STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP185

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH M. KUTSKA,

Defendant-Appellant.

APPEAL FROM AN ORDER ENTERED IN
THE CIRCUIT COURT FOR BROWN COUNTY,
THE HONORABLE JAMES T. BAYORGEON PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because there is no reason to believe it would add anything significantly different to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

SUPPLEMENTAL STATEMENT OF FACTS

The Green Bay police received an anonymous call reporting that the defendant-appellant, Keith M. Kutska, was going to steal an expensive electrical cord at the end of his shift at the James River paper mill. (228:23-26.) The caller warned that Kutska was known to be violent. (228:27.)

A plant security guard tried to stop Kutska when he left work, but Kutska bolted out the door without letting the guard inspect his bag. (228:32-33.) Because of this evasion, Kutska was suspended for five days. (260:217-18.)

Upset about his suspension, Kutska decided to find out who snitched on him. (264:239-41; 266:63-65.) Despite the fact that Kutska had stolen the cord (260:214-15), he asked the police for a recording of the anonymous call so he could "clear his name." (228:40, 43.)

Despite the fact that the informant pleaded with the police not to release the recording because he feared for his safety, the police gave Kutska a copy of the tape. (228:43, 46, 49-50, 54; 264:241-42.) Kutska immediately recognized the voice on the recording as that of Tom Monfils. (264:243.)

Shortly after seven the next morning, Kutska confronted Monfils with the tape in the control room or "coop" of the number seven machine at the paper mill. (260:259-62.) Monfils admitted the voice on the recording was his. (260:262-63.) He said that he called the police because he was a concerned employee who had a future with the company. (248:296.)

Kutska then played the tape in the coop of the neighboring number nine machine for a group that included Michael Piaskowski, Dale Basten, Michael Johnson, Reynold Moore and Michael Hirn. (236:151-52; 240:239-40; 246:3-6; 260:276-78.) Basten and Johnson were friends who worked together on a maintenance team at the mill. (248:177; 261:240.)

The men who heard the tape were upset that Monfils broke an unwritten union rule by turning in a fellow member, especially since Kutska implied that Monfils falsely accused him. (236:42-43, 115; 265:46-47; 267:33; 270:4, 66.) The level of collective anger escalated as each of the men fed off the comments made by one another. (237:84-85.) When Kutska encouraged the others to give Monfils some "shit" for snitching on a union brother, the group decided to let Monfils know how they felt. (246:7-8, 75-76; 264:262; 266:81.)

When Monfils finished an operation on his machine about 7:35 a.m., he was surrounded by the entire group from the neighboring control room. (228:147-49; 246:7-8, 63, 102, 218; 263:38-39.) They started hollering and swearing at

Monfils. (246:9, 77.) Hirn shoved him. (246:12; 261:130-32.) Kutska punched him in the face. (261:170.) Moore hit him on the back of the head, possibly with a wrench or a board. (246:10-12, 180; 261:131-32, 170-71.) Everyone joined in kicking and beating him. (261:169-70, 179-80, 182.)

Monfils suffered numerous injuries to his head, neck, chest and abdomen, including a depressed fracture on the back of his skull. (240:185-98, 204, 208.) When the attack ended, he was unconscious but alive, lying there curled up in a ball. (240:222; 261:183.)

About 7:40 a.m., David Wiener observed Basten and Johnson in the area between the paper machines and the vat that supplies them with paper pulp. (232:225; 240:60; 248:128; 251:94-97.) Johnson was walking backwards about five or six feet ahead of Basten. (251:98.) Both were bent over and appeared to be carrying something, although Wiener could not see what it was. (251:98-99.) They were heading from the machines toward the vat. (240:60; 251:100.)

Kutska, Moore and Piaskowski returned to the number seven coop shortly before 7:45 a.m. (228:151-52, 156-57; 232:21.) Kutska told Piaskowski to notify a supervisor that Monfils was missing, even though it was no more than ten minutes since he was last seen, it was not unusual for mill employees, including Monfils, to be away from their work stations, and management did not care if they were. (228:159-60, 164; 232:190; 237:212; 232:82; 237:212; 240:87.)

Piaskowski complied, telling the supervisor that "[s]ome heavy shit [wa]s coming down." (237:207-09; 257:99.)

That afternoon, Kutska spray washed the floor around the paper machines. (260:302-03.)

Although a search for Monfils began immediately, his body was not found until after the pulp vat was drained the next morning. (236:228; 237:221-29; 240:11, 16-20, 157; 248:128.) A weight which had been kept near the number seven machine was tied around his neck with a rope from the same location. (232:4-7; 240:159-60.)

Monfils was unconscious but alive when he was thrown into the vat. (240:177-78, 194, 222.) He died by asphyxiation due to aspiration of paper pulp and ligature strangulation. (240:177-78, 200.) When Monfils was found, his body was already in an advanced state of decomposition. (240:192.) In another day or two the body would have been dissolved into the pulp. (240:199.)

After Monfils' body was found, Basten began acting weirdly. (251:230.) Basten suggested that there had been a fight, that Monfils had been hit hard on the head, that the men involved in the fight thought they had killed him, and that they threw him into the pulp vat. (260:314-15.) Basten told people how he would have disposed of Monfils. (251:230.) He acted out how Monfils could have been kicked in the groin, a fact that had not been publicly disclosed, and how Monfils could have been weighted down and put into the vat. (255:26-28.)

Basten kept coming to Wiener's work area to determine what could be seen from the table where Wiener had been sitting and to find out what he knew. (251:112-14, 207, 228-33; 254:60-61, 97-98.) When Basten learned that Wiener was going to be a witness in the case, he called Wiener a "fuckin' squealer." (261:127.)

When Basten was questioned by the police, he started to cry and said he did not mean to kill Monfils. (261:240.) He said he should have left town when the police started questioning him because now they knew that "we did the shit." (261:124.)

ARGUMENT

I. Kutska failed to prove that he was denied the effective assistance of counsel at his trial over twenty years ago.

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305. A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893.

