STATE OF WISCONSIN **CIRCUIT COURT** **BROWN COUNTY**

STATE OF WISCONSIN,

Plaintiff,

Case No. 95-CF-238

v.

KEITH M. KUTSKA,

Defendant

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

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At each stage of this case, Mr. Kutska's counsel failed to investigate and challenge Dr. Young and the prosecution's cause-of-death theory and to present evidence supporting the contention that Tom Monfils had taken his own life. Instead, trial counsel conceded an essential element of the offense, namely the prosecution's theory that Monfils had been viciously beaten and then placed in the vat. In post-conviction and on appeal, Kutska's counsel similarly failed to investigate and challenge the State's cause-of-death theory and present evidence of suicide, although there were powerfully compelling reasons to do so. Throughout, Kutska's defense counsel gave the prosecution a pass on the most basic question imaginable in an entirely circumstantial homicide case—did someone murder Tom Monfils?

The wholesale concession of that issue effectively left Kutska's defense with the overwhelming burden of proving who killed Tom Monfils. Making that task all the more problematic were the realities that Kutska, more than anyone else in the mill that morning, had personal reasons to be upset with Monfils **and** there was no physical or eyewitness evidence tying anyone (including Kutska) to the alleged beating. How would Kutska's counsel establish at least a reasonable doubt about who killed Tom Monfils if they conceded that Monfils had been murdered just shortly after Kutska and the other defendants were with or near him?

If defense counsel had consulted with a forensic pathologist, such as Dr. Sens, and investigated the evidence pointing to suicide, they would never have (1) conceded the State's cause-of-death theory; (2) failed to challenge Dr. Young's testimony; and (3) failed to show the jury why Tom Monfils was fully capable of taking his own life in the very manner that he died.

In our initial brief, we discussed the multiple misassumptions and errors evident in Dr. Young's testimony and the evidence of likely suicide contained in several fact witness statements and the affidavits supporting the motion. We explained why, if Kutska's counsel had

investigated and obtained the evidence that is now before this Court, they would have presented a convincing reasonable doubt defense. That is not a conclusion based on hindsight, but on a comparison of the newly-presented evidence and cause-of-death contentions with the thinly-presented "some-other-guy-did-it" defense that Kutska's counsel offered. Our contentions are supported by the applicable Wisconsin and federal ineffective assistance of counsel case law and the report of Wisconsin criminal defense lawyer, Steve Glynn. Defense counsels' ineffectiveness undermines confidence in the verdict because the remaining evidence is entirely inadequate and the product of perjury.

The totality of the evidence now before this Court regarding the cause of death, suicide, **and** the perjury of key prosecution witnesses establishes that (1) Dr. Young's conclusions were wrong and unsupportable, and there was strong evidence pointing to the likelihood of suicide; (2) defense counsel was ineffective in failing to challenge Dr. Young and present the evidence of suicide; (3) Brian Kellner's Fox Den Bar testimony was a complete fiction; (4) David Wiener had a strong motive to lie when he gave the police his "repressed memory" story in May 1993, **and** he demonstrably lied when he denied having a deal for his trial testimony; (5) the prosecution was complicit in concealing the deal for Wiener's testimony from defense counsel and this Court; and (6) James Gilliam was a confessed liar, paid-informant, and opportunist who could never keep his story straight no matter how many times he tried to tell it.

The State's attempt to evade the merits of this motion on the purported bases of procedural default, issue preclusion, and delay/laches contentions ignores the plain language of Section 974.06 and the case law applying it.

I. SECTION 974.06 PERMITS A SUCCESSIVE MOTION WHERE THERE IS SUFFICIENT REASON WHY A GROUND FOR RELIEF WAS NOT PRESENTED OR WAS RAISED INADEQUATELY IN THE PRIOR MOTION.

Section 974.06 provides as follows:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental, or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, **unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended motion.** (Emphasis added.)

Accordingly, Section 974.06 affords a defendant the right to present a successive motion when circumstances beyond his or her control precluded a full presentation of all meritorious grounds for relief during the initial post-conviction/appeal proceedings. Because a Section 974.06 motion is a "part of the original criminal action," its "sufficient reason" provision controls when a defendant can pursue a successive post-conviction motion. *State v. Allen*, 786 N.W. 2d 89 (Wis. 2010). Section 974.06's "sufficient reason" requirement is the gateway through which a defendant must pass in order to present a second post-conviction motion and the means by which the courts balance the legal system's interests in efficiency and finality against its need to do justice. When there is "sufficient reason" for a successive motion, an issue preclusion contention is irrelevant.

As the statute and the Wisconsin courts recognize, a defendant's ability to present a meritorious ground for relief fully and adequately at the time of the initial post-conviction motion may be impaired, if not precluded, by (1) prior counsel's ineffective representation and/or (2) the lack of evidence that did not then exist, had not yet been discovered, and/or was still concealed by witnesses or the State. *State ex rel. Rothering v. McCaughtry*, 556 N.W. 2d 136, 139 (Wis. Ct. App. 1996), *State v. Love*, 700 N.W. 2d 62 (Wis. 2005), *State v. Allen*, 786 N.W. 2d 124, 139 (Wis. 2010), *State v. Baliette*, 805 N.W. 2d 334 (Wis. 2011); *State v. Andres Romero-Georgana*, 2014 WI 83; *State v. Edmunds*, 746 N.W. 2d 590 (Wis. Ct. App. 2008). As

the Wisconsin Court of Appeals noted in another context, any interest in finality of criminal litigation must recognize that:

> our system of justice would have little meaning if it failed to provide a procedure for individuals who have substantial credible evidence to prove their innocence. Due process is the quintessential foundation upon which fairness and justice rest, not only at the time of trial, but at all stages of proceedings.

State ex rel. Booker v. Schwartz, 678 N.W. 2d 361 (Wis. Ct. App. 2004).

Whether there is a "sufficient reason" for a successive motion in a particular case is facts-and-circumstances-specific. The decisions applying this standard reflect what the courts have found to be factually adequate and justifiable and what they have not found to be such in a given case. Rather than acknowledging the need for this analysis, the State simply points to *State v. Escalona-Naranjo*, 517 N.W. 2d 157 (1994) and argues that the current motion must be dismissed. *Escalona-Naranjo* establishes no more, however, than that the defendant's ineffective assistance of counsel claim **in that case** lacked factual support.

A. A Defendant Establishes Sufficient Reason Where, as Here, Prior Trial and Post-Conviction Counsel Were Deficient and Later Discovered Evidence Establishes a Reasonable Probability of a Different Result on Retrial.

1. Ineffective Assistance of Counsel as a Sufficient Reason.

As the Wisconsin courts have recognized in such cases as *Rothering, Love, Allen, Baliette,* and *Andres Romero-Georgana, supra*, a defendant establishes the requisite "sufficient reason" for a successive motion presenting (1) an entirely new ground for relief **and/or (2)** additional evidence that supplements a ground previously presented in an initial post-conviction motion, if the defendant alleges the following:

1. Post-conviction counsel was deficient in failing to present the current ground for relief and/or evidence in support of a ground presented in the prior motion;

2. The defendant did not participate in or direct the prior failure to present a ground or additional evidence and/or argument in support of it;

3. The current motion alleges the specific "who-what-where-why-and-how" of counsel's deficient representation and the prejudice resulting from it;

4. The currently asserted grounds for relief are stronger than those previously presented; and

5. It is reasonably probable that the current grounds would change the outcome.

A defendant who, like Kutska, alleges these specific factors is entitled to an evidentiary hearing in support of his motion. *Allen, Love,* and *Baliette*, *supra.* Kutska's specific allegations regarding ineffectiveness and the prejudice resulting from it are supported by fact witness statements to the police and affidavits; the Sens and Glynn expert reports; the deposition testimony of the mill's chief engineer, Anthony Cicero; the evidence of Dr. Young's unfounded assumptions and rank speculation; the absence of any physical evidence corroborating the State's cause-of-death theory; the absence of any eye witness testimony supporting the alleged beating; the evidence confirming that Tom Monfils was capable of committing suicide in the very manner that he died; the evidence of key prosecution witness perjury; and the bankruptcy of the prosecution's arguments to the jury.

Defense counsel knew or should have known that Dr. Young's conclusions were wrong and begged for challenge in light of what she stated in her autopsy report, civil wrongful death case deposition, at the preliminary hearing, and again at trial. Because there was never any physical evidence or eyewitness testimony to confirm the alleged beating, the most simple and logical conclusion was that Monfils had not been beaten.

At a minimum, whether Tom Monfils had been beaten begged for investigation and consultation with a forensic pathologist, other experts, and fact witnesses. Nonetheless, and contrary to the State's assertion in its opposition brief, defense counsel never investigated and challenged the accuracy of and/or basis for Dr. Young's opinions or conclusions. Instead, they conceded the correctness of her cause-of-death conclusions from the outset of their work and in their opening statements. They did so without ever consulting a forensic pathologist, other forensic experts, and investigating whether Monfils may have died as a result of suicide. Affidavits of Royce Finne and James Connell.

As the State acknowledges, Dr. Sens would have provided the same analysis and conclusions set forth in her expert report if defense counsel had consulted with her before trial and/or before the conclusion of the first post-conviction motion proceedings. That is the very point that we have made—if defense counsel had consulted an independent forensic pathologist to review Dr. Young's autopsy report and testimony, they would have learned why Dr. Young's conclusions were unsupportable and wrong and why Monfils' death was fully compatible with suicide. The State's assertion that Kutska has not shown why counsel's failure to consult with a forensic pathologist was deficient simply ignores the content and impact of what Dr. Sens has provided in her report and would have testified at trial and/or post-conviction motion.

Because the forensic pathology and engineering evidence supporting this motion would have undermined Dr. Young's conclusions, the State's beating/vat-disposal theory would have relied primarily on the Kellner, Wiener, Irish, Gilliam, and Charleston testimony that presumed the correctness of Dr. Young's testimony. An attack on Dr. Young's reasoning would, in turn, cast further doubt on that already dubious testimony and on Winkler's contention that he had

never threatened or coerced the indispensable Fox Den Bar component of the prosecution's case from Kellner and Irish.

Had they obtained Dr. Sens' analysis, or that of a similarly qualified forensic pathologist, defense counsel would necessarily have investigated Tom Monfils' thought-processes and emotional history, Coast Guard service, obsessions with death and drowning, facility with tying knots, marital problems, all-consuming commitment to his job and personal standing in the mill, and how the exposure of his 911 call emotionally devastated him. Monfils knew that he would be the subject of enduring gossip, criticism, and condemnation within the mill and outside of it. He knew that others, including his wife and family members, would be embarrassed, if not appalled, by what he had done. He would have to tell his wife why he had not only jeopardized their economic well-being and social standing, but also why he lied when he told her that he had not reported Kutska. (Ex. 29.)

