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

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 95-CF-238

KEITH M. KUTSKA,

Defendant.

DEFENDANT'S POST-HEARING BRIEF

The evidence presented at the July 2015 hearing proves that Mr. Kutska's conviction resulted from the ineffective assistance of his trial and post-conviction counsel who, without any investigation, conceded that Tom Monfils had been murdered. Armed with the credible forensic pathology testimony that even a modest investigation would have yielded, the evidence pointing to suicide, and the evidence showing that key fact witness testimony was false, a jury would have a compelling basis for reasonable doubt. The totality of the evidence now before the Court requires the vacating of Mr. Kutska's conviction and the granting of a new trial.[1]

[1] Trial transcript references are designated by the day and page number of the proceedings. For example, "3 at 25" would reference page 25 of the transcript for the third day. Transcript references to the evidentiary hearing are designated by the prefix "EH," the day, and page number of that day's proceedings. For example "EH 7/8/15 at 100" refers to page 100 of the transcript for the proceedings on July 8, 2015. The brief presents not only the evidence that the Court received, but also that which was submitted pursuant to an offer of proof.

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A. The Effective Assistance of Counsel Standard Requires a Full and Complete Investigation of All Facts and Circumstances That Are or May Be Relevant to the Defense.

Under the Sixth Amendment of the U.S. Constitution, an "effective" advocate is one who is "zealous" and "active." *Powell v. Alabama*, 287 U.S. 45, 58 (1932). As the ABA Criminal Justice Section Standards: Defense Function ("ABA Standards") state, "[t]he basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to law."

Defense counsel denies the accused that right when the quality of representation falls "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *State v. Johnson*, 395 N.W. 2d 176, 181 (Wis. 1986). If the representation fails that standard, the accused is entitled to a new trial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, at 694.

A "reasonable probability" exists if the evidence is sufficient to "undermine confidence in the outcome." *Id.*, at 694; *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011) (ineffective assistance is prejudicial when the likelihood of a different result is substantial); *State v. Moffet*, 433 N.W. 2d 572 (Wis. 1989). *Rompilla v. Beard*, 125 S. Ct. 2456, 2465-67 (2005); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Wiggins v. Smith*, 539 U.S. 510, 522-24 (2003).

The more severe the criminal charge, the greater the duty to investigate thoroughly **all** avenues of potential defense. The defense of a first-degree intentional homicide charge, the most

serious in the Wisconsin criminal code, requires the highest degree of thorough fact-finding, diligence, and skill. *State v. Zimmerman*, 669 N.W. 2d 762 (Wis. 2003). Indeed, as Mr. Glynn emphasized, the obligations of a defense lawyer in a first-degree intentional homicide case are essentially indistinguishable from those imposed on defense counsel in a capital murder case for which first-degree intentional homicide is the predicate. (EH 7/8/15 at 184.)

In applying *Strickland* in capital murder cases, the Supreme Court has acknowledged the representation obligations articulated in the ABA Standards and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (February 2003) ("ABA Guidelines") that require an investigation of all facts sufficient to enable defense counsel to formulate a rational strategy. *Williams*, 529 U.S. at 395-96; *Wiggins*, 539 U.S. at 524, 534; *Rompilla*, 125 S. Ct. at 2462-63); and *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

Wisconsin constitutional law applies the same two-part "substandard conduct/prejudice" test articulated in *Strickland* and likewise obligates defense counsel "**to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant** to the merits of the case and the penalty in the event of conviction." *State v. Pitsch*, 369 N.W. 711 (Wis. 1985) (Emphasis added.); *State v. Sanchez*, 548 N.W. 2d 69 (Wis. 1996). Defense counsel's failure to investigate a critically important aspect of the case is objectively unreasonable and deficient under Wisconsin law whether that failure results from inattention, oversight, or neglect. *State v. Thiel*, 665 N.W. 2d 305 (Wis. 2003). *Moffet*, 433 N.W. 2d at 576; *Dixon v. Snyder*, 266 F. 3d 693, 703 (7th Cir. 2001).