On review, an appellate court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Thiel*, 264 Wis. 2d 571, ¶¶ 21, 23. Whether counsel's performance was deficient and/or prejudicial to the defense are questions of law which are determined independently. *Thiel*, 264 Wis. 2d 571, ¶¶ 21, 23.

A. Kutska failed to prove that his attorney performed deficiently by not procuring an expert who would have contradicted the testimony of the State's pathologist regarding the nature and timing of the victim's injuries.

To prove that his attorney performed deficiently the defendant must overcome a strong presumption that counsel acted reasonably, and establish that counsel's representation fell below an objective standard of reasonableness. *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115; *Thiel*, 264 Wis. 2d 571, ¶ 19; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986).

There is a range of reasonableness, *Chen v. Warner*, 2005 WI 55, ¶ 37 n.24, 280 Wis. 2d 344, 695 N.W.2d 758, permitting different people to reasonably make different decisions in the same circumstances. *State v. St. George*, 2002 WI 50, ¶ 58, 252 Wis. 2d 499, 643 N.W.2d 777; *State v. Robinson*, 146 Wis. 2d 315, 330, 431 N.W.2d 165 (1988). So to prove deficient performance, the defendant must demonstrate that his attorney's acts were outside the wide range of professionally competent assistance that could be

provided in the case. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990); *Johnson*, 133 Wis. 2d at 217.

To be reasonable is not to be perfect, so a decision can be perfectly reasonable even though it is mistaken. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014); *State v. Houghton*, 2015 WI 79, ¶ 44, 364 Wis. 2d 234, 868 N.W.2d 143; *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). Thus, the test for ineffective assistance does not assess the legal correctness of counsel's judgments, but the reasonableness of those judgments under the circumstances of the case. *State v. Weber*, 174 Wis. 2d 98, 115, 496 N.W.2d 762 (Ct. App. 1993).

The reasonableness of an attorney's acts is judged deferentially on the facts of the particular case viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695; *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583; *Johnson*, 133 Wis. 2d at 217. An attorney's performance must be judged on the facts available to him at the time. *State v. Goetsch*, 186 Wis. 2d 1, 17, 519 N.W.2d 634 (Ct. App. 1994).

Under the test for deficient performance, defense counsel's duty is not necessarily to make a successful investigation, but rather to make a reasonable investigation or decision not to investigate considering the circumstances existing at the time. *Carter*, 324 Wis. 2d 640, ¶¶ 22-23; *State*

v. Hubert, 181 Wis. 2d 333, 344, 510 N.W.2d 799 (Ct. App. 1993).

An attorney does not perform deficiently merely because he "did not investigate enough to find the right expert." *Hubert*, 181 Wis. 2d at 343.[1]

Deficient performance is "necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

A good part of the legal community practiced their profession in this case.

No fewer than nine defense attorneys, Royce Finne, who represented Kutska, Timothy Pedretti, Robert Parent, Gerald Boyle, Jonathan Smith, Avram Berk, Nila Robinson, Eric Stearn and Vance Waggoner, participated in the trial.[2] Eleven other attorneys, James Connell, who represented Kutska, Kelly Christopher, Christopher Dickinson, Robert

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[1] Kutska cites no authority for his remarkable assertion that counsel's failure to consult with an independent pathologist is presumptively prejudicial. (Appellant's Br. 30.) The case cited by Kutska immediately after this assertion states that counsel's failure to investigate must be assessed for reasonableness "giving a heavy measure of deference to counsel's judgments." *State v. Zimmerman*, 2003 WI App 196, ¶ 42, 266 Wis. 2d 1003, 669 N.W.2d 762. *See State v. Smith*, 207 Wis. 2d 258, 278-80, 558 N.W.2d 379 (1997) (discussing circumstances where prejudice presumed).

[2] The names of these attorneys are listed on the trial transcripts in this case.

Byman, Michael Brody, Jodi Rosen, Rachelle Niedzwicki, James Rebholz, Lew Wasserman, Lawrence Marshall and Christopher Van Wagner, handled the postconviction motions and appeals for the various defendants.[3]

Yet not one of these twenty lawyers, many of whom enjoyed reputations as pre-eminent criminal defense lawyers in their day, raised any question about the autopsy findings of the State's pathologist, Dr. Helen M. Young. (284A:104.)[4] Not one of these twenty lawyers attempted to locate their own pathologist in an attempt to question Dr. Young's findings. (284A:125.) Not one of these twenty lawyers ever suggested that there should have been an attempt to locate a defense pathologist.

Surely, the uniform performance of twenty lawyers reflects the practice and expectations of the legal community at the time regarding the consistent decision of one of their number not to try to find his own pathologist. So does the record.[5]

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[3] The names of these attorneys can be found in this court's electronic records of the appeals filed by each of the six defendants.

[4] All three separately paginated transcripts of Kutska's 2015 postconviction hearing are in a single binder numbered Record 284. The State will differentiate them by referring to the transcript of the proceedings on July 8, 2015, as 284A, the transcript of the proceedings on July 9, 2015, as 284B, and the transcript of the proceedings on July 22, 2015, as 284C.

[5] It was inappropriate for Kutska to call Attorney Steven Glynn to testify on the legal issue of whether Attorney Finne rendered ineffective assistance. *State v. McDowell*, 2003 WI App 168, ¶ 62 n.20, 266 Wis. 2d 599, 669 N.W.2d 204, *aff'd*, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d

Finne testified at the postconviction hearing that the reason he did not attempt to find another pathologist was that he had confidence in Dr. Young's findings. (284A:126.) He and some of the other defense lawyers had worked with her previously. (284A:126.) They had no reason to question her competence and thought she was "state of the art." (284A:95, 126.)

Finne believed that if he shopped for his own forensic specialist, he would have likely encountered other pathologists who came to the same conclusions as Dr. Young. (284A:126.)

The pathologist hired by Kutska twenty years later proved that Finne was absolutely right.

