pathologist's ability to make autopsy determinations could be impacted by the condition of the body and its having been submerged in liquid for some period of time. (*Id.* at 141-142, 145, 148)

Similarly, he never considered investigating suicide or consulting with any forensic expert to determine why, if Monfils would have bled profusely from his injuries as Dr. Young testified, there was no evidence of any blood at or near the bubbler, the vat, or anywhere else. (*Id*. at 146)

There can be no fact-based justification for Finne and Connell's failures to investigate Dr. Young's conclusions, the soundness of State's homicide theory,

and the issue of Monfils' possible suicide. Certainly, the trial court's decision offers none. There is no suggestion that investigating any of those issues would have been harmful to Kutska's defense, wasteful, or anything other than critical to defense counsel's full understanding of what was indispensable to formulating the most effective defense strategy possible.

While absolving defense counsel of its failures to pursue any of these issues, the decision seemingly faults Kutska for assuming during post-conviction proceedings that Wiener had killed Monfils. That assertion, however, ignores Kutska's prior and long-held insistence that Monfils had committed suicide **and** Finne's steadfast refusal to credit his client's belief. (R. 265 at 18) It also fails to recognize that Kutska abandoned his conviction that the death was a suicide only after he had read a copy of Dr. Young's in August 1994 and assumed it was correct.

These considerations aside, Finne and Connell conceded that Kutska trusted their judgment and had never told them what to do or not do. (R. 284: 7/8/15 at 123, 153) The failures to pursue any actually or potentially issues were theirs alone.

The trial court's acceptance of a "not-very-good" standard of representation can never be squared with the "leave-no-stone-unturned" duty of diligence that the courts impose on counsel in first-degree intentional homicide cases. *Zimmerman; Thomas;* SCR 20.1: 1.2, ABA Comment [5].

D. The Decision Erroneously Rejects Kutska's Due Process Claims.

Crucial to the State's case was Brian Kellner's bar "re-enactment" testimony. Despite Winkler's denials, the overwhelming evidence establishes that he coerced Brian and Verna Kellner to sign false statements that, wondrously and miraculously enough, just happened to adopt the essence of Winkler's long-held bubbler theory.

The Defendant's Offer of Proof Under Seal Regarding Exhibit Nos. 75-77, 79, and 99 further documents Winkler's coercive conduct and lack of credibility when confronting those whom he perceives as resistant to him. (R. 201) This Court can have no faith in his work or testimony in this case.

The evidence confirms that Wiener had, indeed, leveraged the State's need for his testimony to secure an unopposed sentence reduction and an early release after he had served just 39 months of his original 120-month sentence and that the State had never produced the relevant communications to Kutska's counsel.

The trial court's 2010 decision confirms that Gilliam was the habitual liar that he freely admitted being and why jailhouse informants contribute to wrongful convictions. (App.103)

Each newly-presented item of evidence confirms all of the other items of such evidence. Each item is also fully consistent with and corroborated by the prior statements and testimony of the two bar owners, the four alleged eyewitnesses to the purported beating, the host of others who attested to Winkler's

coercion and threats, and the utter lack of any eyewitness or trace evidence supporting the beating theory.

When the state knows that it has presented false testimony, the defendant is entitled to a new trial if there is a reasonable likelihood that such testimony influenced or affected the jury's judgment, even if the court is not convinced that the jury would have acquitted the defendant in the absence of that testimony. This reduced materiality standard recognizes the doubt that the use of knowingly false testimony casts on the credibility of the state's case. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Giglio,* 405 U.S. at 153-54.

Even if prosecutors themselves do not know that the testimony is false, that knowledge is imputed to the state if police working on the case know that it is false. *Curran v. Delaware,* 259 F.2d 707 (3d Cir. 1958) (false police officer testimony denied due process, even if prosecutor was unaware of it); *Schneider v. Estelle,* 552 F.2d 593 (5th Cir. 1977) (perjury suborned by a law enforcement officer imputed to the prosecution); *Kyles v. Whitle*y, 514 U.S. 419 (1995) (failure to disclose evidence of false testimony known only to police investigators violated due process).