Wisconsin law holds that, absent a thorough inquiry into and consideration of all of the facts and circumstances that are actually or potentially relevant, counsel cannot develop a reasoned theory of the defense and defense counsel's decisions are neither "strategic" nor

immune from attack as ineffective. *State ex. rel. Walker*, 735 N.W. 2d 582 (Wis. 2007); *State v. Chu*, 643 N.W. 2d 878 (Wis. 2002). Consequently, a defense decision or theory is not "strategic" or "reasonable" unless it is the product of an investigation of the facts commensurate with the severity of the offense charged and potential consequences for the accused. Wisconsin Code of Professional Responsibility, Rule 1.1; *Rompilla, Wiggins, and Williams, supra*. A decision or theory is neither 'strategic" nor "reasonable" simply because a defense lawyer believes it to be so.

B. Defense Counsel Must Consult With a Qualified Independent Forensic Pathologist Where, As Here, the State Relies on Its Own Forensic Pathologist to Prove an Element of the Offense.

Under Wisconsin and federal caselaw, defense counsel's failure to consult with an independent forensic pathologist is deficient and prejudicial when the prosecution relies on its own forensic pathologist to prove an element of the offense which otherwise might be disputed. In *State v. Zimmerman*, 669 N.W. 2d 762 (Wis. 2003), the Wisconsin Court of Appeals held that defense counsel's failure to investigate and challenge the cause of death was deficient and prejudicial when the prosecution's cause-of-death theory relied on its medical examiner's conclusions (footnotes 41-42 and 51.)

In *Zimmerman*, the State presented the testimony of its forensic pathologist both to establish the alleged homicide and to connect the defendant to it. Defense counsel, however, never consulted with an independent forensic pathologist to review the State's pathologist's determinations and, instead, allowed that pathologist to testify at trial without challenge.

The defendant's post-conviction counsel did, however, consult with and present an independent forensic pathologist's testimony that challenged the State's pathologist's analysis and conclusions. The Court of Appeals held that trial counsel was deficient in "failing to present available alternative testimony" to that offered by the State's pathologist because it precluded the

jury from rejecting the State's pathologist's incriminating connection of the defendant to the death.

The Seventh Circuit Court of Appeals recently reached the same conclusion in a Wisconsin state court murder case in *Thomas v. Clements*, No. 14-2539, slip opinion, June 16, 2015. There, the State's intentional homicide theory was based on its forensic pathologist's autopsy conclusion that the death resulted from manual strangulation. At trial, the defense conceded that the defendant had caused the victim's death, but contended that he had done so only unintentionally and not by manually strangling her.

At trial, defense counsel knew that the State's forensic pathologist would testify at trial, the State's pathologist had repeatedly rejected any alternative explanations for the manner of death and that he could not effectively cross-examine her, and that there was no other medical evidence indicating whether the victim's death had been intentional or unintentional. Nonetheless, defense counsel failed to consult with an independent forensic pathologist. Without any opposition to the State's pathologist's testimony, the jury convicted the defendant of intentional homicide.

The defendant's post-conviction counsel presented an independent forensic pathologist who testified that she had found no evidence supporting the State pathologist's manual strangulation conclusion. This pathologist testified that the injuries were as consistent with an inadvertent and unintentional application of pressure to the victim's neck as they were with intentional manual strangulation. This pathologist also saw no evidence of manual strangulation, including any bruises or scratches that would confirm an intentional homicide contention.

The Seventh Circuit determined that "defense counsel was deficient in failing to consider and consult with a pathologist who would have reviewed the autopsy report and possibly

testified." That failure "only reconfirmed the one-sidedness of the expert opinion before the jury." The Court concluded, in terms that are equally applicable here, that (at 16):

> Counsel should have known there was reason to question a finding of intentional homicide. Based on the facts, a reasonable counsel would have at least reached out to a pathologist to see if the medical findings could be reconciled with [the defendant's] versions of the events. **To not even contact an expert, however, was to accept [the state's pathologist's] finding of intentional death without challenge and basically doom defense's theory of the case.** (Emphasis added.)