In the days leading up the release of the tape to Kutska, Monfils repeatedly expressed his fears and anxieties of the consequences he would suffer if he were exposed as the anonymous 911 caller. He told the police that he could not sleep. An Assistant District Attorney with whom Monfils spoke in an effort to suppress the release of the tape had no doubt that Monfils was upset. Those who saw him after the tape had been played for him testified to his despondent and pensive demeanor.

The police investigation files in defense counsel's possession contained the statements of numerous mill workers, including Messrs. Stein, Verheyden, Seidl, Gerbensky, Melville, Prue, and Servais, confirming that Monfils was fully capable of taking his life in the manner that he died and that he had a history of depression and other mental problems. (Exs. 26, 32-34, 38, 40, and 108.) These men told the police that Monfils often spoke about his Coast Guard service

experiences of recovering the bodies of suicide victims who had tied heavy objects to their bodies and drowned themselves. **Monfils spoke about how much weight a person had to tie to his/her body to stay submerged long enough to drown.**

These mill worker statements informed police that Monfils was obsessed not only with drowning, but also with the act of dying itself. Although committing suicide in a paper mill pulp vat may have then struck many as a particularly improbable and horrific means of doing so, it was not unprecedented. In 1959, Rhynold Marks, a Green Bay paper mill worker who had no known history of mental illness, committed an apparent suicide in a pulp vat. According to a *Milwaukee Journal* news article (Ex. 113.):

> The **mangled body** of Marks was found...in a 'digester' vat...The 14-foot-high vat, containing wood chips, wood, and acids, had not been functioning properly, so workmen reversed a pump on the vat, equipped with **agitators** to keep its contents in motion, and Marks' body came to the surface.

(Emphasis added.) Before Marks' body was found in the vat, the search for him in the mill revealed that his street clothes were still in his locker, he had not punched out, and he could not be found anywhere else. The search for Tom Monfils and the condition of his body in the vat bore striking parallels. Because Monfils' father and other relatives had spent long careers working in a Green Bay paper mill, it was likely that Tom Monfils had heard the story of Rhynold Marks' suicide.

The police investigation files also included Susan Monfils' statement that her husband was capable of harming himself after the tape was played for him because, as she stated, his life "was in the mill." (Ex. 29.) As defense counsel later learned, Tom and Susan Monfils had experienced problems serious enough to warrant marriage counseling in the months preceding his death. Suicide—not homicide—explained the complete lack of any physical evidence or eyewitness testimony confirming the alleged beating.

Nonetheless, Kutska's counsel failed to investigate the cause of death and the possibility of suicide. Whatever aversion counsel may have had to a possible suicide defense, they were obligated to investigate it thoroughly **before** they could intelligently and professionally reject it. Suicide was and remains an all-too-tragic reality of life. In the Green Bay community at that time, suicide was also far more common than homicide, and a suicide in a paper mill pulp vat was not unprecedented.

Defense counsel never utilized the civil wrongful death litigation discovery process to interview or depose Monfils' parents, siblings, or others, including his co-workers, to ascertain what they knew about his emotional history, Coast Guard service, obsessions with death and drowning, his marriage, stresses and anxieties, and/or his behavior in the time leading up to his death. Consequently, they failed to learn that Susan Monfils told the family that he had killed himself and left notes to such effect. Affidavit of Cal Monfils.

The State has made no serious effort to justify these defense failures. This was, after all, a first-degree murder case that carried the most severe sentence permissible under Wisconsin law—life in prison. Under those circumstances, counsel was obligated to investigate **all** relevant avenues of potential defense and to not simply grab onto a garden-variety "some-other-guy-did-it" contention. *Rompilla v. Beard*, 125 St. Ct. 2456, 2465-67 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522-24 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); and *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). Kutska's counsel could make a "strategic" decision regarding the most effective available defense theory only **after** a full investigation into all relevant or potentially relevant facts. Because they failed to so, they were deficient. *Id.*

Nothing prevented Kutska's counsel from contending that Monfils had taken his own life and presenting that as a threshold defense. The evidence shows, however, that neither trial nor

post-conviction/appellate counsel ever considered the possibility of a suicide defense, even as an alternative to their "some-other-guy-did-it" theory.

As Mr. Glynn states in his report, counsel's concession that the case was a homicide without ever consulting a forensic pathologist and/or pursuing the existing evidence pointing toward suicide was inherently unreasonable and failed to satisfy counsel's duty to investigate the relevant facts thoroughly. Wisconsin ineffective assistance of counsel case law and the ABA criminal defense standards confirm Mr. Glynn's conclusions. *State v. Zimmerman*, 669 N.W. 2d 762 (Wis. 2003) (defense counsel deficient in failing to consult with and present forensic pathology testimony where the cause of death was premised on the medical examiner's opinions); *State v. Glass*, 488 N.W. 2d 432 (Wis. 1992) (defense counsel deficient in allowing a prosecution witness to testify that a scientific test was "inconclusive" when it was, in fact, exculpatory); ABA Standards for the Defense Function, Standard 4-4.1 ("Defense counsel should conduct a prompt investigation of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in case of conviction").

Kutska's post-conviction/appellate counsel had access to the same information and testimony supporting the current motion's assertion that Kutska's trial counsel was deficient in failing to investigate and challenge Dr. Young's and the prosecution's cause-of-death theory. Post-conviction/appellate counsel was obligated to study the police investigation files; the John Doe hearing, preliminary hearing, civil wrongful death case deposition, and trial transcripts; and the trial exhibits to identify errors and potential grounds for relief.

Because a well-established ground for vacating a conviction is the ineffective assistance of trial counsel, post-conviction/appellate counsel was obligated to focus intensively on whether trial counsel was deficient and, if so, whether prejudice resulted from ineffective representation.

Although post-conviction/appellate counsel retained an investigator to pursue additional evidence sufficient to vacate the conviction, neither counsel nor the investigator consulted an independent forensic pathologist or investigated whether the evidence of suicide—already presented in pretrial witness police statements—would have contributed to establishing reasonable doubt. Instead, post-conviction/appellate counsel accepted trial counsel's concessions that Monfils' death resulted from a beating and the disposal of his body in the vat.

Post-conviction counsel supplemented trial counsel's "some-other-guy-did-it" defense with some unconvincing inmate testimony to the effect that David Wiener admitted to involvement in Monfils' murder. Despite the deep flaws evident in trial counsel's approach to the case, post-conviction/appellate counsel raised only one unrelated ineffective assistance of counsel argument—the boilerplate contention that, if any valid objections to any evidence or arguments at trial were deemed waived on appeal, such would be due to trial counsel's ineffectiveness.

Although Mr. Kutska genuinely believed and told his trial counsel from the outset that Monfils had taken his own life, counsel simply presumed that the medical examiner and police had correctly determined that the death was a homicide. According to trial counsel, the case had to be defended on the ground that Kutska was innocent of any involvement in the beating and drowning. After Kutska obtained and reviewed a copy of Dr. Young's autopsy report in August 1994, he finally accepted the conclusion that Monfils must have been murdered for the reasons that Dr. Young stated in it. (Ex. 66.) He did not appreciate that his trial and post-conviction counsel were obligated to consult with an independent forensic pathologist or other experts to review Dr. Young's conclusions and to investigate Tom Monfils' mental and emotional history and condition at the time of his death.

Mr. Kutska was a mill worker with a high school education who relied on his experienced counsel at trial, in post-conviction, and on appeal. That was what anyone in his position would do, particularly if, like him, they had no prior criminal history or contact with the justice system. He had invested, financially and emotionally, in his counsel's experience, knowledge, and abilities. He did not know that his counsel was deficient and prejudicing his defense by failing to challenge the cause of death and pursue the suicide issue.

Although the State points to this Court's favorable comment regarding the quality of the representation that Kutska's trial counsel provided, such was based on the then undisputed presumption that Monfils had been beaten and murdered, Kutska and the other defendants were properly judged guilty, and the only ineffectiveness question was whether counsel's failure to utilize one particular police report at trial was deficient.

2. The State's Delay and Laches Defenses.

Pursuant to Section 974.06, alleged delay and laches are not defenses to the defendant's right to present a successive motion. The statute imposes **no time limit** for the filing of any post-conviction motion, and the Wisconsin appellate courts have declined to apply laches in determining whether a successive Section 974.06 motion should be dismissed without regard to its substantive content. *State v. Brunton,* 552 N.W. 2d 452 (Wis. Ct. App. 1996); *State v. Evans*, 682 N.W. 2d 784, abrogated on other grounds; *State ex. rel. Coleman v. McCaughtry*, *supra*; *State v. Kelley*, unpublished opinion, No. 1990AP 14-CR (2005).

Far from being a reason to dismiss a successive motion, delay may be a necessary predicate to bringing a compelling motion before the court, as in *Edmunds, supra.* There, the defendant contended at trial that an infant's fatal injuries resulted from injuries that her parents had inflicted on her and not from any injury that the defendant caused while the infant was in her

care. The jury rejected her defense and accepted the prosecution's theory that she had shaken the baby to death.

In 1997, the defendant filed her initial motion for post-conviction relief on the ground that the State's "shaken baby syndrome" theory was unsupported by the medical evidence. To support her motion, the defendant proffered the expert reports of two physicians that attacked the State's theory, although their opinions then represented the "minority view" regarding "shaken baby syndrome." The court denied the motion on the dual grounds that the defendant had not shown that she was not negligent in failing to obtain that expert medical testimony before trial and that it was not probable that this new testimony, even if offered at trial, would have changed the result.

In 2006, the defendant filed a second motion for post-conviction relief on the ground that "developments in medical research and literature in the ten years since her trial have provided new evidence that creates a reasonable probability that a different result would be reached in a new trial." In opposition, the State argued that the motion was procedurally barred because the defendant had presented the **identical** claims in her 1997 motion.

The Wisconsin Court of Appeals rejected the State's procedural bar defense because the claim advanced in her second motion was supported by evidence that was "entirely different in character from the evidence offered in her 1997...motion." During the intervening ten years, the testimony upon which the defendant relied in her first motion was transformed from the "minority view" to the "majority view" regarding "shaken baby syndrome."

Because the defendant in *Edmunds* obtained this enhanced evidence only after her conviction, she had not been negligent in failing to seek or obtain it before trial. Because it was not merely cumulative to what she had offered previously in his first post-conviction motion, the

court considered her second motion on the merits. *State v. Armstrong*, 700 N.W. 2d 98 (Wis. 2005); *see also, State v. McCallum*, 561 N.W. 2d 707 (Wis. 1997). In *Edmunds*, the passage of time was critical because the same evidence that the defendant offered in support of her first motion had become far more compelling in light of the medical research that had taken place during the time between the two motions.