Doctor Mary Ann Sens was hesitant to say with certainty at the postconviction hearing in 2015 whether Monfils' injuries were inflicted before or after he died. (284A:60-61.) But as the circuit court found, "Dr. Sens clearly stated that she believes this hesitancy to make definite rulings is distinctly different than the opinions held

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500. In any event, Attorney Glynn's opinions are inconsistent with the applicable law and the record in this case because they fail to judge counsel's performance deferentially on the facts viewed from counsel's contemporary perspective under then prevailing professional norms to eliminate the distortion of hindsight. Attorney Glynn's opinions are based on what he believes an attorney should do now, rather than relevantly relating to the situation faced by Kutska's attorney more than twenty years ago. Moreover, Attorney Glynn's views are at odds with the views of twenty other attorneys who did have a contemporary perspective.

by forensic pathologists at the time of [Kutska's] trial" in 1995. (169:15, A-App. 15.)

Doctor Sens testified that back in the 1990s, pathologists thought they could determine whether injuries were inflicted premortem or postmortem "down to the minute." (284A:60, 71, 88.) Doctor Sens stated that "in all fairness to Dr. Young, back in the eighties and nineties when I started this, we thought we could do it." (284A:88.) Doctor Sens admitted that back then she made calls she would not make now. (284A:88.)

So if Finne had attempted to find another pathologist back in the 1990s, it is quite likely that anyone he contacted would have had the same opinion as Dr. Young regarding the time the injuries suffered by the victim were inflicted. Even if Finne had contacted Dr. Sens in the 1990s, it is likely that she would have seconded the opinion of Dr. Young.

Although an attorney may be "deficient by failing to present available alternative testimony" to the expert testimony presented by the State, *State v. Zimmerman*, 2003 WI App 196, ¶ 42, 266 Wis. 2d 1003, 669 N.W.2d 762, a defendant fails to prove that his attorney performed deficiently when he fails to show that any alternative testimony was available at the time.

Finne's decision not to search for a defense pathologist was a reasonable strategic decision under the circumstances as they existed at the time, and twenty years later is

virtually invulnerable to second guessing. *See State v. Westmoreland*, 2008 WI App 15, ¶ 20, 307 Wis. 2d 429, 744 N.W.2d 919.

Kutska failed to show that Attorney Finne performed deficiently by not finding a pathologist who would have disagreed with the findings of Dr. Young in 1995.

B. Kutska failed to prove that he was prejudiced by not having his own pathologist.

Deficient performance is prejudicial when the probability of a different result, absent the error, is sufficiently strong to undermine confidence in the reliability of the existing outcome. *Allen*, 274 Wis. 2d 568, ¶ 26; *Thiel*, 264 Wis. 2d 571, ¶ 20.

It is not enough for a defendant to speculate on what the result of the proceeding might have been if his attorney had not erred. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999); *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994); *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). The defendant must show actual prejudice. *State v. Keeran*, 2004 WI App 4, ¶ 19, 268 Wis. 2d 761, 674 N.W.2d 570; *Erickson*, 227 Wis. 2d at 773; *Wirts*, 176 Wis. 2d at 187.

When the defendant alleges that his attorney was ineffective for failing to take some action, he must show with specificity what that action would have accomplished if it had been taken, and how its accomplishment would have probably altered the result of the proceeding. *State v. Byrge*,

225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; *Flynn*, 190 Wis. 2d at 48.

A defendant who claims his attorney was ineffective for failing to investigate must allege with specificity what the investigation would have revealed and how the evidence which was found would have altered the outcome of the proceeding. *Thiel*, 264 Wis. 2d 581, ¶ 44; *State v. Leighton*, 2000 WI App 156, ¶ 38, 237 Wis. 2d 709, 616 N.W.2d 126.

Kutska failed to show that he was prejudiced by his attorney's failure to find an expert witness who would have contradicted the opinion of the State's pathologist because he failed to show that any amount of investigation would have or could have found any such witness.

Kutska's own evidence shows that any pathologist his attorney might have contacted in 1995 would have probably agreed with Dr. Young. (284A:60, 71, 88.) Indeed, even if counsel had contacted Dr. Sens in 1995, she would have probably agreed with Dr. Young. (284A:88.)

Because counsel could not have found anyone who would have disputed Dr. Young's findings that the victim was severely beaten and knocked unconscious by a blow to his head before he died, (240:180-81, 187-88, 191-98, 200, 208, 222), a defense based on speculation that the victim committed suicide would have been impossible.

Kutska lists a series of sequentially numbered facts and circumstances he says his attorney knew or should have

known. (Appellant's Br. 36-39.) Most are broadly sweeping assertions and conclusions that are not supported by references to any specific pages in the record.

In any event, Kutska fails to explain how any of these facts or circumstances could have changed the result of his trial.

1. Kutska says he firmly believed that Monfils committed suicide.

Actually, Kutska tried to falsely deceive people with the story that Monfils committed suicide to deflect blame from himself as the principal perpetrator of Monfils' murder.[6]

The evidence presented at the trial showed that Kutska was very much aware that Monfils had been murdered as the victim of a vendetta for reporting Kutska to the police as a thief. As shown in the State's Supplemental Statement of Facts, Resp't's Br. 1-5, Kutska was present directing events when Monfils was beaten and killed. He cleaned up the crime scene. And he reenacted the murder for some of his friends afterwards. (246:3-20, 63, 218.)

2. Kutska claims there was no direct evidence of a beating.

But as shown in the State's Supplemental Statement of Facts, there was plenty of evidence, even apart from the

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[6] This was a variant of the "some other dude did it" defense. The "other dude" was Monfils.

forensic testimony, that Monfils was beaten, knocked unconscious and thrown into the pulp vat. Although much of this evidence was circumstantial, circumstantial evidence can be, and often is, stronger than direct evidence. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

The evidence shows that there were six eyewitnesses to the beating. But since all six were charged as parties to Monfils' murder, fear of self-incrimination most simply and completely explains why there was no unequivocal eyewitness evidence of a beating.

The injuries to Monfils' body (240:180-81, 187-88, 191-98, 200, 208, 222) were physical evidence attesting to the fact that there was a beating.