Trial counsel's performance in *Thomas* was deficient and prejudicial because "the state presented an expert whose testimony was used to strongly support its theory of intentional death, and defense counsel never pursued any rebuttal expert." *Thomas* at 19; *Rogers v. Israel*, 746 F. 2d 1288, 1294 (7th Cir. 1984) (failure to consult with and present a pathologist to rebut state's pathologist was ineffective); *Dugas v. Coplan*, 428 F. 3d 317, 329-30 (1st Cir. 2005) (defense counsel was ineffective in failing to consult with an arson expert); *Hinton v. Alabama*, 134 S. Ct. 1081 (2014) (defense counsel was ineffective in knowingly retaining an unqualified ballistics expert when the only evidence connecting the defendant was the state's ballistic evidence.)

C. Dr. Young Provided the State's "Scientific/Medical" Basis For Its Beating and Homicide Theory.

Dr. Helen Young began the autopsy some 52 hours after Monfils disappeared and after the police concluded that his body had been submerged in vat liquid for approximately 42 hours. At the time of the autopsy, his body was in an advanced state of decomposition, putrefied, swollen, bloated, and discolored. (Exs. 16, 127, and 128.)

Based on her autopsy examination, Dr. Young determined that Monfils had suffered (1) certain injuries from a beating before his body was placed in the vat and (2) certain other injuries inside the vat. On that basis, she concluded that his death was a homicide and not a suicide. She

also concluded that Monfils would have bled profusely from his skull, head, and facial injuries.

Consequently, the police scoured the mill for trace evidence of blood and any other physical evidence of a beating, including (a) blood, tissue, or hair; (b) forensic evidence of any attempt(s) to destroy, remove, or conceal such blood, tissue, or hair; and (c) one or more blunt objects that had inflicted one or more of the injuries. Despite that search, police never located any such evidence.

The police investigation, of course, also included the search for an eyewitness to the alleged beating. Although there was no shortage of potential eyewitnesses to any such attack, police could not find any eyewitness to any confrontation with or beating of Tom Monfils, the tying of a rope and weight to his body, or who saw Monfils' body being carried to the vat. In the more than 22 years since Monfils' death, no such witness has ever come forward or been located.

To explain the lack of any eyewitness testimony at trial, the State alleged that those who had seen the crime were lying and stonewalling to protect their "union brothers" out of a misguided sense of "union loyalty." That obstruction, it contended, necessitated Winkler's resort to "unusual" interrogation tactics, including "threats." It also suggested that the lack of blood evidence could be explained by any number of causes, including its destruction or removal by unidentified individuals.

1. Dr. Young's Engineering Assumptions Were Beyond Her Ability to Make and Provably Wrong.

There was nothing in Dr. Young's education, training, and experience as a forensic pathologist that qualified her to know (1) the consistency of the vat liquid; (2) the buoyancy of a human body in it; (3) the design and operation of the vat; (4) the movements of Monfils' body in the vat with the weight tied to it; (5) where his body would have been at any moment before or after his death; and/or (6) what injuries could and could not have been suffered in the vat. She

was not trained in fluid dynamics, mechanical engineering, and/or the design and operation of the vat. Nonetheless, she made assumptions, findings, and conclusions regarding and based on those factors (and others) that were provably false, but went unchallenged by defense counsel.

Dr. Young based her beating and homicide conclusions on the following assumptions:

A. Despite the condition of the body at the autopsy, she could determine (a) what injuries had been suffered before death; (b) what injuries had been suffered after death; and (c) whether each injury had been caused by a beating or, instead, as a result of being in the vat.

B. She could determine which injuries had been suffered while Monfils was still alive and which had been suffered after his death based on what she believed was the presence or absence of bruising and hemorrhaging. If she observed what she believed was bruising and hemorrhaging, she determined that the injury had been suffered before death. If she did not see any such indications, she determined that it had been suffered after death.