Likewise, although there was a twenty-year delay in *State v. Vollbrecht*, 2012 WI App 90, between the initial and successive post-conviction motions, the court adjudicated the second motion and vacated the defendant's conviction.

Accordingly, delay is, at most, merely one factor for a court to consider in determining whether there is "sufficient reason" for a successive motion and, in particular, whether the defendant was personally negligent in failing to present all meritorious grounds for relief **and** all material evidence in support of them in the first motion.

Mr. Kutska has never sought to delay judicial consideration of his conviction and claim of innocence. The delay resulted only because he has lacked the financial ability to pay for investigators and lawyers to pursue and present the evidence of his innocence. Immediately following trial, his financial condition was such that the State Public Defender appointed appellate and post-conviction counsel for him. Following the conclusion of his federal habeas proceedings in 2002, Kutska had no counsel and could only look forward to spending the rest of his life in prison for a crime he had not committed.

His circumstances would later change only because of events over which he had no control. In 2001, the federal courts vacated Mike Piaskowski's conviction. Piaskowski's release then inspired two Green Bay authors, John Gaie and Denis Gullickson, to investigate the prosecution's evidence and theories in the "Monfils Six" case. They interviewed witnesses,

studied the trial and post-conviction motion transcripts, examined the available police investigation files, obtained documents, and painstakingly dissected the prosecution's timeline.

In 2009, after some seven years of work, Gullickson and Gaie published their book, "The Monfils Conspiracy," that documented the serious and manifold evidentiary failings in the prosecution's case that raised profound questions about the defendants' guilt. After reading the book and making their own inquiries, two individuals in the Twin Cities area looked for counsel willing to provide legal representation on a pro bono basis. In early 2013, a Minneapolis law firm agreed to represent Mr. Kutska in that manner. After some twenty months of work, and in conjunction with the Minnesota Innocence Project, the firm submitted the current motion and supporting documents.

The State complains, however, that it has been prejudiced by delay because Dr. Young is deceased and cannot respond to Kutska's attack on her testimony. We note, however, that Dr. Young testified on three separate occasions and prepared an extensive autopsy report. What she stated on each of those occasions is no mystery. If the State wishes to defend Dr. Young's testimony, it can retain one or more other forensic pathologists who may support her testimony and opinions and refute Dr. Sens' analysis. If anyone is prejudiced by her unavailability, it is Kutska who cannot confront her regarding her provably false assumptions and conclusions.

Because Brian Kellner died in March 2014, literally just hours before he was to execute his affidavit confessing that the Fox Den Bar story was purely fictional, the party prejudiced by his unavailability is Kutska who has the burden of proof in this proceeding. As did Dr. Young, however, Kellner has left a wealth of statements and testimony. This Court judged Kellner's credibility at the preliminary hearing, at trial, and at a 1997 post-conviction motion hearing. In 1997, it concluded that Kellner's trial testimony was "barely credible," he had perjured himself

either at trial or in post-conviction, and his 1997 recantation testimony was not credible. This Court can ably weigh Kellner's 2014 confession in its consideration of the present motion.

For the vast majority of fact witnesses, the events relating to Tom Monfils' death remain and will forever be all too clear. The State will not be prejudiced if a retrial were ordered.

Mr. Kutska's case is indistinguishable from *Edmunds* and *Vollbrecht* because the additional evidence on which he relies was obtained only after the conclusion of his initial post-conviction motion and appeal proceedings and the delay in obtaining that evidence was never his fault. This additional evidence was not previously in his counsel's possession either because (1) it did not exist at that time; (2) was concealed by witness perjury and/or by the prosecution; and/or (3) defense counsel was deficient in failing to obtain it.

In addition to the compelling cause-of-death and suicide evidence submitted with this motion, defense counsel also did not have the following at trial or during the initial post-conviction and appeal proceedings:

1. Kellner's 2014 confession that his Fox Den Bar testimony was a complete fiction. Kellner's confession is fully corroborated by a raft of other reliable evidence that we reference later in this brief. His confession and the evidence corroborating it confirm the truthfulness of Kutska's trial testimony denying that the alleged Fox Den Bar incident had ever occurred;

2. The documents proving that Wiener had a deal for his trial testimony;

3. Winkler's personnel records—including the July 1997 draft set of charges documenting his lies, abuse, threats, and fraud. Although this Court conducted an in camera review in 1997 of certain personnel documents, Kutska's counsel did not then, and still does not, know whether they included the information obtained in 2013 pursuant to an open records law

request. These documents relate to Winkler's work before, during, and after the Monfils case and **Winkler's own attribution of his psychiatric illnesses to his work the Monfils case.** They are relevant to his actions in the Monfils case and the credibility of his trial and post-conviction testimony; and

4. This Court's decision in 2010 that Gilliam was not credible.

The case decisions that the State has cited for its issue preclusion, delay, and laches contentions are irrelevant. This is not, for example, a case in which Mr. Kutska has filed eight post-conviction motions. *State v. Casteel*, 2001 WI App 188. It does not involve a sex offender adjudication in a Chapter 980 petition proceeding, as in *State v. Sorenson*, 2001 WI App 251. This is not private civil litigation, as in *Sumpter v. Crozier*, 495 N.W. 2d 327 (Wis. 1993) and *Matter of the Estate of Lohr v. Viney*, 174 N.W. 2d 468 (Wis. Ct. App. 1993). It does not involve a claim of double jeopardy, as in *State v. Nommensen*, 2007 WI App 224, or the timeliness of a petition for a habeas writ, as in *State ex rel. Coleman v. McCaughtry*, 2006 WI 49 or *State v. Morgan*, 565 N.W. 2d 805 (Wis. Ct. App. 1997).

II. THE EVIDENCE DISPROVING THE STATE'S CAUSE-OF-DEATH THEORY AND THE EVIDENCE PROVING THAT KEY PROSECUTION WITNESSES PERJURED THEMSELVES ESTABLISH A REASONABLE PROBABILITY OF A DIFFERENT RESULT ON RETRIAL.

A. Brief Summary of the Wiener Testimony.

Immediately following the discovery of Monfils' body, the police searched for blood and other physical evidence that would confirm a homicide. When they could find no such evidence, Winkler and other detectives turned their attention to finding mill workers and other witnesses who would inculpate the suspects whom the police presumed were the perpetrators.

In the weeks immediately following Monfils' death, Winkler communicated his beating/vat-disposal theory to dozens of mill workers and other potential witnesses. He and

other detectives told those who believed that Monfils had committed suicide that their statements were hampering the homicide investigation. When certain workers denied seeing any alleged physical confrontation and/or refused to provide other statements on which he insisted, Winkler called them liars and threatened them with job loss, treatment as a potential suspect, jail for contempt, and/or other harm.

The first witness who provided the police with any support for Winkler's theory was a mill worker, David Wiener. After an evening of drinking heavily and becoming emotionally unhinged at a mid-May 1993 wedding reception, Wiener told police that he had recovered a "repressed memory" after hearing someone at the reception mention the name "Rodell." According to Wiener, after hearing that name, he recalled seeing Basten and Johnson on the morning of Monfils' death walking together, bent over, and apparently carrying something heavy and/or cumbersome toward the furnace room where the vat was located. The import of Wiener's statement was that he had seen them carrying Monfils' body to the vat.

The multiple problems with Wiener's "repressed memory" statement were self-evident: (1) he had been drinking heavily that evening, was under the care of a psychiatrist who had wanted to hospitalize him, and was highly medicated for mental illness; (2) Wiener's prior police statements and John Doe hearing testimony flatly contradicted his "repressed memory" account; (3) at Wiener's John Doe hearing appearance, the District Attorney called him a perjurer and a likely suspect whom Basten was justified in investigating; (4) Wiener had an axe to grind with Basten for that very reason; and (5) Wiener had a motive to point a finger at others because he was a police suspect in the Monfils homicide investigation.

The police had not only interrogated Wiener soon after Monfils' death, but also polygraphed him. By December 1, 1992, the police identified him as one of nine suspects,

including the six suspects who would later be charged with murdering Tom Monfils. (Ex. 114.) Wiener responded to that scrutiny by taking a four-month "stress" leave from the mill beginning in January 1993. At his February 1994 deposition testimony in the Monfils civil wrongful death litigation, Wiener admitted that he had been a suspect.

In mid-1994, Winkler sent a pair of Wiener's work gloves to the State Crime Lab to determine if they evidenced his involvement in Monfils' death. (Ex. 110.) In mid-October 1994, Winkler obtained Wiener's handwriting samples in connection with the continuing police effort to identify the writer of the fake suicide note found in a phone book in the No. 7 coop. The State's contention that Wiener was never a suspect and had no motive to lie when he gave his "repressed memory" statement in May 1993 was provably untrue.

B. Brief Summary of the Kellner Testimony.

What the police still needed, however, was someone to attest to the alleged beating, particularly because there was no physical evidence proving that any such attack had occurred. By late 1994 and after two years of investigation, the police had failed to obtain any such eyewitness statement. Winkler solved that problem as best that he could in late November/early December 1994 when he confronted Brian Kellner and Verna Kellner Irish, who were friends of Kutska, Kutska's wife, Ardie, and Piaskowski. By then, Winkler knew that Kellner was in serious financial difficulty, Kellner and his wife, Verna, were in the process of divorcing, and that they had two minor children. He also knew that Verna was then and/or had been involved in relationships with various other men.

To force Kellner to sign off on what he wanted Kellner to state, Winkler threatened him over a two-day period with jail, loss of employment at the mill, and loss of child custody if Kellner did not sign the Fox Den Bar "role-playing re-enactment" statement that Winkler wrote for him. On November 30, 1994, Winkler finally obtained Kellner's signature on that statement.

With that statement in his pocket, Winkler then approached Verna Kellner two days later on December 2, 1994 and threatened her with jail and the humiliation of having her private phone conversations[1] exposed at trial unless she signed a statement that Winkler wrote for her embracing the Fox Den Bar "role-playing re-enactment" fiction. As he had with Brian Kellner, Winkler restricted her ability to correct the statement. When Kellner and Verna Irish later attempted to back away from their signed statements before trial, Winkler demanded that they stay on script when they testified. Winkler lied at trial and again in post-conviction when he denied coercing any false statements or testimony from them or anyone else, for that matter.

Kellner's November 30, 1994 statement and later trial testimony alleged that Kutska had placed all six defendants at the bubbler where they verbally confronted and then struck Monfils. The prosecution later acknowledged that the Fox Den Bar "role-playing re-enactment" story that Winkler procured from Kellner on November 30, 1994 was **the** critical breakthrough enabling it to charge the defendants with murder.

With the Kellner and Irish signed statements and Wiener's "repressed memory," the prosecution determined that it could, at last, charge the defendants with first-degree intentional homicide. At trial, it would season the Kellner, Irish, and Wiener statements with a dash of jailhouse snitch testimony from James Gilliam and James Charleston to further incriminate Moore, Hirn, and Kutska.