To present even an arguable defense of suicide, Kutska would have had to overcome all the transactional as well as forensic evidence that Monfils was murdered. Kutska has never explained how his attorney could have possibly done that. Simply ignoring this evidence does not work.

In light of all the evidence that Monfils was murdered, a defense that he committed suicide would have been ludicrous. The theory would have had to be that Monfils hit himself on the back of the head, knocked himself out, and while he was unconscious tied a weight around his neck, walked to the pulp vat, and jumped in.

3. There is no evidence in the record that Monfils had any ability to inflict self-harm. There is no medical diagnosis of any suicidal tendencies, no history of any

attempts to commit suicide, no evidence of any threats to commit suicide.[7] There are only a few speculative lay opinions, unsupported by any facts, suggesting that some people may have thought Monfils was suicidal. Monfils' wife said she did not know if he would harm himself although it was possible. (147, Ex. 29:3, A-App. 175.)

The fact that Monfils knew how to tie the type of knot in the rope around his neck is meaningless since it is a common knot, easy to tie, often used by sailors and boy scouts. (284B:73-74, 80-85.)

The most notable fact about the knot is that it was tied in back of Monfils' neck. (240:174.) Kutska has no explanation for why or how Monfils might have tied it there.

The fact that Monfils told some people about his experiences with drowning victims when he was in the Coast Guard cannot reasonably be stretched into an obsession with death by drowning. People in the military often talk about things that others have not experienced in civilian life. The fact that veterans might talk about experiences where others have died does not mean they plan to kill themselves.

Kutska says that the police reports were laced with statements regarding a possible suicide. But lace is by nature flimsy and full of holes.

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[7] There were some notations in a telephone book in one of the coops that could be interpreted as a suicide note, but they were not written by Monfils. (257:126-29, 163-64.) The notes may have been written by someone who wanted to make Monfils' death seem like a suicide.

4. Monfils was indeed under pressure because of his exposure as the person who snitched on Kutska. He frantically feared for his safety, for good reason as it unfortunately turned out, because Kutska was a violent man. (228:27, 49-50.)

The undisputed fact that Monfils was concerned about being harmed is completely contrary to any unsupported speculation that he might have harmed himself.

While Monfils undoubtedly faced a loss of personal standing with Kutska's cronies (147, Ex. 72:659), there is no evidence that he faced any loss of personal standing with other workers at the paper mill. Monfils' wife thought that everyone would understand his motives and remain friends with him. (147, Ex. 29:3, A-App. 175.)

In any event, there is no evidence that Monfils cared about his personal standing, only his personal safety.

Nor did Monfils face any loss of his job. To the contrary, Monfils believed that reporting Kutska's theft would help his position as an employee with a future in the paper mill. (248:296.)

5. Kutska misunderstands the deposition testimony of Anthony Cicero.

Cicero did not say that the vat liquid was approximately 96% water and 4% finely ground pulp particles, as Kutska claims. (Appellant's Br. 9.)

"Liquid" is a word that Kutska uses. Cicero never used that term. Throughout Cicero's deposition he used terms like

"stock," "pulp" and "slurry" when speaking about the contents of the vat. (147, Ex. 14, A-App. 131-57.)[8]

In discussing the weight of the pulp, Cicero mentioned that it was "roughly four percent consistency" (147, Ex. 14:39, A-App. 138), but he never explained what he meant by that. He never said anything about the appearance of the stock, pulp or slurry that would contradict an observation that it looked like oatmeal.

Indeed, the fact that Monfils' body was not discovered until the vat had been drained more than a day after he was thrown in (240:11, 16-20; 248:128), shows that the pulp in the vat was thick enough to obscure a body, like oatmeal.

Some idea of what the pulp looked like can be gleaned from pictures of the emptied vat which show a fuzzy grayish-white opaque residue clinging to the sides and floor of the vat. (147, Ex. 48, A-App. 198-99.)

These pictures are consistent with the statements in Dr. Young's autopsy report that flecks and clumps of paper pulp were present on Monfils' body, and that his nostrils, trachea and lungs were filled with paper pulp material. (147, Ex. 16:3, 5, 16, 27, A-App. 112, 114, 119.)

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[8] Kutska keeps repeating that Monfils drowned, as if he died from liquid filling his lungs. But Monfils died from inhaling paper pulp that, along with the rope around his neck, cut off the supply of oxygen to his lungs. (240:177-78, 200.) Paper is made mostly from trees. For a brief explanation of how wood is turned into paper *see How Products are Made,* Vol. 2, *Paper,* http://www.madehow.com/Volume-2/Paper.html.

Nor did Cicero confirm that Monfils would almost certainly have come into contact with the propeller blades, as Kutska claims. (Appellant's Br. 10.)

Cicero said that a person who was floating would have been drawn into the blades of the propeller. (147, Ex. 14:40, A-App. 139.) But Monfils did not float because he was submerged with a fifty pound weight. (240:159-60, 210.)

The pulp vat was twenty-four feet in diameter. (147, Ex. 14:17, A-App. 132.) The propeller was mounted vertically on one side of the vat. (147, Ex. 48, A-App. 198.) A body with a fifty pound weight tied to it would not have moved from the force of the propeller. (147, Ex. 14:43, A-App. 142.) So unless Monfils went into the vat right on top of the propeller, it is physically unlikely that his body would have come even close to it.

Moreover, Cicero said that if a person came into contact with the propeller, the blades would sever "big parts of the body." (147, Ex. 14:51, A-App. 145.) Since nothing like that happened to Monfils' body, it is not likely that it ever came into contact with the propeller blades.

6. Kutska claims that no forensic pathologist could warrant the degree of deference given to Dr. Young by his attorney.

But in this case, nineteen other attorneys gave Dr. Young the same deference, which, as Kutska's new expert observed, was in accord with what pathologists thought they could do at the time of Kutska's trial. (284A:60, 71, 88.)

7. Kutska says that pathologists will often differ with each other.

But he has produced no evidence that any other pathologist would have differed with Dr. Young's conclusions at the time of his trial twenty years ago.