C. She could determine whether Monfils had suffered any particular injury in the vat or whether he had necessarily suffered it elsewhere. To make that determination, she made the following additional assumptions:

i. The only means by which Monfils could have suffered any injury in the vat was from contact with the agitator blades;

ii. Contact with the blades would have caused a "large rent" or other devastating injury that would have been readily identifiable;

iii. The consistency of the liquid was akin to that of "thick oatmeal. For that reason, she concluded, Monfils, even with the weight attached to him, would have been too buoyant to come into contact with the blades while he was still alive and could only have

done so after he was dead. Hence, she concluded, all pre-mortem injuries were necessarily suffered before Monfils entered the vat and all post-mortem injuries were suffered afterward.

Because she concluded that he had suffered pre-mortem injuries and that all such injuries could only have been inflicted by a beating, Dr. Young concluded that Monfils was beaten before his body was placed in the vat where he died from drowning. Consequently, the police promptly began a homicide investigation and took no account of a possible suicide. (EH 7/22/15 at 53-54 and 147.)

That Dr. Young was profoundly mistaken was evident from the wrongful death litigation deposition of Mr. Cicero, the mill's chief engineer, who testified in that case before the criminal case trial. At his deposition, he testified that (a) the vat liquid was approximately 96% water by volume; (b) Monfils would have been essentially as buoyant in it as he would have been in a similar volume of water; (c) Monfils body, with the weight attached to it, would have sunk rapidly to the floor and not continued to float in the liquid; and (d) Monfils would certainly have come into contact with the blades, given the fluid dynamics and design of the vat. (Ex. 14. at 17, 24-25, 29-30, 32, 38-43, 48-49, 51,-57, 63, and 83-87.)

Mr. Cicero further testified that **no engineer** could know how a six-foot-tall-185-lb. man, with a 49-lb. weight attached to a rope tied around his neck, would have moved and where he would have been in the vat at any moment while the blades were rotating. (Ex. 14.) Nonetheless, Dr. Young professed to know that Monfils could never have suffered an injury in the vat while he was still alive, that contact with the blades was the **only** means by which he could have been injured in the vat, and that such contact would have caused injuries that she could identify. Her assumptions begged for challenge, but received none.

2. Dr. Young's Forensic Pathology Assumptions Were Also Wrong and Unreliable.

Dr. Mary Ann Sens is Professor and Chair of Pathology at the University of North Dakota School of Medicine and Health Sciences and is a Board Certified member of the American Board of Pathology, Anatomic and Forensic Pathology. Her report and testimony explain the forensic pathology reasons why Dr. Young's beating and homicide conclusions were erroneous and unreliable.

Dr. Sens testified that the condition of Monfils' body at the time of the autopsy **precluded** any forensic pathologist from accurately and reliably determining what injuries were suffered before death, what injuries were suffered after death, and where and how any of the injuries were suffered. Her testimony established that (EH 7/8/15):

a. The body was in advanced state of decomposition, putrefaction, swelling, bloating, and discoloration, and his organs were partially liquefied. The head, face, and skull were "markedly swollen." (*Id.* at 34.) Consequently, it would have been "difficult, if not impossible" for a forensic pathologist to distinguish between pre-mortem and post-mortem injuries. (*Id.* at 39.) Absent an indication that an injury had begun to heal, there was no definitive way to know whether it was inflicted while a person was still alive. (*Id.* at 51 and 60.)

b. Dr. Young determined that certain injuries were suffered before death by reference to what she believed were signs of bruising and hemorrhaging. Dr. Sens testified, however, that the degree of decomposition and other post-mortem changes to Monfils' body made it impossible for a forensic pathologist to distinguish reliably between what was (a) pre-mortem bruising and hemorrhaging and what was (b) post-mortem lividity and discoloration. (*Id.* at 50.) She testified that the distinction between pre-mortem and post-mortem injuries can be (*Id.* at 50-52):

> ….very subtle to begin with. And once decomposition starts you can lose some of their subtle findings. So, you could miss stuff. You can also misinterpret. You can get lividity and swelling. You can get abnormal coloration of muscles and tissues from this decomposition and putrefaction process. And, unfortunately, you can't even look at it under the microscope often because the cells are starting to dissolve.
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> * * * * *
>
> Q. And can a body that has been discolored make it difficult to determine whether there was bruising from an injury or simply discoloration from the process of decomposition?
>
> A. Yes; it can be very difficult.