In its 1997 decisions rejecting all six defendants' post-conviction motions, this Court profoundly discredited the credibility and importance of the Kellner and Wiener trial testimony. Nonetheless, it affirmed the convictions based on (1) the "undisputed fact" that Monfils was beaten and then placed in the vat; (2) the murder occurred within the closed environment of the

[1] Winkler falsely told her that he had tapes of her private phone conversations.

mill; and (3) the defendants were the only individuals with the opportunity and motive to harm Monfils.

C. Kellner's Confession in 2014.

Before discussing Kellner's 2014 confession, we note that this Court erred in concluding that Kellner's 1997 post-conviction recantation refuted only that portion of his trial testimony that claimed Kutska had placed each of the defendants at the bubbler during the alleged Fox Den Bar "role-playing re-enactment" demonstration. That conclusion was incorrect because:

a. Kellner's trial testimony asserted that Kutska made only a highly limited number of "what if' statements when Kutska allegedly described the bubbler confrontation and beating. In his 1997 recantation, however, Kellner cast **essentially everything** that Kutska allegedly said and demonstrated at the Fox Den Bar as being "what if," speculative, and/or reflecting only what Kutska understood the police then believed.

b. Further contrary to his trial testimony, Kellner's 1997 recantation attributed his prior false police statements and testimony to Winkler's coercion. At trial, Kellner declined to state that Winkler had coerced a false statement from him or demanded that he regurgitate its content in his trial testimony. He told the jury that Winkler had "badgered" but not threatened or coerced him. Kellner, Winkler, and the prosecution falsely led the jury to believe that Winkler's tactics were merely a non-coercive and legitimate means of obtaining truthful statements and testimony from Kellner and Irish. Kellner's recantation refuted that characterization and described the threats Winkler used to coerce his false Fox Den Bar account.

As his 2014 confession now makes clear, Kellner was still unwilling to tell the truth in his 1997 post-conviction testimony because he remained intimidated by Winkler's threats, and he feared adverse legal consequences if he confessed to his perjury at trial and the preliminary hearing. Instead, in his 1997 post-conviction testimony, Kellner manufactured a false account of

the alleged Fox Den Bar incident in a misguided attempt to undo the harm from his perjury at trial, while minimizing any risk of harm to himself. Accordingly, his 1997 rendition of the Fox Den Bar story he (1) portrayed the alleged "role-playing" as **entirely** "what if," speculative, and/or Kutska's account of what the police then believed had occurred; and (2) described his trial testimony as the product of Winkler's threats.

By early 2014, Brian Kellner knew that he was dying of cancer and understood that he had only two-to-three years to live. For that reason, he was then willing to confess truthfully that the alleged Fox Den Bar incident had never occurred at all. Kellner's confession is corroborated by other evidence, including:

1. The trial testimony of Ron and Char Salnik, the owners of the Fox Den Bar, denying that the alleged "role-playing demonstration" had ever happened;

2. The trial testimony of Messrs. Delvoe, Boulanger, and Servais—whom Kellner testified Kutska had identified as eyewitnesses to the beating—denying that they had ever seen any such confrontation;

3. The pretrial statements of Jon Mineau, whom Kellner's testimony also identified as an eyewitness to the beating, confirming that he had never seen any such confrontation;

4. Kutska's trial testimony denying Kellner's Fox Den Bar story;

5. The trial testimony of all six defendants denying that they participated in any alleged "bubbler confrontation" or other attack on Monfils;

6. The testimony that Ardie Kutska, Kutska's former wife, will offer at the evidentiary hearing confirming that the Kellner/Irish Fox Den Bar testimony was completely false;

7. The absence of any physical evidence confirming the alleged beating;

8. Dr. Sens' report casting serious doubt on whether **any** of Monfils' injuries resulted from a beating;

9. Winkler's detail sheets documenting his use of powerfully coercive interrogation methods in an effort to obtain witness statements; and

10. Winkler's personnel files documenting his propensities to lie, abuse, threaten, and disregard accepted police procedures to suit his own ends.

To support Winkler's denials that he threatened to deprive Kellner of his child custody rights, the prosecution in post-conviction called a witness from Oconto County to testify that it had no record of any child abuse complaint or investigation relating to Kellner's children. The Court accepted Winkler's testimony denying that he had ever threatened Kellner with loss of child custody.

Following the submission of Kutska's initial brief, his current counsel obtained new information regarding an incident that confirms Winkler's threat to deprive Kellner of custody of his children, Earl and Amanda, if Kellner did not accede to the Fox Den Bar story. In his March 23, 2015 statement, Earl Kellner describes the following (Ex. 122.):

He was at school one day in late November 1994, during the period when Winkler was leaning heavily on his father to provide the "smoking gun" in the Monfils investigation. On that occasion, Earl was introduced to a woman who described herself as a social worker. She began asking him about the various relationships within the Kellner family and what he and his sister were experiencing during their parents' ongoing divorce.

After about an hour discussing the family's dynamics, the woman began asking Earl about Kutska. At that point, "the questions became more menacing and somewhat threatening." The woman then posed such questions to him as the following:

"Are you aware your father has been speaking to the police regarding Mr. Monfils' murder?" "Has your father said anything about Mr. Kutska's involvement in the Monfils' murder?" "Are you aware that your father knows what happened and if he does not tell the police you and your sister will be taken from your home? "Do you know that if your father does not help us, we will be forced to put him in jail and you will be removed from the custody of your parents?"

Toward the end of this "interview," the woman asked Earl if he "knew that my father was involved in this case and that he had helped cover up the murder of Tom Monfils?" Because the last bus that Earl could take home from school had left from the school by the time that this woman had finished talking to him, she drove him home. Years later, Earl learned that his sister had experienced a "very similar interaction on the same day."

Following dinner that evening, his father told Earl that:

> he had been questioned by Mr. Winkler and that he was being threatened to have me and my sister taken away from him. If he did not cooperate then Amanda and I might be taken from the house. At this point, my relationship with my mother had deteriorated to such an extent that my father knew I would not live with her and he was worried about how I would take of Amanda if were separated. He said that he needed my help to keep the three of us together....
>
> My dad assured me that all he had to do was co-operate and everything would be fine at home. He assured me that Keith was not in any trouble but he wanted to know more about the questions I was asked at school. I proceeded to tell him what had happened and the questions that I was asked about him and about Keith.

Before this incident, Brian Kellner had mentioned to Earl that he was being followed to and from work. Kellner was also convinced that their home was bugged. "He knew it was the police following him and he was sure it was because of the Monfils case and our continued interaction with the Kutska family...My father told me that there were some bad things happening involving Keith and that I should keep an eye on things."

Earl Kellner's statement confirms that Winkler used the Kellners' impending divorce and child custody issues to coerce the false Fox Den Bar statement from Brian Kellner on November 30, 1994. To do so, Winkler enlisted the assistance of individuals who were not Oconto County social or child welfare workers, but who were willing to participate in this deceit. Winkler's ploy and other threats achieved their purpose when Kellner signed his false Fox Den Bar statement and testified in accordance with it at trial. Winkler prepared no detail sheets regarding this incident to avoid documenting his coercion. Winkler used the Kellners' impending divorce to threaten Verna Kellner Irish with exposure of her private conversations which he claimed he had on tape and with jail to coerce a similarly false statement and testimony from her.

D. Wiener's Status as a Monfils Case Suspect.

As explained above, when Wiener proffered his "repressed memory" story to the police in mid-May 1993, he not only knew the prevailing police homicide theory, but also that he was an actual or potential suspect in the Monfils investigation. Although the State repeatedly assured the jury and the courts that Wiener was never a suspect and that Wiener had no motive to lie when he gave his "repressed memory" statement in May 1993, Wiener was a suspect, knew that he was such, and did have a motive to lie, both then and subsequently.

E. Wiener's John Doe Hearing Testimony, Recantation, and "Repressed Memory" Statement to Police.

At his mid-March 1993 John Doe hearing testimony in the Monfils case, Wiener testified that he had been with Kutska at a table near the No. 9 coop from between approximately 7:45 a.m. and 8:10 a.m.—the very time during which the police theorized that an "angry mob" led by Kutska had beaten Monfils and carried his body to the vat. Wiener's testimony (and his prior police statement), if true, precluded Kutska's direct involvement in the beating and murder.

The District Attorney responded by accusing Wiener of perjury, cautioning him to "quit this game playing," and instructing him to "start talking about the truth." (Ex. 72 at 659.) After showing Wiener a copy of Wiener's police statement accounting for his and Kutska's whereabouts at the critical time, the District Attorney asked whether there was "anything in that statement that's truthful." (Ex. 72 at 662.) When Wiener testified that he would not lie for anybody regarding a murder, the District Attorney stated "[n]o, I think you would lie, Mr. Wiener."

Wiener attributed his need for a four-month "stress" leave from the mill to his being a "key" witness in the Monfils case because he could testify to Basten's alleged constant harassment of him. That harassment, he claimed, consisted of Basten's repeatedly coming to Wiener's work area, attempting to see what Wiener could have seen from there, and asking Wiener and others about Wiener's actions on the morning of Monfils' disappearance. The District Attorney responded by characterizing Basten's actions in wanting to know what Wiener saw and did that morning as reasonable and responsible. He told Wiener that Basten might well have been onto something in wanting to know what Wiener had seen and done.

Wiener also knew that the police might later learn that he was the author of a fake Monfils suicide note, a fact that would likely bring yet more attention to him as a suspect and/or

obstructer of justice. Therefore, on the day after his John Doe hearing testimony, Wiener called the District Attorney to state that he had **not** been with Kutska until between 8:45-9:10 a.m., an hour later than he had testified at the hearing that he had been with Kutska. That recantation sought to eliminate him as a Kutska alibi witness, aid the prosecution's case, and enable Wiener to separate himself physically from Kutska and the other suspects during the critical 7:45-8:00 a.m. period.

After he had returned to work from his "stress" leave and to protect himself further, Wiener met with the police on the early morning hours of May 16, 1993, after a night of heavy drinking at a wedding reception and while he was on a regimen of multiple prescription anti-anxiety drugs. On that occasion, he reported to police his previously "repressed memory" of seeing Basten and Johnson on the morning of November 21, 1992 carrying something heavy and/or cumbersome toward the area where the vat was located.

This "repressed memory" gave law enforcement not only a way to connect the alleged beating to the alleged disposal of Monfils' body in the vat, but also an incriminating spin on Basten's interest in what Wiener had seen and done on the morning of Monfils' disappearance. Rather than treating Basten's pursuit of that information as reasonable and responsible, it could now portray it as the incriminating response of a murderer determined to learn whether Wiener had seen him and Johnson carrying Monfils' body. For a homicide investigation that had accomplished little other than publicly embarrassing the police, Wiener's "repressed memory" was a positive step, no matter how far-fetched it was.