8. Kutska cites a few cases where Dr. Young's conclusions were disputed by other pathologists.

But he cites no cases where Dr. Young's conclusions regarding the timing of trauma were disputed. And he cites no reason why any other pathologist would have disputed those conclusions of Dr. Young at the time of the trial in this case.

9. The fact that Kutska's attorney consulted with pathologists in other cases demonstrates that his decision not to consult with a pathologist in this case was not ignorant but informed. Counsel knew that in some cases an opposing expert could be helpful to the defense, but correctly concluded that Dr. Young's findings were not subject to attack by another expert, considering the state of expert opinion at the time. (284A:60, 71, 88.)

10. Although nothing prevented counsel from consulting with another pathologist, there was no reason to. (284A:60, 71, 88.)

11. Monfils' skull fracture did not match the blades of the propeller in the pulp vat, as Kutska contends.

The fracture measured 2 inches in length, 3/8 of an inch in width, and 1/16 of an inch in depth. (147, Ex. 16:21,

A-App. 116.) The sides were parallel. (147, Ex. 16:21, A-App. 116.) The anterior and posterior ends were concave on their inner surfaces. (147, Ex. 16:21, A-App. 116.)

Although the propeller blades were 3/8 of an inch wide, the edges stretched much longer than 2 inches. (147, Ex. 48, A-App. 197-200.) Therefore, these blades would likely have caused a fracture exceeding 2 inches in length.

Moreover, considering that the propeller blades would have severed "big parts" of any body they came into contact with (147, Ex. 14:51, A-App. 145), it is not likely that these blades would have caused a fracture only 2 inches long and 1/16 of an inch deep.

Furthermore, the curved shape of the blades, resembling a water wing, would not have caused a fracture that was uniformly deep end to end. That kind of fracture would likely be caused by a straight firm object. (240:204.)

Besides, Kutska has not satisfactorily explained how Monfils' head could have even come into contact with the propeller blades.

The size of the fracture on Monfils' skull is much more consistent with his head having been manually struck from behind by the 2 inch long head of a 3/8 inch wide wrench, a size commonly available and in use for both domestic and industrial purposes.

12. Kutska fails to cite any support in the record for his sweeping assertion that Monfils exhibited nearly every

one of the warning signs of suicide on the morning he was killed.

Monfils was anxious because he contemplated what Kutska would do to him if Kutska knew who reported him to the police. (228:49-50.) But that is the antithesis of contemplating doing something to himself.[9]

Actually, Kutska exhibited several of the warning signs of suicide. He impulsively took an unnecessary risk by stealing from his employer. (228:25-27; 260:215; 265:46-47.) He had a desire for revenge against Monfils. (264:244-45, 262; 266:52, 63-65.) And he exhibited sudden signs of happiness when he said that he got his "deer," i.e., Monfils. (260:305.)

But despite these warning signs of suicide, Kutska did not kill himself. He killed Monfils.

13. There was nothing in the civil litigation discovery that was helpful to Kutska's criminal defense. Properly understood, the deposition of Anthony Cicero was consistent with Dr. Young's conclusions, and actually tended to rebut any contention that Monfils' injuries were inflicted after he was thrown into the pulp vat.

14. The State did not need any alleged concession by Kutska's attorney to point him out as the person with a

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[9] Record 147, Exhibit 7, which Kutska cites for the proposition that Monfils was sleep-deprived, emotionally isolated and anxiety ridden, (Appellant's Br. 7), is a transcript of Monfils' subsequent call to the police begging them not to release the tape of his original telephone call.

motive to harm Monfils. Kutska did that by himself. Supplemental Statement of Facts, Resp't's Br. 1-5.

Nor was the State relieved of its burden to prove that there was a homicide by any defense concession. The State met that burden with abundant evidence at the trial. Supplemental Statement of Facts, Resp't's Br. 1-5.

Kutska points to no evidence that the deteriorated condition of Monfils' body, which Dr. Young noted in her report (147, Ex. 16:3, A-App. 112), had any impact on the accuracy of her conclusions regarding his injuries.

There was no evidence of blood in the area where Monfils was beaten because Kutska cleaned it up with a pressure hose. (260:302-03.)

Monfils was dumped into the pulp vat to eliminate evidence of the beating. Employees at a paper mill would know that Monfils' body would not just be covered up by sixteen feet of opaque paper pulp in a vat that was seldom emptied (147, Ex. 14:24-25, A-App. 133-34), but would be dissolved in a few days into part of the pulp. (240:199.)

The result of Kutska's trial was driven primarily by the strong transactional evidence recounted at the beginning of this brief. Supplemental Statement of Facts, Resp't's Br. 1-5.

This transactional evidence was corroborated by the findings of Dr. Young. Even if Kutska's attorney had tried to find a favorable pathologist, he would have failed, so the expert testimony would have been exactly the same.

Neither the factually unfounded speculation that Monfils might have been suicidal, the exaggerated evidence of Monfils' "obsession" with death and drowning, the factually unsupported assertion that Monfils had serious emotional problems, the speculation that Monfils faced a loss of personal standing and his job, the erroneous interpretation of Cicero's testimony about the pulp vat, nor any other evidence that was not presented at Kutska's trial would have made a dent in any of the evidence that was presented proving that Monfils was murdered by a gang gathered and goaded by Kutska.

A defense that someone else, *e.g.*, David Wiener (147, Ex. 114, A-App. 239), was responsible for Monfils' death might not have been very good, but under the circumstances it was the best that Kutska and the other defendants could muster.

That defense was certainly better than a defense that someone else, i.e., Monfils was responsible for his death. The evidence available to support a theory that Monfils might have committed suicide was so flimsy and unconvincing that no reasonable jury could have seriously entertained any doubt that he was murdered.

That the defendant now thinks a better defense should have been presented is not the test for ineffectiveness. *State v. Robinson*, 177 Wis. 2d 46, 56, 501 N.W.2d 831 (Ct. App. 1993). Sometimes there simply is no viable defense. *McAfee*

v. Thurmer, 589 F.3d 353, 357 (7th Cir. 2009); *Tenner v. Gilmore*, 184 F.3d 608, 617 (7th Cir. 1999).