Dr. Sens further explained that "you can get areas that may look like hemorrhage, real hemorrhage that occurred during life, but in actual fact are the result of decomposition and settling or some sort of leakage of blood after death." (*Id.* at 77.) For such reasons, Dr. Sens classified all of Monfils' injuries as "peri-mortem"—i.e., suffered at or near the time of death—rather than as definitively either "pre-mortem" or "post-mortem."

c. The state of Monfils' body aside, Dr. Sens testified that medical science "cannot distinguish if any individual(s) other than the decedent caused the decedent to enter the vat or if any injury was present prior to entering the vat. This may have happened, or it may not have happened—we simply cannot tell from the autopsy findings alone." (Ex. 123.) **Because Monfils was, as Dr. Young also concluded, unquestionably alive when he entered the vat, Dr. Sens determined that he could have suffered all of his injuries in the vat.** (EH 7/8/15 at 62.)

d. Dr. Sens, unlike Dr. Young, disclaimed any ability to know what injuries might have been suffered during Monfils' first five minutes in the vat or at any later time (*Id.* at

64.) She found that the injuries to Monfils' neck, jaw, and head, and the subarachnoid hemorrhaging were also best described as "peri-mortem," rather than as occurring before death, and "may have occurred in the peri-mortem period while the decedent was in the vat and still alive."

e. Dr. Sens **did "not feel ANY injury can conclusively be labeled as occurring prior to or after entry into the vat."** (Emphasis added.) (*Id.*) The trauma could have occurred either before Monfils entered the vat or afterward. "In other words, this trauma is not specific enough to definitively assign to a traumatic event, such as an assault outside of the vat."

As Dr. Sens notes in her report, Monfils' neck injuries could have been caused as he was drowning in the vat and not before he entered it, and the abdominal injuries that Dr. Young determined were pre-mortem could likewise have been suffered in the vat as Monfils was moving with regard to the rotating blades. (Ex. 123.) These same injuries could also have resulted from the stress of his body's movements in the vat as he was drowning and suffering asphyxia and/or from entanglement of his feet or extremities with the propeller blades.

Dr. Sens observed that pieces of Monfils' clothing had been removed from the blades, a circumstance confirming that his body had come into contact with them and been exposed to injury from repeated contact with the blades, rope, weight, and the floor and walls of the vat. Dr. Young had made a similar observation regarding Monfils' clothing, but she, unlike Dr. Sens, assigned no significance to it. (Ex. 16.)

f. A forensic pathologist performing an autopsy on Monfils' body could not know whether he had suffered all of his pre-mortem injuries as a result of a beating. (*Id.* at 61-62) The vat had a propeller, sides, and he had weight tied to him. His body would have moved

in the vat. "So, there would have been propeller blade injury potential, injury caused from landing on the bottom, landing against the weight, propelled against the weight, propelled against the side. There were a lot of areas in that vat where injury could have occurred." (*Id.*)

There was nothing "distinctive" about any of the injuries that Dr. Young classified as "pre-mortem," and there was nothing to give Dr. Sens "reason to believe that they couldn't have occurred inside the vat. That's not to say they did. I can't say that either." (*Id.* at 90.) In Dr. Sens's view, "the decomposition and the condition of the body in all likelihood had so much potential for error that I don't believe anyone should be going down one path or another but say that either [homicide or suicide] could occur." (*Id.* at 76.)

g. In most cases, including this one, a forensic pathologist does not have all of the answers regarding the manner of death. That determination often requires a team-effort that includes police and other forensic experts. A forensic pathologist could not determine which of Monfils' injuries were suffered before death, after death, and by what mechanism or object(s). (EH 7/8/15 at 41, 59, 66, and 68.)

h. The manner of death in this case could be determined, if at all, only after a complete investigation into Monfils' history, condition, relationships, interactions, and actions leading up to the time of his death. (*Id.* at 56.) Determining the manner of death in cases like Monfils' "prove the most difficult medicolegal problems." (*Id.* at 58.) How a drowning victim, like Monfils, died depends "largely on the history and investigative reports." (*Id.* at 58-59.)