F. The False Denials of a Deal at Trial and in Post-Conviction.

Wiener was arrested for shooting his unarmed brother to death on November 28, 1993, some six months after giving his "repressed memory" statement to police. The District Attorney

assured the public that Wiener, who had been released on a signature bond, would never receive a deal for his testimony or cooperation in the Monfils case. (Ex. 115.)

Nonetheless, Wiener remained a key Monfils case prosecution witness, and any lawyer representing him would certainly investigate the leverage that Wiener had as such. Consequently, in January 1994, Wiener's defense counsel requested copies of Wiener's prior statements in the Monfils case so that he could gauge their significance to the prosecution. (Ex. 121.)

On March 24, 1994, a jury convicted Wiener of second-degree reckless homicide, and on May 12, 1994, the Court sentenced him to the ten-year maximum period of incarceration. (Ex. 58.) Immediately following sentencing, Wiener publicly expressed his disappointment that the District Attorney had not given him a deal for his cooperation in the Monfils case, and he pledged not to cooperate with the prosecution in Monfils case absent an arrangement. (Ex. 116.)

On October 9, 1995, Wiener testified to his "repressed memory" at the Monfils trial. There, he denied that he had any deal or expectation of any benefit for his testimony, although he acknowledged that he was then serving time in prison for "a crime." The prosecution assured the jury that it had not given or offered Wiener anything in consideration of his testimony.

In early March 1996, less than three months after sentencing of the Monfils defendants, Wiener moved to have his sentence reduced from ten years to seven years. In May 1996, the Court granted his unopposed motion and reduced his sentence from ten years to eight years, thereby making Wiener statutorily eligible for immediate release. (Exs. 58 and 118.)

At the evidentiary hearing on February 13, 1997 in connection with the Moore and Basten post-conviction motions, the State called Wiener to testify that he never had a deal for his testimony. When the District Attorney asked him whether "there was ever any deal or

inducement to get you to testify in the course of the Monfils trial," Wiener responded "[n]o, there wasn't." (Ex. 120.)

Nonetheless, given Wiener's demands for a deal, his testifying at the Monfils trial, and the Court's granting of a sentence reduction in May 1996, Kutska's post-conviction counsel pursued the issue of a deal at the August 21, 1997 evidentiary hearing in connection with Kutska's initial post-conviction motion. At that hearing, Wiener again flatly denied ever receiving any deal or promise for his testimony. In response to the District Attorney's questioning, Wiener testified that whenever he or his lawyers raised the question of a deal or benefit for his testimony, the prosecution's answer was a resounding "no." When the District Attorney asked him whether the District Attorney had ever promised him a sentence reduction if he testified at the Monfils case, Wiener responded that "[n]o you did not. It was a flat, emphatic: No. Don't ask...I received nothing for my testimony." *Id.* On cross-examination by Kutska's counsel, Wiener affirmed that there "was nothing ever given me, promised or accepted. I got absolutely nothing."

At this same hearing, the District Attorney assured this Court that (*Id.*):

> [T]he State never did even approach or agree or consider a deal with Mr. Wiener. They never had to consider a deal with Mr. Wiener...Statements that were given to the police indicating Basten and Johnson long before this incident with his brother. He was not in trouble. He was not giving that statement because he was looking for a time cut. He wasn't in trouble at that time.
>
> His deposition testimony was given subsequent to that, and prior to his trial, prior to his conviction, prior to his ten-year sentence...And the point being is that the State was prepared to introduce Mr. Wiener's deposition at trial. There was no need to cut a deal with Mr. Wiener because the State was going to get his testimony in, or try to get his testimony in, in any regard. There never were any promises made....It could not be done. There never was any consideration of a deal. (Emphasis added.)

On the basis of Wiener's testimony and the prosecution's representations, this Court found that Wiener had no deal or any prospect of one when he testified at the Monfils trial. Indeed, it found that the evidence showed that there had never been any negotiations for one. The Wisconsin Court of Appeals affirmed these findings and added that any such evidence would have been "immaterial" in any event. The basis for that "immateriality" finding was the then-undisputed fact that Monfils had been murdered at the mill and the sufficiency of the other witness testimony (presumably, Kellner's and Gilliam's) linking Kutska to the murder.

Kutska now has documents that his prior counsel lacked. These documents and the facts and circumstances relevant to them establish the following and prove that Wiener's denials and the State's representations regarding any deal were untrue:

1. On October 14, 1994, Winkler visited Wiener in prison for the ostensible purpose of obtaining handwriting samples from him. Although Winkler's detail sheets for that visit make no reference to his having done so, Winkler used that occasion to let Wiener know that he could benefit from cooperating with law enforcement in the Monfils case investigation. That Winkler did so is confirmed in the October 17, 1994 letter that Wiener's attorney, Steve Miller, wrote to Winkler, with a copy to Assistant District Attorney Griesbach. In that letter, Attorney Miller referenced Winkler's recent visit to Wiener in prison during which **Winkler advised Wiener that his "current status" could be affected by his "cooperation" in the Monfils investigation.** The letter stated that "any future contact will have to be arranged through my office." (Ex. 87.)

2. Attorney Miller's October 17, 1994 letter itself refutes the District Attorney's August 21, 1997 representation that the State never approached or considered approaching Wiener regarding a possible arrangement for his testimony. It also confirms that the

District Attorney's Office, at a minimum, knew that Winkler had approached Wiener regarding a possible quid pro quo, if only because a copy of that letter was sent to Assistant District Attorney Griesbach.

3. Before the Monfils trial began, Wiener complained to his counsel and prison officials that he was being exposed to verbal and physical abuse from other inmates because of the publicity surrounding his testimony as a key Monfils prosecution witness. On May 10, 1995, approximately two weeks after Wiener's preliminary hearing testimony in the Monfils case, another Wiener attorney, John Evans, wrote to the District Attorney to state that "Mr. Wiener has advised me that he has been harassed by the other inmates, who claim he is a stool pigeon. Please contact me as soon as possible to discuss these concerns." (Ex. 105.)

4. On May 25, 1995, a month after his preliminary hearing testimony in the Monfils case, Wiener wrote to Attorney Evans to state the following and to ask Evans to share Wiener's letter with the District Attorney (Ex. 106.):

> I am now known as a snitch, not a good thing in prison. I have been totally ostracized by all of the inmates, as soon as new inmates arrive they are informed of what and who I am. I am lucky if I associate with five or six other inmates. For wha[t] it is worth, before I testified, I was well respected in the system.
>
> * * * * *
>
> **In conclusion, it seems to me, that the State (D.A. Zakowski) 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. In other words, I feel I could be put back on D.I.S. or released in some way, if they wish me to testify.** (Emphasis added.)

The District Attorney's comments at the February 13, 1997 Moore and Basten motion hearing regarding Wiener's May 25, 1995 letter are a revelation. When questioning Wiener at

that hearing, the District Attorney showed him a copy of an October 15, 1995 letter[2] that Wiener had written to the District Attorney (approximately one week after Wiener had testified at the Monfils trial). Wiener testified that he wrote that letter to communicate that he was "feeling a bit of heat" after testifying at the Monfils trial. (Ex. 119.)

Because this was the only letter from Wiener or his counsel to the District Attorney's Office that was in evidence at the hearing, the District Attorney added the following when addressing this Court (Ex. 119):

> First of all, there was another letter that Mr. Wiener had sent to our office. I shared that information with co-counsel. We do not have that letter in our possession. My recollection is it was received by our office between the prelim and prior to trial. The contents of that letter was Mr. Wiener's concern about the safety in prison. He was complaining about his treatment, how he was treated in the mess hall, being called a snitch, physical confrontations and so on as a result of his testimony at the prelim. And he expressed his displeasure at having to testify at trial. I believe that's my recollection of that particular letter.

As is evident, in describing what we now know was Wiener's May 25, 1995 letter, the prosecutor omitted the critical point that Wiener had not only expressed his concern that the District Attorney had "turned his back" on Wiener, but also that Wiener had expressly insisted on a deal "if they wish me to testify." The point of this letter was not to relate Wiener's concerns about his treatment in prison or his "displeasure" at having to testify at trial, but to reaffirm his resolve not to testify at all, **unless he got something valuable in return, such as a release from prison.**[3] Rather than acknowledging that this critical letter confirmed defense counsel's contention that Wiener and the District Attorney had negotiated a deal for his trial testimony, the State spun it as confirming that there had not been one.

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[2] We do not have a copy of this letter.

[3] Prison officials determined that Wiener was not eligible for D.I.S. classification and assignment.

The District Attorney's reference to and description of that letter confirm his awareness that it had never been produced to the defense either in pre-trial discovery or in later proceedings. If the letter had been produced to the defense, the District Attorney would have had no reason to make a point of "sharing" information about it with defense counsel in connection with this hearing. Moreover, if that letter had been produced to the defense, counsel would have used it to prove the existence of a deal. Lastly, the prosecution offered no explanation why this letter was no longer in the District Attorney's possession. (We are also left to ask how this same letter later resurfaced and became available to Kutska's current counsel.)

5. On June 12, 1995, Attorney Evans wrote to the District Attorney and enclosed a copy of Wiener's May 25, 1995 letter with it. (Ex.88.) In his June 12, 1995 letter, Evans stated that Wiener believed that the District Attorney had "abandoned" him and that Wiener was being treated as a "snitch." Evans told the District Attorney that he wanted the opportunity to "sit down with you at length to discuss this matter" and asked the District Attorney to provide convenient dates and times when they could meet.

6. The District Attorney's response to Evans' June 12, 1995 letter was documented in Evans' July 24, 1995 letter to the District Attorney stating (Ex. 89.):

> This letter will confirm our recent conference with regard to my client, David Wiener. You expressed to me your desire to speak with David, and I can understand that it is difficult for you to get away from the office. At any rate, we had agreed that something would be scheduled by July 20, 1995. As of today's date, I have not heard from your office.
>
> Please have your office contact my paralegal...to schedule a time for you and I to meet with David to discuss these matters further. I would appreciate if this could be done as soon as possible in order to put David at some sort of ease with all of this.

As is evident from the foregoing correspondence, Winkler's October 14, 1994 in-person suggestion to Wiener that Wiener might be able to improve his "current status" by "cooperating"

in the Monfils investigation ripened between May and July 1995 into correspondence from Wiener's counsel to the District Attorney; a conference between them; and the District Attorney's request for a meeting with Wiener as trial in the Monfils case approached.

7. As previously noted, Wiener testified to his "repressed memory" at the Monfils trial on October 9, 1995 where he denied receiving or expecting to receive any deal or benefit for his testimony. Neither at trial nor in prior post-conviction proceedings did any trial, post-conviction, or appellate lawyer for any of the six defendants ever reference, introduce, or use any of the foregoing correspondence to counter those denials.