Had Kutska's attorney presented any or all of the irrelevant, speculative or erroneous evidence Kutska now faults him for not presenting, the result of Kutska's trial would have remained exactly the same.

Having failed to prove either deficient performance or prejudice, Kutska failed to prove that the attorney who represented him at his trial was ineffective.

Of course, since Kutska failed to prove that his trial counsel was ineffective, he failed to prove that his postconviction counsel was ineffective for failing to argue that trial counsel was ineffective. *State v. Ziebart*, 2003 WI App 258, ¶ 15, 268 Wis. 2d 468, 673 N.W.2d 369.

II. Kutska has not adequately developed his arguments that the circuit court erroneously rejected his due process claims.

A. Kutska has not adequately developed his argument that Kellner's trial testimony was false and coerced.

One of the many arguments Kutska made on his first appeal was that "Kellner's testimony was false, coerced, and unreliable." *State v. Kutska*, No. 97-2962-CR, 1998 WL 644759, slip op. 22 (Wis. Ct. App. Sept. 22, 1998) (unpublished). (A-App. 51.) This Court rejected this contention. *Kutska*, No. 97-2962-CR, slip op. 23-25. (A-App. 52-54.)

On this subsequent appeal many years later, Kutska again argues that Brian Kellner was coerced to make false statements. (Appellant's Br. 41.) However, Kutska fails to adequately explain how he can reprise an argument that has already been authoritatively rejected.

Issues previously considered on direct appeal cannot be reconsidered on a motion for postconviction relief under Wis. Stat. § 974.06. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991); *State v. Brown*, 96 Wis. 2d 238, 241, 291 N.W.2d 528 (1980); *Beamon v. State*, 93 Wis. 2d 215, 220, 286 N.W.2d 592 (1980).

Moreover, the principle of issue preclusion restricts relitigation of issues of fact or law that have actually been decided previously. *State v. Miller*, 2004 WI App 117, ¶ 19, 274 Wis. 2d 471, 683 N.W.2d 485. If an issue necessary to a judgment has been litigated by the same parties before, that issue cannot be litigated again unless it would be fundamentally unfair to preclude one of those parties from reprising it. *City of Sheboygan v. Nytsch*, 2006 WI App 191, ¶ 10, 296 Wis. 2d 73, 722 N.W.2d 626; *Miller*, 274 Wis. 2d 471, ¶ 19.

A stricter sister of issue preclusion applies when an issue of law has been previously decided by an appellate court. A decision on a legal issue by an appellate court establishes the law of the case which must be followed in all subsequent proceedings in the circuit court or on a later appeal. *State v. Stuart*, 2003 WI 73, ¶ 23, 262 Wis. 2d 620,

664 N.W.2d 82. A court should adhere to the law of the case unless the applicable law or the relevant facts have changed, or the prior decision was clearly erroneous. *Stuart*, 262 Wis. 2d 620, ¶ 24. *Cf. Miller*, 274 Wis. 2d 471, ¶ 25 (discussing preclusion of claims litigated in circuit court).

Discovery of new evidence is arguably a situation where relevant facts have changed. And that may be what Kutska means to contend when he says that "[e]ach newly-presented item of evidence confirms all the other items of such evidence." (Appellant's Br. 41.) But Kutska does not attempt to develop any argument regarding newly-discovered evidence in his argument on due process.

In his next argument that the circuit court failed to apply the reasonable probability test to the totality of the evidence, Kutska asserts that the statements of four people, Stein, Thyes, Lundquist and Liegeois, confirm that Kellner's testimony was perjured. (Appellant's Br. 45.) But Kutska still fails to explain why any of these statements should be considered at this time under the test for newly discovered evidence.

A criminal defendant who seeks a new trial on the basis of evidence not presented at the trial resulting in his conviction must prove by clear and convincing evidence that: (1) the evidence was discovered after the conviction, (2) the defendant was not negligent in failing to find the evidence sooner, (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative. *State v.*

Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42; *State v. Love*, 2005 WI 116, ¶ 43, 284 Wis. 2d 111, 700 N.W.2d 62; *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

In addition, when the new evidence is an inherently unreliable recantation of previous statements inculpating the defendant, sworn or not, the recantation must be corroborated either by other newly discovered evidence or by circumstantial guarantees of trustworthiness. *State v. Sorenson*, 2002 WI 78, ¶ 26, 254 Wis. 2d 54, 646 N.W.2d 354; *State v. Kivioja*, 225 Wis. 2d 271, 285-86, 592 N.W.2d 220 (1999); *McCallum*, 208 Wis. 2d at 476-78.

Since all these factors must be established to show that evidence qualifies as newly discovered, *State v. Sarinske*, 91 Wis. 2d 14, 38, 280 N.W.2d 725 (1979), the defendant fails to meet the required burden of proof if the evidence fails to satisfy any one of them. *Sheehan v. State*, 65 Wis. 2d 757, 768, 223 N.W.2d 600 (1974).

The determination of the circuit court that the defendant failed to prove these factors is reviewed for erroneous exercise of discretion. *Plude*, 310 Wis. 2d 28, ¶ 31; *McCallum*, 208 Wis. 2d at 473.

Even a defendant who establishes that he has newly discovered evidence is not entitled to reversal of his conviction unless there is a reasonable probability that a jury, looking at the evidence available when the defendant was convicted and the new evidence now available to the

defendant, would find that the new evidence changes the factual picture so significantly that the jury would have a reasonable doubt about the defendant's guilt. *Plude*, 310 Wis. 2d 28, ¶¶ 32-33; *Love*, 284 Wis. 2d 111, ¶¶ 43-44.

This test is not concerned with the impact of the new evidence on a reviewing court's view of the case. *See Plude*, 310 Wis. 2d 28, ¶ 33; *Love*, 284 Wis. 2d 11, ¶ 44. So it is not enough that the evidence may undermine the court's confidence in the existing conviction. *State v. Avery*, 213 Wis. 2d 228, 237-41 & n.1, 570 N.W.2d 573 (Ct. App. 1997), *modified in part on other grounds, State v. Armstrong*, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98.