Winkler was an integral part of the investigation from the outset, became its lead detective in early 1994, conducted hundreds of interviews, procured the crucial Kellner "re-enactment" statements and testimony, assisted the prosecution team before and during trial, and testified at trial and in post-conviction proceedings. What he knew about his tactics, activities, concealment or disclosure

of information, and the truth or falsity of his own testimony and that of other witnesses was imputable to the State.

The State had strong reason to know that Winkler coerced witness statements and testimony. Indeed, to pre-empt defense attacks on Winkler's conduct in doing so, it told the jury that he had "maybe threatened" witnesses, but that his doing so was a necessary and appropriate means of overcoming witness "obstruction." (R. 226 at 102-03) The State knew, at minimum, that his tactics posed the serious risk of procuring false statements and testimony, but it willingly embraced them and what they yielded. *U.S. v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991); *U.S. v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000); *Plude*, *supra*.

E. The Decision Fails to Apply the "Reasonable Probability" Test to the Totality of the Evidence.

A defendant is entitled to a retrial when newly-presented evidence impacts the prior evidence sufficiently to create a "reasonable probability" of an acquittal. *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707, 711 (Wis. 1997); *Edmunds*, *supra*.

The trial court's decision disregards Dr. Sens' testimony on the ground that it purportedly did not categorically refute Dr. Young's homicide conclusion. (App. 1) In fact, however, Dr. Sens's testimony did precisely that. She explained why Dr. Young's analysis could not establish a homicide and why any possible homicide determination could be based only on evidence other than an autopsy. If the jury accepted Dr. Sens' reasoning that the manner of death could only be

considered "undetermined" on the basis of an autopsy, it would necessarily reject Dr. Young's "homicide" determination. Given the lack of any direct evidence proving a beating and homicide, the refutation of Dr. Young's autopsy assumptions and conclusions would have dealt the State's case a devastating blow.

The trial court further dismisses Dr. Sens' testimony because it included a reference to the currently greater reluctance among forensic pathologists to conclude that an injury was suffered before death than had been the practice at the time of the autopsy. (R. 284: 7/8/15 at 71, 88) The trial court concludes from that statement that Dr. Sens' testimony contradicting Dr. Young would have been unavailable to Kutska's former counsel at the time of their work and, accordingly, their failure to consult with an independent forensic pathologist could not have prejudiced him.

The trial court errs in this regard because Dr. Sens did not reject Dr. Young's homicide conclusion on the basis of any current trend in determining whether an injury occurred before death. Rather, Dr. Sens did so because: (1) a forensic pathologist is unqualified to make the types of engineering assumptions that Dr. Young formulated and relied on; (2) Monfils was indisputably alive when he entered the vat; (3) there were no tell-tale injuries that could have resulted only from a beating; (4) all of Monfils' injuries could have been suffered in the vat; and (5) the condition of Monfils' body precluded a forensic pathologist from knowing whether he was beaten or had committed suicide. (*Id.* at 21-26, 38-66, 76-78, 84, 89-90)

In sum, Dr. Sens rejected Dr. Young's homicide conclusion because a forensic pathologist could not know **where and how** any of Monfils' injuries had been suffered, irrespective of whether he had been alive or dead when any particular injury occurred.

Even if Dr. Sens had rejected Dr. Young's conclusions because of advances in forensic pathology, however, the trial court would err in disregarding it. Advances in science and medicine, either alone or in combination with other evidence, often establish a "reasonable probability" of an acquittal and/or provide a "sufficient reason" why such evidence was not previously presented. *Edmunds*, *supra*.