i. Dr. Sens found it "surprising" that Dr. Young excluded the blade edges or the blades as a potential cause of the skull fracture. As Dr. Sens testified, "that was actually one of the first things that I thought of when I saw it. I asked what the blades looked like. I've seen a lot of propeller injuries, I guess." (*Id.* at 65.) A tool mark examiner or a forensic

anthropologist could determine whether the skull fracture or any other injury had been caused by any particular blunt object. (*Id.* at 66-67.)

j. A forensic pathologist would not have known (i) how buoyant or lacking in buoyancy Monfils would have been; (ii) the design and operation of the vat; or (iii) where Monfils' body would have been any moment in the vat. (*Id.* at 63-64). There is nothing in a forensic pathologist's training that would afford that knowledge.

k. The location of the knot tied around Monfils' neck when he was removed from the vat could not preclude the possibility of suicide, contrary to Dr. Young's trial testimony. The knot may have moved during the time he was in the vat and, in any event, the death occurred by drowning, and not (as Dr. Young had been asked to assume), by hanging. (*Id.* at 82, and 87-88.)

l. Dr. Sens' analysis is confirmed by developments since the 1980's and 1990's regarding what can be reliably determined on the basis of an autopsy. Forensic pathologists are now considerably less certain than they were at that earlier time regarding their ability to determine whether a particular injury was suffered before or after death. They are also far more reluctant to rely on what they believe is evidence of bruising and hemorrhaging. (*Id.* at 71and 88-89.)

3. Analysis of the Skull Fracture Casts Further Doubt on Dr. Young's Conclusions.

Of all of Monfils' injuries, the one that begged for the most scrutiny was his skull fracture. It was not only an injury whose shape and dimensions were ascertainable, but also one that tested the accuracy and reliability of Dr. Young's assumptions and conclusions. That was so because she concluded that the skull fracture was a (1) pre-mortem injury (2) that could **only** have resulted from a beating and (3) not from contact with a blade. Consequently, if the skull

fracture matched the shape and dimensions of the blade edges, such would contradict Dr. Young's basic assumptions and conclusions regarding her ability to conclude that **every** pre-mortem injury was caused by a beating and that the blades could never have caused the skull fracture or any other injury that she decided was pre-mortem.

Dr. Young observed that the skull fracture was 2" long, had straight edges that were parallel to each other, and was **3/8" wide**. (Ex. 16) She testified that the object that inflicted it had edges that were both **straight and rounded** and that would match the shape and dimensions of the fracture. As the evidence presented at the hearing revealed, **the blade edges were straight, rounded, and 3/8" wide**. (Exs. 124-126.) They were, in short, the exact shape and dimensions of the skull fracture. That the skull fracture matched the shape and width of the blade edges casts further doubt on Dr. Young's testimony.

Law enforcement understood the significance of the blades as a potential cause of Monfils' injuries. The police took photos of the blade edges, placed a measuring tape across the width of at least one of them, and made Styrofoam and silicon impressions of the blade edges to enable various objects to be compared with them. (Exs. 133-136.) A plaster cast of Monfils' skull had also been made showing the shape and size of the fracture to enable various objects to compared with it. (Ex. 96.)

Given the importance of determining what object (and who) had caused the skull fracture, it is inconceivable that no one in law enforcement made or commissioned that comparison. Nonetheless, Winkler professed at the hearing not to know whether any such comparison had been made and, if so, what it showed. (EH 7/22/15 at 80.) Similarly, there was nothing in the police files documenting any comparison between the skull fracture and the blades, or, for that matter, any other object.

Whatever law enforcement did or did not do, however, nothing precluded defense counsel from investigating whether the blades might have caused that injury and Dr. Young's entire rationale for her homicide finding could be challenged. Rather than doing so, however, the defense merely **presumed** that whatever Dr. Young concluded was reliable and accurate. As Mr. Kutska's trial counsel testified at the hearing, he regarded her as "state of the art" and never thought once about questioning whatever she assumed, thought, or asserted. (EH 7/8/15 at 95.)