The test focuses, rather, on a jury's assessment of the new evidence. *Plude*, 310 Wis. 2d 28, ¶ 33; *Love*, 284 Wis. 2d 11, ¶ 44. To reverse a conviction the court must be able to affirmatively determine that the new evidence would, not could, create a reasonable doubt in the minds of the jury. *Avery*, 213 Wis. 2d at 237-41. *See Plude*, 310 Wis. 2d 28, ¶ 33; *Love*, 284 Wis. 2d 111, ¶ 44.

This is an outcome determinative test. *Avery*, 213 Wis. 2d at 237-41 & n.1. *See State v. Edmunds*, 2008 WI App 33, ¶¶ 21-22, 308 Wis. 2d 374, 746 N.W.2d 590. The question is what a jury would probably do if they heard the new evidence. That is a question that looks to the probable outcome of a new trial.

The Supreme Court's discussion of reasonable probability in *Strickland*, also indicates why a standard that

may be appropriate in ineffective assistance cases is not appropriate in newly discovered evidence cases.

An attorney's error can make the result of a proceeding unreliable even if it did not determine the outcome. *Strickland*, 466 U.S. at 694. But a newly discovered evidence claim presupposes that all the elements of a presumptively accurate proceeding were present at the original trial. *Strickland*, 466 U.S. at 694. In newly discovered evidence cases, therefore, the critical consideration is finality rather than reliability, making the outcome determinative standard the right one to use. *Strickland*, 466 U.S. at 693-94.

Whether newly discovered evidence would change the result of the prosecution is a question of law considered independently by an appellate court. *Plude*, 310 Wis. 2d 28, ¶ 33.

Kutska makes no effort to show how the statements of Stein, Thyes, Lundquist and Liegeois would pass any aspect of this test.

All he asserts is that these statements would be admissible under exceptions to the hearsay rule for statements regarding the declarant's then-existing mental or emotional condition under Wis. Stat. § 908.03(3), and for statements which when made were against the declarant's pecuniary, proprietary, penal or social interest under Wis. Stat. § 908.045(4). (Appellant's Br. 45.) And even then he does not actually argue that any of these statements are

admissible under either of these hearsay exceptions, but simply references the argument he made in his brief in the circuit court, which is not permitted under Wisconsin appellate practice. *Bank of America NA v. Neis*, 2013 WI App 89, ¶ 11 n.8, 349 Wis. 2d 461, 835 N.W.2d 527.

In any event, none of these hearsay statements would be admissible under § 908.03(3) to show that Kellner had been coerced into making false statements. That hearsay exception allows the admission of statements to prove how the declarant feels, but does not allow any evidence of the cause of those feelings to prove that certain events occurred. *State v. Kutz*, 2003 WI App 205, ¶¶ 55-62, 267 Wis. 2d 531, 671 N.W.2d 660.

A declaration that Kellner gave false testimony because he was coerced would not be admissible as a statement against penal interest under § 908.045(4). Since the statement was supposedly coerced by the police and given as testimony on behalf of the State, it is impossible to imagine that anyone would be prosecuted for perjury under these circumstances, certainly not someone who was terminally ill with no more than a couple years left to live. Moreover, any person who was charged with perjury under these circumstances would have a complete defense of entrapment which would prohibit the State from prosecuting him for conduct which the State itself induced. *See State v. Schuman*, 226 Wis. 2d 398, 403, 595 N.W.2d 86 (Ct. App. 1999) (discussing defense of entrapment).

The statement that tended to subject Kellner to hatred, ridicule or disgrace was the one he made at Kutska's trial, relating how Kutska reenacted the beating and murder of Monfils for some friends at a bar. (246:3-20.) That put Kellner in the same class as Monfils, i.e., someone who snitched on Kutska. *Cf. State v. Murillo*, 2001 WI App 11, ¶ 17, 240 Wis. 2d 666, 623 N.W.2d 187 (a statement that the declarant's brother and fellow gang member killed the victim was against the declarant's social interest because it tended to subject him to the opprobrium of his family and friends).

The subsequent statement that Kellner was coerced to lie about the reenactment would not be admissible as a statement against social interest under § 908.045(4) since it sought to explain and excuse the prior anti-social statement about the reenactment, and hopefully get Kellner back in the good graces of those who were angry at him for his trial testimony.

Although the hearsay rule cannot be applied mechanistically to exclude statements against interest that have other guarantees of trustworthiness, *e.g.*, *Brown*, 96 Wis. 2d 238, Kutska fails to explain how that rule might apply to statements that were, if anything, in favor of Kellner's interest at the time they were made.

Kutska has not adequately developed in either procedure or substance his argument that Kellner's testimony was false and coerced.

When a party's arguments fail to cite factual or legal authority, or to develop themes reflecting legal reasoning, but rely instead only on general assertions of error, the court may decline to consider them. *State v. West*, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993), *aff'd*, 185 Wis. 2d 68, 517 N.W.2d 482 (1994); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992); *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

B. Kutska has not adequately developed his argument that Wiener testified for the State in expectation of a reduction in his sentence for an unrelated crime.

Another argument Kutska made on his first appeal was that "Wiener's testimony was false and given in expectation of a reduction in his current sentence for an unrelated crime." *Kutska*, No. 97-2962-CR, slip op. 22. (A-App. 51.) This Court rejected this contention. *Kutska*, No. 97-2962-CR, slip op. 29. (A-App. 58.)

Kutska simply rehashes the same arguments that were rejected twenty years ago. He provides no new evidence even remotely suggesting that the district attorney promised Wiener a deal in return for his testimony or even gave Wiener reason to hope that he might get a deal in return for his testimony. He provides no new evidence showing that the district attorney ever communicated with Wiener regarding a deal.

In fact, Kutska's new evidence affirmatively shows that Wiener did not have a deal or expect any deal.

(Appellant's Br. 17-18.) It just confirms that Wiener may have unilaterally hoped for some benefit from his testimony, but nothing more.