The decision dismisses on hearsay grounds the Stein, Thyes, Lundquist, and Liegeois testimony confirming that the Kellners' statements and testimony were perjured. As previously explained, however, such is admissible under the statement-against-interest and state-of-mind exceptions to the hearsay rule and/or the trustworthiness and materiality standards of the Due Process Clause. (R. 206 at 27-29); Wis. Stat. §§908.045(4) and 908.03(3); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *State v. Brown*, 291 N.W. 2d 528, 532-33 (Wis. 1980).

This testimony proves, moreover, precisely what the prior evidence did not—the alleged "re-enactment" was a complete fiction and never happened. Moreover, without explanation, the trial court ignores Ardie Kutska's testimony confirming that the Kellner bar "re-enactment" testimony was false and its 2010

ruling attesting to Gilliam's demonstrable lack of credibility. It thereby allows the Kellner and Gilliam perjury to support Kutska's conviction.

It accepts the State's failure to disclose the communications relating to Wiener's deal solicitation and contends that such evidence, at best, proves that Wiener expected a deal for his testimony. Whatever the trial court believes these communications may establish, they undeniably impeached Wiener's testimony that was critical to the conviction . The State breached its disclosure obligations under *Giglio v. U.S.*, 405 U.S. 150 (1972) and prejudiced Kutska. *Wearry v. Cain*, 577 U.S. ___ (2016) (slip opinion at 9)

The decision dismisses the suicide evidence as merely "cumulative" and pre-existing and blames Kutska for any failure to present it at trial. As shown, however, Kutska's defense counsel made that decision and others. Logically, Finne and Connell could not be "effective" if Kutska was negligent in that regard.

In the end, the decision minimizes what little evidence it does address, ignores the remainder, and fails to analyze the State's case in light of the totality of the evidence. It accepts a conviction based on erroneous forensic pathology, coerced and perjured key fact-witness testimony, disclosure violations, and ineffective counsel.

II. THERE IS "SUFFICIENT REASON" FOR THIS MOTION.

Kutska has "sufficient reason" for this motion under Wis. Stat. §974.06 because the present grounds for relief were not previously presented as a result of his counsel's ineffective representation, Dr. Young's erroneous testimony, key

fact-witness perjury, and official misconduct. *State v. Allen*, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124, 130 (Wis. 2010) ; *State v. Balliette*, 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334, 342 (Wis. 2011).

III. THE CONVICTION SHOULD BE VACATED IN THE INTERESTS OF JUSTICE

Because a host of constitutional violations precluded the jury from learning what actually happened to Tom Monfils, Kutska's conviction should be vacated in the interests of justice. Wis. Stat. §805.15(1); *State v. Vandenberg*, 2010 WI App 135, ¶20, 329 Wis. 2d 710, 790 N.W.2d 542; *Plude, supra; McCallum, supra.*

IV. CONCLUSION

For the reasons stated above and previously submitted in support of the motion, the Court should reverse the decision below.

Dated: March 18, 2016

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §§809.19(8) (b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,941 words.

Dated: March 18, 2016

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have caused an electronic copy of this brief which complies with the requirements of Wis. Stat. §§809.19(12)(f) and 809.19(13)(c) to be filed with this Court.

This electronic brief is identical in content and format to the printed form of the brief that is being sent on this date by Federal Express for filing with the Clerk of the Court on March 21, 2016.

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Dated: March 18, 2016

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I have caused an electronic copy of the appendix which complies with the requirements to Wis. Stat. §809.19(2)(b) to be filed with this Court.

This electronic appendix is identical in content to the printed form of the appendix that has been mailed on this date by Federal Express for filing with the Court.

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Dated: March 18, 2016

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CERTIFICATION OF APPENDIX

I hereby certify that:

Filed with this brief as a separate document is an appendix that complies with Wis. Stat. §809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court entries; (3) the decision and order of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including written rulings or decisions showing the trial court's reasoning regarding those issues.

If the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using initials instead of full names of persons, or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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