D. Defense Counsel's Failure to Consult With an Independent Forensic Pathologist Was Deficient and Prejudicial.

Here, as in *Zimmerman* and *Thomas*, the "scientific/medical" basis for the State's homicide theory was entirely "one-sided." As in those cases, Mr. Kutska's trial counsel knew that the State's forensic pathologist would not only present testimony supporting the beating/homicide theory, but also that she was highly unlikely to admit any doubt regarding her assumptions, findings, and conclusions. (Id. at 96-97.) Indeed, she had testified twice before trial and her views were well-known. Moreover, he knew from his prior experience that Dr. Young was a difficult cross-examination subject. He was, therefore, required to consult with an independent forensic pathologist not only to learn whether Dr. Young could be challenged, but, if so, to educate the jury to why her testimony was unreliable and/or erroneous.

The failure to consult with a forensic pathologist was all the more unjustified because counsel knew or should have known that forensic pathologists (a) are often provably wrong in their conclusions, as occurred in a "shaken baby syndrome" case resulting in the wrongful conviction of a Wisconsin day-care provider in *State v. Edmunds*, 746 N.W. 2d 590 (Wis. Ct. App. 2008) and/or that they (b) may often disagree with each other regarding such basic questions as the manner and cause of death. Indeed, Dr. Young, long before trial in this case, was no stranger to such disagreements, as in (1) *State v. Kimpel*, 295 N.W. 2d 225 (Wis. Ct. App.

1989), where she and two forensic pathologists differed regarding their ability to determine the cause of death and (2) *Dancy v. Metropolitan Life Ins. Co.*, 1982 U.S. Dist. LEXIS 13639 (N.D. Ill. 1982), where she and another forensic pathologist disagreed regarding the time of death.

Likewise, in *State v. Plude*, 750 N.W. 2d 42 (Wisc. 2008), forensic pathology experts disagreed whether the cause of death was murder by drowning or, instead, by suicide. In sum, what any particular forensic pathologist believes or concludes may be more a matter of individual judgment than uncontroverted science.

Mr. Kutska's trial counsel conceded that he would have needed to consult with a medical professional if he had any "medical questions about the facts of the case." (*Id.* at 94.) In such case, he would want to consult with a forensic pathologist or other medical expert to understand how to proceed in a criminal case. (*Id.* at 93-94.) In Mr. Kutska's case, however, he entertained no such questions because he **assumed** that Dr. Young could not be mistaken in concluding that Monfils had been murdered and not committed suicide.

He had no such doubts or questions, he stated, based on his prior dealings with her while he worked in the District Attorney's Office. While there, he had come to regard to Dr. Young as "state of the art" in forensic pathology. (*Id.* at 95.) He therefore **assumed** that her autopsy report was accurate and reliable. (*Id.* at 101.) Even though he could not **know** whether she was right or wrong in her conclusions, he "would certainly accept" her opinions, and he had no reason to question any of her pretrial testimony. (*Id.* at 96 and 102.)

In particular, he "saw no reason to challenge" her determinations regarding which injuries were pre-mortem and which were post-mortem and/or her conclusion that Monfils had been beaten and carried to the vat. (*Id.* at 105-107.) He **believed** that Dr. Young would not have testified to anything that "she was not absolutely sure of in terms of her science." (*Id.*) He

assumed that she had the ability to know what injuries had and had not been suffered in the vat. (*Id.* at 108.)

Based on his unquestioned confidence in Dr. Young, he deemed any questions relating to how and when any of the injuries were sustained to be a "distraction." (*Id.* at 113.) As he testified (*Id.* at 113-114.):

> As long as **they** had an expert that could establish a cause of death, that it was in fact a homicide, the circumstances surrounding it really didn't matter that much. Because everybody's position was that they didn't know what happened, because they weren't involved. (Emphasis added.)