Given the number of lawyers involved for all six defendants between April 1995, when the charges were filed, and 2001, when the first round of post-conviction motions, appeals, and federal habeas proceedings concluded, it is difficult to conclude that the prosecution provided these documents to the defense in pretrial discovery. The District Attorney's apparent need to reference Wiener's May 25, 1995 letter at the February 1997 hearing confirms that defense counsel had not only never received a copy of it, but also had not received copies of any of the other deal-related communications. At trial, the prosecution had avoided any reference to any of the foregoing correspondence.

8. Shortly after the defendants were sentenced to life in prison in December 1995, the deal for Wiener's testimony began playing out. In early March 1996, Wiener's lawyer, Steve Miller, sent the District Attorney a draft of Wiener's proposed motion seeking to reduce Wiener's sentence from ten years to seven years. (Ex. 107.)

9. In early March 1996, Attorney Miller also wrote to request that the District Attorney stipulate to the facts that would serve as the basis for that motion. (Ex. 91.) The proposed stipulation stated that Wiener had been subjected to certain physical and mental

abuse in prison since April 1995 following the publicity regarding the arrests in the Monfils case and Wiener's identity as a key prosecution witness. As Attorney Miller anticipated, the District Attorney accepted the proposed stipulation and agreed not to contest the motion.

10. In its May 29, 1996 order reducing Wiener's sentence from ten years to eight years, the Court (Hon. Peter J. Naze) cited the threats, abuse, and risks that Wiener experienced in prison. It found that Wiener testified at the Monfils trial **voluntarily and without any benefit**, and that a sentence reduction was in the public interest because **Wiener's testimony was critical** to securing the convictions in that case. The Court then noted the State's representations regarding the credibility and importance of Wiener's testimony (Ex. 58.):

> In this case, the parties have stipulated that the defendant was given no consideration in exchange for his testimony either at the preliminary hearing or the trial in the Monfils cases. The defendant was called to testify and did so freely, while not under compulsion. At the same time, the State assures that the defendant testified '...quite honestly and forthrightly, and he did so without any consideration on the part of the State whatsoever.' That the State offered Mr. Wiener nothing in return for his testimony was also made clear to the jury at the trial of the Monfils' defendants. Moreover, the State considered Mr. Wiener to be a 'crucial witness' in those matters.

The Court further noted that, although the State had requested "significant incarceration" at the time of Wiener's sentencing, it had now taken "no position" regarding Wiener's motion. The Court reduced Wiener's sentence from ten years to eight years, thereby making him statutorily eligible for parole immediately.

Under the then-prevailing Parole Office policy, a person convicted of an "assaultive" offense, such as Wiener's, could not receive early release at the initial parole eligibility hearing. The Parole Office therefore denied Wiener early release at his September 1996 hearing, but it granted it to him, without District Attorney's Office objection, in August 1997. Although Wiener was later convicted in 2001 of disorderly conduct and placed on probation for a year, his

early release was not revoked. (Exs. 111-112.) In all, Wiener served 39 months of his original 120-month sentence.

11. If the State never considered a deal with Wiener and never approached him regarding one, we must ask why:

a. Winkler raised that subject during his October 14, 1994 meeting with Wiener;

b. The District Attorney's Office did not emphatically terminate all deal-related communications after receiving the October 17, 1994 letter from Wiener's attorney;

c. Wiener believed that the District Attorney had "abandoned" and "turned his back" on him after Wiener was incarcerated and before the Monfils trial;

d. The District Attorney communicated and met with Attorney Evans;

e. The District Attorney requested a face-to-face meeting with Wiener as trial in the Monfils case approached;

f. Wiener, who had consistently demanded a deal as a condition to testifying at the Monfils trial, would have testified there without one;

g. The prosecution had not simply offered Wiener's deposition testimony at trial rather than engaging in the multiple communications and meetings referenced in the foregoing correspondence; and

h. The District Attorney's Office agreed to the stipulation supporting Wiener's sentence reduction motion, further agreed not to oppose it, and then spoke glowingly regarding Wiener's "voluntary" testimony and its critical importance in securing the six convictions.

The prosecution's assurances that it never considered the need for a deal with Wiener because it could have offered his wrongful death case deposition testimony if he refused to testify at trial are unconvincing, to say the least.

Any offer of Wiener's deposition testimony at the Monfils trial would have been dependent on his being "unavailable" to testify pursuant to a valid claim of a Fifth Amendment privilege. There was, however, nothing remotely self-incriminating about his "repressed memory" statements and testimony. Furthermore, the prosecution assured this Court that it never considered Wiener to be a Monfils case suspect or charging him with obstruction for writing the fake suicide note (and repeatedly lying when he denied having done so). Because he was purportedly not a suspect, the prosecution contended that Wiener had no reason to concoct a false "repressed memory" story when he first gave it in May 1993, several months before he shot his brother to death.

A valid claim of the Fifth Amendment privilege at trial might have been premised, however, on Wiener's contention that his "repressed memory" testimony would put him in jeopardy of perjury and/or obstruction charges because it contradicted his prior police statements and John Doe hearing testimony. If this Court sustained that claim, the State would either have had to immunize Wiener, thereby further damaging Wiener's credibility at trial, or convince this Court that Wiener's civil deposition testimony in February 1994 was admissible. Based on its representations at the August 21, 1997 post-conviction hearing, the prosecution would have offered Wiener's deposition testimony as evidence.

That offer was subject, first, to the objection that the deposition testimony was inadmissible because the defendants had no compelling interest in cross-examining Wiener when he testified at his February 1994 civil deposition because they were judgment-proof and

conserving their resources to defend against any future criminal prosecution. In fact, Kutska's lawyer had not attended either of Wiener's February 13 or 24, 1994 deposition sessions.

More to the point, when Wiener testified at his deposition in February 1994, he had not yet been convicted, sentenced, and incarcerated for killing his brother **and** Winkler had not yet paid his October 1994 visit to Wiener to suggest that Wiener could improve his "current status" by "cooperating" in the Monfils investigation. Of course, the subsequent communications and dealings between Wiener and Wiener's lawyer, on the one hand, and the District Attorney, on the other, during the spring and summer of 1995 had also not yet occurred. A defense lawyer questioning Wiener in February 1994 about any actual or potential quid pro quo for his testimony would have been drilling a dry well.

Even if, however, the prosecution succeeded in getting Wiener's deposition testimony into evidence, such would have triggered the admission of all of Wiener's prior pretrial statements and John Doe hearing testimony. At that John Doe hearing, the District Attorney not only called him a perjurer and a legitimate Monfils murder suspect but also defended Basten's interest in Wiener as reasonable and responsible. The prosecution would therefore never have wanted Wiener's John Doe testimony before the jury.

Wiener was well-represented by counsel and fully understood the leverage he had as the Monfils trial approached. The prosecution concluded that it could not afford to call Wiener's bluff and hope that he would testify without a deal. What it wanted and needed was for Wiener, as a live witness, to tell the jury his "repressed memory" story and trust that the jury would accept it as consistent with the prosecution's overall beating/vat-disposal cause-of-death theory. A deal was the price for achieving that desired goal.

No doubt, Wiener's life in prison became more difficult because of the testimony that he gave in the Monfils case. Prisons are, however, more than equipped to protect inmates from harm from other inmates, whether in retaliation for "snitch" or "stool pigeon" testimony or the limitless other interactions that give rise to actual or threatened abuse or violence. Inmates, like Wiener, frequently testify for the prosecution and survive in prison after having done so. There is no evidence that once Wisconsin corrections officials took protective action Wiener was anything but safe in the prison system.

The prosecution's suggestion that Wiener's sentence reduction/early release was merely the unplanned by-product of his selfless insistence upon speaking the truth, even to the point of risking his physical safety, defies reason. At a minimum, Kutska is, and always has been, entitled to present **all** of the evidence of Wiener's deal and the State's efforts to conceal it to a jury.[4]

We close this discussion of Wiener's testimony by referencing the State's September 1, 2000 federal district court brief opposing Kutska's federal habeas petition in *Kutska v. McCaughtry*, Case No. 00-C-0106. At trial, this Court rejected a defense proffer of expert witness testimony intended to refute Wiener's claim that he had repressed and then recovered his memory of seeing Basten and Johnson. Later, certain defendants cited that ruling as error supporting their claims for a new trial.

In arguing in Kutska's federal habeas case that this expert's testimony was immaterial, the State offered the following regarding Wiener's trial testimony (Ex. 120 at 36-37):

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[4] The prosecution has never produced any documents evidencing its or the Green Bay Police Department's dealings with Wiener or his counsel regarding Wiener's efforts to secure a deal for himself. Similarly, we are not aware of any documents that it has produced to the defense regarding its communications with the two jailhouse snitches, Gilliam and Charleston, concerning any potential or actual benefit for their testimony.

> ...[A] jury did not need an expert to tell them it was unlikely that Wiener really had a repressed memory of Basten and Johnson dragging something to the pulp vat. To begin with, this observation, innocuous at the moment it was made, was not the kind of traumatic incident which a person would likely repress.

Accordingly, the State contended that—**contrary to what it had told the jury**—Wiener never had a "repressed memory," he had always remembered the incident, and that his delay in coming forward to tell police resulted from his "severe inner conflict because he had knowledge about Monfils' murder which he did not want to divulge although he thought he should." The State again called Wiener a liar, but sought to justify his lies with the following psychoanalysis and union-bashing excuses:

> No reasonable juror could believe that an extraneous name could really trigger the sudden recollection of a repressed memory about the murder. Rather, the jurors would likely conclude that the pressure finally got to Wiener, and with his inhibitions emotionally and alcoholically diminished, he decided it was time to defy the union code of ***omerta***, and tell what he had known all along...The claim of repressed memory was just an excuse for not revealing the information earlier. (Emphasis added.)

This resort to the union's alleged Mafia-like code of "omerta" mimicked the prosecution's "twisted sense of union loyalty" and a "conspiracy/code/veil of secrecy" trial arguments that sought to explain its palpable lack of evidence. Here, the State doubled-down on what it portrayed, without any proof, as the dark-side of union membership.

These purported excuses for the lack of credible physical evidence and key fact witness testimony ignored the facts. Immediately following Monfils' death, the local unions joined with the mill's management and the police in encouraging the workers to cooperate fully with law enforcement. Untold numbers of union members, including the defendants and the prosecution's fact witnesses, gave multiple statements to the police. They testified in union arbitrations, unemployment compensation hearings, John Doe hearings, civil depositions, the preliminary

hearing, and at trial. The unions contributed financially to the $75,000 reward fund established to secure evidence helpful to law enforcement.