Nor does Kutska suggest why the district attorney had any obligation to disclose documents that did not remotely suggest that the district attorney promised Wiener a deal in return for his testimony or even gave Wiener reason to actually expect that he might get a deal.

The court should decline to consider this argument. *West*, 179 Wis. 2d at 195-96; *Pettit*, 171 Wis. 2d at 646-47; *Shaffer*, 96 Wis. 2d at 545-46.

III. Doctor Sens' newly formed opinion does not qualify as newly discovered evidence because it would not change the result of Kutska's trial.

As discussed above, there is no reason to believe that Dr. Sens would have disagreed in any significant respect with the State's pathologist, Dr. Young, if Sens had testified at Kutska's trial in 1995.

Doctor Sens did not suggest that any new scientific evidence regarding Monfils' death had come to light since that trial. She simply reexamined the same facts that were known twenty years ago.

Doctor Sens testified that the opinions she expressed at the hearing on Kutska's postconviction motion in 2015, now disagreeing with Dr. Young's interpretation of those facts, were influenced by a shift in scientific thought over the years. (284A:71, 76.)

There is a distinction between newly discovered evidence and newly available evidence. *State v. Jackson*, 188 Wis. 2d 187, 198-99, 525 N.W.2d 739 (Ct. App. 1994). Newly available testimony of a witness is not newly discovered evidence when the defendant was aware of the facts at the time of the trial but was unable to present the testimony of the witness regarding those facts. *Jackson*, 188 Wis. 2d at 201.

A new appreciation of the importance of evidence known previously does not transform the old evidence into newly discovered evidence. *State v. Williams*, 2001 WI App 155, ¶ 16, 246 Wis. 2d 722, 631 N.W.2d 623, *modified on other grounds, State v. Morford*, 2004 WI 5, 268 Wis. 2d 300, 674 N.W.2d 349; *State v. Fosnow*, 2001 WI App 2, ¶¶ 9, 13, 240 Wis. 2d 699, 624 N.W.2d 883; *Vara v. State*, 56 Wis. 2d 390, 394, 202 N.W.2d 10 (1972). It does not matter what caused the known evidence to acquire new significance. *State v. Bembenek*, 140 Wis. 2d 248, 256-57, 409 N.W.2d 432 (Ct. App. 1987). So merely recycling and reformulating existing information into a new format presented by a new witness does not generate new evidence. *Williams*, 246 Wis. 2d 722, ¶¶ 15-16.

This Court may determine de novo whether the defendant is offering newly discovered evidence or only a newly discovered appreciation of previously known evidence. *Fosnow*, 240 Wis. 2d 699, ¶ 12. The State suggests it was the latter.

In any event, although Dr. Sens now disagreed with Dr. Young's conclusion that Monfils was beaten and injured before being thrown into the pulp vat, there is a genuine question whether a jury would agree with Dr. Sens since, by her own admission, there was nothing wrong with Dr. Young's methodology in conducting the autopsy, and deference must be given to the pathologist who actually performed the autopsy. (284A:70, 75.)

Moreover, although Dr. Sens now disagreed with Dr. Young's conclusion that Monfils was beaten and injured before being thrown into the pulp vat, her testimony did not pendulate to the opposite conclusion. There was not enough of an adjustment in scientific thinking to lead Dr. Sens to testify that Monfils was not beaten and did not suffer a skull fracture before he was thrown into the vat.

Doctor Sens testified that it was difficult to determine if Monfils' injuries were sustained before or after he died. (284A:27, 39-40, 60-62, 75, 85.) She testified that Monfils' injuries were consistent with either a suicide, where they would have been inflicted after he went into the vat, or with a homicide, where they would have been inflicted before he was thrown into the vat. (284A:41, 61-62, 65, 73, 87.) Doctor Sens said she did not believe that anyone could say one way or another based on the autopsy. (284A:76.)

Doctor Sens believed that the cause of Monfils' death could not be determined by a pathologist, but had to be determined by the police. (284A:41.)

And so it was. There was abundant testimonial evidence that Kutska incited a gang of his cronies who beat Monfils and murdered him to cover up their crime. Supplemental Statement of Facts, Resp't's Br. 1-5.

Even if Dr. Sens' new testimony might have neutralized Dr. Young's testimony, it would not have had any effect whatever on all the other evidence of Kutska's guilt. Sens said that Monfils' death could have been either a suicide or a homicide. The evidence that Sens did not and could not question proved beyond a reasonable doubt that it was murder.

Doctor Sens' newly formed opinion does not qualify as newly discovered evidence because it would not change the result of Kutska's trial.

IV. It is not in the interest of justice to vacate Kutska's conviction.

Although discretionary reversal is not precluded by the rules regarding newly discovered evidence, a court should nevertheless be reluctant to grant a new trial in the interest of justice, and should exercise its power cautiously and only in exceptional cases. *State v. Armstrong*, 2005 WI 119, ¶ 114 & n.26, 283 Wis. 2d 639, 700 N.W.2d 98.

Kutska does not explain why his present case might be exceptional twenty years after his first state appeal and federal habeas were rejected.

The power of discretionary reversal does not allow a defendant to get a new trial in order to present a different

defense simply because the defense he selected at the first trial did not work as well as he thought it would. *State v. Van Buren*, 2008 WI App 26, ¶ 20, 307 Wis. 2d 447, 746 N.W.2d 545; *State v. Maloney*, 2006 WI 15, ¶ 37, 288 Wis. 2d 551, 709 N.W.2d 436; *Flynn*, 190 Wis. 2d at 49 n.5; *State v. Hubanks*, 173 Wis. 2d 1, 28-29, 496 N.W.2d 96 (Ct. App. 1992).

CONCLUSION

The mere fact that twenty years after this conviction Kutska has dredged up evidence that was not presented at his trial is not a reason to give him a new trial.

It is therefore respectfully submitted that the order of the circuit court denying Kutska's postconviction motion should be affirmed.

Dated: May 20, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 8,964 words.

Dated this 20th day of May, 2016.

THOMAS J. BALISTRERI
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of May, 2016.

THOMAS J. BALISTRERI
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