G. This Court's 2010 Decision Regarding Gilliam's Testimony.

In affirming the Kutska and Moore convictions, the Wisconsin Court of Appeals and the federal courts determined that the jury could have credited Gilliam's testimony that, while he and Moore were together in the Brown County Jail, Moore told Gilliam that he had struck Monfils **and** that Kutska had punched Monfils in the face.

Gilliam's testimony was directly at odds with Kellner's testimony and the prosecution's depiction of Kutska as a master manipulator who stood back while others brutalized Monfils. Nonetheless, it supported the prosecution's case against Kutska, Moore, and Hirn, as long as no one was too fussy about the details.

At an evidentiary hearing on November 20, 2009 in connection with Moore's post-conviction motion, Gilliam was utterly incapable of keeping his story straight regarding whether (1) Moore admitted or denied striking Monfils; and (2) Moore attempted or had not attempted to keep others from doing so. Gilliam admitted that he would lie whenever necessary or helpful to do so. (Ex. 94.) The Court's 2010 decision characterized Gilliam's testimony as dependent upon the direction of the wind. That finding, however, came only long after other courts credited Gilliam's testimony in affirming the Kutska and Moore convictions.

The evidence submitted with this motion, when considered with the prior evidence, confirms that Kutska's conviction rested on the perjured testimony of the prosecution's key fact witnesses, Kellner, Wiener, and Gilliam. As the federal courts stated in overturning Piaskowski's conviction, a conviction must be vacated when it may have resulted from perjured testimony material to it. *See also State v. Plude*, 750 N.W. 2d 42 (Wis. 2008). Kellner's confession just days before his death in March 2014 that **all** of his prior Fox Den Bar statements

and testimony were fictitious means not only that his trial testimony was false, but also strongly confirms that the Wiener, Irish, Winkler, Gilliam, and Charleston testimony that was premised on the alleged beating was likewise false.

On a retrial, a jury would learn that Dr. Young was wrong in concluding emphatically that Monfils had been beaten and that no credible fact witness testimony confirmed that any such beating occurred. It would learn that Wiener lied about his sentence-reduction/early-release deal and that the prosecution confirmed his false denials. It would conclude that the gaping holes in the prosecution's case could never be explained by a union "conspiracy/code/veil of silence," "twisted sense of union loyalty," the code of "omerta," and other alleged "conspiracies" to conceal and destroy evidence, but only by Tom Monfils' suicide.

The evidence on retrial would strike "at the heart of the State's evidence at trial," and there is an overwhelming likelihood that a jury would have profound reasonable doubt. *State v. Avery*, 826 N.W. 2d 60 (Wis. 2013); *McCallum, supra*; *State v. Boyce*, 75 N.W. 2d 452 (Wis. 1977).

III. THE COURTS HAVE DISAGREED REGARDING THE CREDIBILITY, MATERIALITY, AND SUFFICIENCY OF THE KELLNER, WIENER, AND GILLIAM TESTIMONY EVEN WITHOUT REGARD TO THE NEW CAUSE-OF--DEATH AND PERJURY EVIDENCE.

In its 1997 post-conviction decisions affirming all six defendants' convictions, this Court found that the Kellner and Wiener testimony was "barely credible" and "immaterial" to the verdicts. In affirming those convictions in 1998, however, the Wisconsin Court of Appeals relied almost exclusively on that testimony. This Court should therefore review this motion in light of the Court of Appeals' conclusions that the Kellner, Wiener, and Gilliam trial testimony was central to affirming Kutska's conviction. The question now presented is whether all of the

evidence creates a reasonable probability that a jury on retrial, at which evidence of suicide would be presented, would not give this testimony sufficient credence to convict Kutska.

A. This Court's Prior Assessment of Kellner's Testimony.

In their post-conviction motions, Basten, Johnson, and Moore contended that Kellner's partial 1997 recantation of his Fox Den Bar testimony required a new trial. They pointed to the District Attorney's remarks to the *Green Bay Press-Gazette* on the day after the Monfils case convictions that affirmed the critical nature of Kellner's testimony. As the District Attorney stated then, the "Kellner testimony came to us in December 1994, and it filled a major gap. . .That was the most significant information we had, in terms of new information. . . .Zakowski said he was well aware Saturday's results would have been different if the jury didn't buy Kellner's story." (*Green Bay Press-Gazette*, October 29, 1995)

These post-conviction statements confirmed the District Attorney's pretrial statement to this Court that the:

> most appropriate evidence that we have, the most significant...was [sic] the statements of Mr. Kellner...That statement was obtained more than two years after the murder. To charge any earlier than that, your honor, I believe would have been an abuse of prosecutorial discretion to charge something without sufficient evidence.

This Court also referenced Kellner's testimony when it cited the evidence supporting the denial of the defendants' motions for acquittal at the close of the prosecution's case-in-chief.

In post-conviction, however, this Court concluded that Kellner's testimony was not important because his testimony, like Wiener's, was "barely credible." It stated that the case would never have gone to the jury if the prosecution's case had been dependent on the Kellner and Wiener testimony. In the Court's view, despite the "publicity attendant upon Mr. Kellner's testimony, it had little, if any, effect upon the jury's verdict." It noted that much of what Kellner testified that Kutska said was of the "'what if variety,'" and it characterized Kellner's trial

testimony as "vastly overblown insofar as its weight and importance are concerned." Although the prosecution may have "thought such testimony to have been crucial to its case, that bubble was burst when Mr. Kellner took the stand at trial." Rather, the jury convicted them because it disbelieved the defendants' denials of guilt.

Because it found Kellner's testimony was "barely credible" and "immaterial," this Court reasoned that his recanted testimony was similarly "immaterial." It concluded that Kellner's recantation would have meant little to the jury because it did not refute the existence of the Fox Den Bar incident as a whole, but only Kutska's alleged identification of certain individuals as being at the bubbler confrontation. Kellner's testimony that Kutska had identified those who had been at the bubbler confrontation was "material" only because it was admissible, but its weight was for the jury to determine. According to Kellner, Kutska had only placed the defendants "near a bubbler," a fact that did "not establish a crime" and "simply places those individuals at a location consistent with testimony given by many other witnesses."

Notwithstanding this finding, Kellner's trial testimony was the **only** evidence that placed any of the defendants at the critical bubbler confrontation. Kellner's description of the alleged beating fit neatly with Dr. Young's testimony and came from someone whom the prosecution portrayed as Kutska's and Piaskowski's friend. The prosecution assured the jury, moreover, that there had not been any "Winkler factor" influencing Kellner's testimony. For such reasons, it argued, the jury should find Kellner "the most credible" and compelling witness in the case.

This Court's analysis of the Kellner trial testimony was also incorrect in stating that it had couched Kutska's statements as "what if" and speculative in nature. At trial, Kellner testified that only on rare occasion had Kutska phrased anything at the Fox Den Bar in "what if" terms. On the contrary, Kellner's trial testimony presented the vast majority of Kutska's

statements as depicting what had, in fact, taken place at the bubbler. At trial, Kellner left no doubt that Kutska affirmed the existence of the bubbler confrontation, each defendant was at the confrontation, and they had beaten Monfils there. In contrast, Kellner's recantation presented nearly every statement that Kutska allegedly made at the Fox Den Bar as being "what if," speculative, and/or a commentary on what the police then believed had happened to Monfils.

Kellner's recantation was also vitally important because he stated that Winkler had threatened him before trial with the loss of child custody, his job, and possible incarceration if he did not sign the statement that Winkler wrote for him and also testify in accordance with that statement. In post-conviction, Kellner refuted his trial testimony which denied that Winkler had coerced any false statements from him using any threats. Based on Kellner's trial testimony, the prosecution told the jury that that there was no "Winkler factor" influencing Kellner. Kellner's recantation made clear that there had been a powerful "Winkler factor" impacting his trial testimony.

Kellner's 2014 confession and the personnel file documents confirming that Winkler was out of control when he was interrogating Kellner and others during 1992 through 1995 must now be added to the evidence that previously led this Court to doubt Kellner's credibility.

B. This Court's Prior Assessment of Wiener's Testimony.

This Court acknowledged that Wiener's "repressed memory" testimony was "damaging" to the defendants, but it viewed it as nothing more than "one piece of evidence presented by the State upon which this case is built." In fact, however, Wiener's testimony was critical because it was the only evidence that connected any defendant to Kellner's "bubbler beating" testimony and the alleged drowning in the vat. Without Wiener's testimony, there was nothing but speculation tying any defendant to the alleged drowning in the vat. After all, according to Dr. Young, Monfils might have survived the beating if he received medical treatment and not been

placed in the vat. Wiener's testimony was so essential to the prosecution that it struck a deal with him to secure it. The Court's May 1996 order granting Wiener's motion to reduce his sentence for murdering his brother further attests to the central importance of Wiener's testimony to the Monfils case convictions.

In 1997, this Court further found that Wiener had been fully and adequately cross-examined at trial and his testimony there was "seriously compromised and his value as a witness diminished." It found that "there is nothing to suggest that there was any promise, either implied or inferred [sic], made by the State. There is absolutely no evidence to suggest any negotiations for a 'deal' with regard to Wiener. In fact, the opposite is true." This Court should now revisit those findings in light of the deal-related documents and the other evidence discussed above.

C. The Inference of Guilt From the Presumption of Murder.

This Court concluded that the defendants' guilt was amply proven because the evidence showed, "without any question, that Mr. Monfils had been the victim of a physical assault and that his death occurred when he was thrown into the pulp vat. His death was not a suicide nor an accident." According to the Court, the State had "presented evidence to show, as best it could, when the attack occurred and who was in the immediate area who could have either participated in or observed the events. At the conclusion of the State's case, there was more than adequate credible evidence which would have allowed the jury to find all defendants guilty." The most damning testimony in the case, the Court concluded, was "primarily that of the defendants themselves." We ask that the Court reconsider each of those findings in light of the totality of the evidence now before it.

D. The Wisconsin Court of Appeals' Rejection of This Court's Analysis.

The Wisconsin Court of Appeals rejected this Court's assessment of the Kellner, Wiener, and Gilliam testimony and found it sufficiently credible and material to affirm all of the Monfils

case convictions. With specific reference to the Basten, Johnson, and Moore convictions, it concluded that such testimony established that between 7:30-8:00 a.m. a group of employees, including the six defendants, confronted Monfils verbally. The "confrontation," it stated, "became physical, and Monfils was beaten and rendered unconscious by a blow to the back of the head." **The defendants had not disputed that Monfils was brutally murdered.**

The Court of Appeals found, based on Kellner's testimony, that Kutska told Kellner at the Fox Den Bar that Kutska "stood back and watched as the others shouted at Monfils, shook the tape in his face, and Hirn shoved Monfils in the chest. " The Kellner testimony also established that Kutska said "what if' somebody hit Monfils in the head with a wrench or a board. Kutska admitted telling Hirn to "'go give [Monfils] some shit.'" Wiener's testimony proved that Basten and Johnson were "hunched over" and appearing to be "carrying something." *State v. Basten*, No. 97-0918-CR; *State v. Moore*, No. 97-1193-CR; and *State v. Johnson*, No. 97-0919, February 17, 1998. The jury could infer that "the defendants intended to permanently dispose of Monfils' body to avoid being identified and suffering the likely consequences of their actions."

The court's sufficiency-of-the-evidence ruling therefore relied on (a) the undisputed "fact" that Monfils was beaten and carried to the vat; (b) the Kellner, Wiener, and Gilliam testimony establishing the defendants' involvement in the beating and drowning of Monfils body in the vat; and (c) the "reasonable inferences" of guilt that a jury could draw from the foregoing. The Kellner and Wiener testimony enabled the jury to "reasonably infer that Kutska was present at the confrontation and participated in the verbal and physical assault of Monfils, and that he took action, independently and collectively, to dispose of the evidence of his actions" because doing so was in Kutska's best interests. *State v. Kutska*, No. 97-2962-CR, September 22, 1998.

The court found that such evidence, along with that which showed the "confrontation escalated to violence rendering Monfils unconscious," was enough to prove the "motive and purpose to dispose of the victim to avoid being identified and suffering the likely consequences of their actions." *Id.* In another reference to Kellner's trial testimony, it noted that a physical confrontation had occurred, even if Kutska expressed it only in "what if" terms. Those statements placed Kutska in a leadership role at the confrontation and could be interpreted as an admission of guilt. It rejected this Court's "barely credible" finding regarding Kellner's testimony because it was the jury's province to determine the weight to accord it, but it accepted this Court's rejection of Kellner's recantation as not credible and immaterial.[5]

In affirming Hirn's conviction, the court similarly relied on Kellner's testimony regarding "statements Kutska made to him at a bar on July 4, 1994 [sic]," including the portions of Kellner's testimony alleging that Kutska told him that Moore, Johnson, Basten, Kutska, Hirn, and Mineau were in the No. 9 coop, got "wound up" about the tape, and decided to confront Monfils. *State v. Hirn*, No. 97-3518-CR, June 30, 1998. Kutska's Fox Den Bar statements sufficiently communicated that someone had given Monfils a "slap upside the back of his head" and somebody had "used a wrench or board or something" to strike Monfils. Kutska's statements to Kellner were trustworthy because they were against his interests. *Id.*

In affirming Piaskowski's conviction, the court similarly relied on the Kellner and Wiener testimony to find that the defendants confronted Monfils between 7:30 and 8 a.m., the ensuing verbal confrontation turned into a physical beating, and the defendants then placed Monfils in the vat. *State v. Piaskowski*, No. 97-2104, September 22, 1998.

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[5] This "immateriality" finding was illogical and erroneous because, unlike this Court, the Court of Appeals did find Kellner's trial testimony to be "material." If so, his recantation of it was also "material."

E. The Federal Courts' Analysis in Piaskowski's Case.

In vacating Piaskowski's conviction, the federal district court (Hon. Myron Gordon) determined that, besides "Mr. Kellner, only two other witnesses gave testimony relevant to precisely how the murder occurred and who did it: David Wiener and James Gilliam." The court found that the case against Piaskowski consisted solely of (a) Kellner's testimony; (b) other testimony placing Piaskowski with Moore in the No. 7 coop just before Monfils' disappearance; and (c) Piaskowski's phone call to the job supervisor.

The court observed that the State "never seriously disputed" that Piaskowski's being "by the bubbler" was "critical" and that such evidence came only from Kellner's testimony. It noted that, although this Court found that Kellner's testimony was "barely credible," that ruling had not precluded the jury from giving it whatever weight the jury wanted to assign it. The prosecution admitted before trial that it lacked enough evidence to prosecute the case until it obtained Kellner's statement, and it argued at trial that Kellner was not only the most credible witness in the case, but also that, if the jury believed him, it had to convict each defendant.

The court determined that the Wisconsin Court of Appeals unreasonably disregarded this Court's assessment of the Kellner trial testimony as "barely credible" and "immaterial" and its further finding that Kellner perjured himself either at trial or in post-conviction.[6] Because the Court of Appeals failed to address those findings, it had left open the possibility that Piaskowski's conviction was based on perjured testimony.

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[6] Judge Gordon found this Court's statements regarding Kellner's credibility confusing because it had found that (a) Kellner committed perjury either at trial or in post-conviction, but failed to specify when he had done so; and (b) the Court had not ruled that Kellner's testimony at trial or in post-conviction was incredible as a matter of law. If Kellner perjured himself at trial, the jury likely relied upon that perjured testimony to convict Piaskowski (and, we add, each of the other defendants, as well).

The court minced no words in characterizing the Wisconsin Court of Appeals' sufficiency-of-the-evidence analysis as not "careful, thoughtful or responsible." It found that the "ultimate finding of guilt in this case required the jury to pile speculation on top of inferences drawn from other inferences. Each step along the way required the jury to eliminate one or more alternatives, thus multiplying the risk of error." Although the prosecution may prove guilt based upon clear inferences from facts and circumstances, it cannot do so, as here, by unconstitutionally presuming guilt and then attempting to show how an inference of guilt could be fashioned from actions and statements giving rise to multiple and conflicting inferences.

The Seventh Circuit likewise found that Kellner's testimony was dubious because he attested to the heavy drinking at the Fox Den Bar (with Kutska allegedly consuming a mind-numbing, if not coma-inducing, 40-plus beers that day), and there were inconsistencies (including those relating to the alleged presence of "eyewitnesses" to the bubbler confrontation) that rendered Kellner's credibility "marginal at best" and "a bit suspect." The Wiener and Gilliam testimony, it found, was no better. Piaskowski's phone call to the supervisor failed to prove his involvement in the beating and murder because, after all, Monfils **was** missing at that time. The State's effort to infer guilt from the phone call, "like so much else in this case, was conjecture camouflaged as evidence."

Although Kellner's testimony placed Piaskowski at the bubbler at the time of the alleged beating, it never ascribed to Piaskowski any action consistent with any intent to harm Monfils. Merely being at the confrontation was insufficient to convict him. Neither Wiener nor Gilliam ever mentioned Piaskowski at all.

F. The Federal District Court's Analysis in Kutska's Case.

In its April 1, 2002 decision, the federal district court (Hon. Lynn Adelman) relied on the Kellner, Gilliam, and Wiener testimony for the following conclusion:

> The testimony of Kellner and Gilliam indicates that petitioner was present at the verbal and physical confrontation with Monfils and participated in the verbal and physical assault on him, which ultimately rendered him unconscious. David Wiener's testimony indicates that defendants Basten and Johnson put Monfils's [sic] body in the vat causing his death.

Kellner's testimony was not only important, the court reasoned, but also the "break" in the case that proved Kutska's involvement in the murder. Kellner's recantation still left Kutska, Hirn, and Moore as participants in the confrontation. Contrary to Judge Gordon's benign view of Piaskowski's call to the job supervisor reporting Monfils as missing, Judge Adelman saw it as "suggesting" that Kutska knew that Monfils' body was being disposed of in the vat. The Seventh Circuit declined to hear Kutska's appeal.

CONCLUSION

The facts surrounding Tom Monfils' death were never properly investigated and presented. Even after the police investigation had gone stone cold for months on end and no physical evidence or eyewitness supporting the presumed murder could be found, the police never re-examined Dr. Young's conclusions or considered the evidence of suicide. Rather, they accused those who believed that Monfils' death was a suicide of lying and obstructing the investigation. Those who refused to lie and tell the police what they wanted to hear were threatened with loss of employment, suspect status, incarceration, loss of child custody, and other harm. Tunnel vision, confirmation bias, pride, and self-interest trumped professionalism.

Dr. Young was provably wrong in concluding that Monfils was savagely beaten and carried to the vat. The evidence that was never presented at trial or in subsequent proceedings shows that Monfils was fully capable of taking his life by drowning in the manner that he died.

The State's fact witness testimony was, at best, dubious at trial and even more so in post-conviction. By the time that he testified at the Moore, Johnson, and Basten post-conviction motion hearing in early 1997, Kellner had given multiple pretrial and post-conviction statements

and testimony that left little doubt regarding his discomfort with his Fox Den Bar account. Verna Kellner Irish expressed similar misgivings before and at trial. They both feared retribution, however, if they told the truth.

By early 1997, this Court found that the Kellner and Wiener trial testimony was "barely credible" and "immaterial," that Kellner committed perjury either at trial or in post-conviction, and that Kellner's recantation was also not credible. The logical conclusion from the foregoing is that Kutska's conviction was based on Kellner's perjured trial testimony. In addition to what this Court concluded regarding Kellner's testimony in 1997, we have now shown that Kellner confessed that the entire Fox Den Bar story was fictional.

At Wiener's John Doe hearing appearance, the District Attorney accused him of perjury and being a suspect. At trial, the prosecution conceded that he lied when he denied writing a fake suicide note. In federal habeas, the State accused Wiener of lying about having a "repressed memory." Because his story was central to the prosecution's case, however, the prosecution gave him a sentence-reduction-early-release deal for it. Wiener perjured himself at trial and again in post-conviction not only when he repeated his false "repressed memory" story about Basten and Johnson, but also when he denied receiving any benefit for his testimony. The prosecution compounded the prejudice to Kutska by affirming Wiener's false denials and failing to disclose the documentary evidence proving his lies.

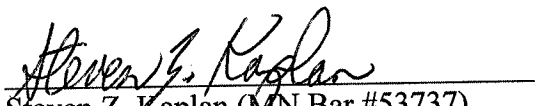
In his 2009 post-conviction testimony, Gilliam admitted that he was a practiced liar and paid-informant who had lied to several people about the Monfils case. His contradictory accounts regarding what Moore had allegedly told and not told him convinced this Court that he was incapable of telling the truth. Unfortunately, the Wisconsin Court of Appeals and the

federal courts had, by that time, already relied upon Gilliam's testimony in affirming the Kutska and Moore convictions.

Wrongful convictions are an established fact of life. If we did not fully appreciate that when this case was tried some twenty years ago, we do so now, in light of advances in DNA and forensic science, an understanding of how police interrogations can induce false confessions and statements, and the fact that eyewitness identifications are often false. In 2014, 125 wrongfully convicted individuals were exonerated in the U.S., many only after decades in prison. The Brown County Circuit Court recently vacated the conviction of a man who was incarcerated for seventeen years after being wrongfully convicted of child sexual abuse. The evidence presented with this motion establishes overwhelming doubt regarding the reliability, credibility, and sufficiency of the prosecution's case against Mr. Kutska. This Court should vacate his conviction and grant him a new trial.

Dated: March 24, 2015

Respectfully submitted,



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