Consequently, he never conducted any forensic pathology research or consulted with an independent forensic pathologist to determine whether Dr. Young's report was accurate and reliable. (*Id.* at 101.) Because he did not question her homicide conclusion, he also did not consult with any forensic experts relating to why, if Monfils had been beaten as Dr. Young concluded, there was no blood evidence of a beating. (*Id.* at 115.) Likewise, he never investigated whether Monfils had committed suicide or considered any need to have the rope knots examined. (*Id.* at 116-117.)

Trial counsel confirmed that certain other defense counsel had similar "confidence" in Dr. Young's homicide finding and "had no reason to question her competency." (*Id* at 126.) He then further elaborated on why he and they accepted her homicide finding without investigation or consultation with another forensic pathologist (*Id*.):

> We sort of figured that we would have to shop for more than one forensic specialist if you're going to get one, because the likelihood was that the closer you were to this area people familiar with her work would likely come to the similar conclusions that she did.

> We also did not think we were going to get to prove it was a suicide, and we saw little profit in attempting to show that. We probably couldn't prove it, and we didn't think that would sit well with the jury.
>
> And as I said before, in some ways it didn't matter, because the basic defense was that the State's witnesses were not credible, and they had arrested the wrong defendants.

In sum, he and these other defense counsel simply assumed that any manner of death investigation was not a worthwhile enterprise because questioning Dr. Young was "likely" useless and the result would "probably" be that the case would still have to be defended as a homicide. Consequently, he and they accepted the SODDI defense as the only one available.

The law, however, does not accept defense counsel's assumptions, speculation, and rationalization for not doing something so unavoidably critical in this case. Defense counsel did not need to prove a suicide, but only to raise a reasonable doubt about whether the death was a homicide. He could never have known whether an independent forensic pathologist was available and what any such expert(s) might conclude unless he made the effort to consult one or more of them. His "figuring" that finding an independent forensic pathologist might be unprofitable could never substitute for actually consulting with one before contenting himself with an improbable SODDI defense.

That failure was all the more illogical because, as he noted, the defense that he and certain other defense counsel adopted was premised on the defendants **not knowing** what had happened to Monfils. (*Id.* at 113-114.) If that were so, it was his (and their) obligation to investigate the case fully to find out what had or might have happened. The failure to do so was fundamentally deficient and left them with nothing but an unprovable SODDI defense for which he had no plausible suspect(s).

Here, there were no gunshot wounds, knife wounds, or other telltale injuries that informed a forensic pathologist that the death was a plainly a homicide. Dr. Young could only attempt to deduce the manner of death based on the chain of assumptions detailed above. Given that her conclusions and testimony were foundational to the State's case, defense counsel was obligated to investigate whether, and not merely assume that, her conclusions were accurate and reliable. If any of her fundamental assumptions were wrong or unreliable, her conclusions were similarly so and subject to attack. His unquestioning acceptance of her conclusions was all the more unwarranted given (a) the total absence of any eyewitnesses and trace evidence of any beating and (b) the existence of several witnesses who expressed their reasons for believing that Monfils had committed suicide.

At the hearing, Mr. Kutska's post-conviction/appellate counsel likewise acknowledged that he had lacked the ability to know whether Dr. Young's testimony was subject to challenge unless he consulted with a forensic pathologist. (*Id.* at 140.) He also realized when he was representing Mr. Kutska that a forensic pathologist's ability to make findings and conclusions regarding certain injuries could be impacted by the condition of the body at the time of the autopsy and by its having been submerged in liquid for some period of time. (*Id.* at 141-142.) He understood then that Dr. Young's testimony was basic to the State's case because it had the burden of proving the alleged homicide, and he acknowledged that trial counsel's concession of the homicide had relieved the State of the burden of proving it. (*Id.* at 145 and 148.)

Nonetheless, post-conviction/appellate counsel never (a) questioned the manner of death; (b) saw any need to consult with (i) an independent forensic pathologist or (ii) any other forensic expert to explain the lack of blood evidence of a beating; and/or (c) investigated the possibility of suicide. (*Id*. at 146.)

Although he theorized that David Wiener had murdered Monfils, he conceded that the only trial evidence pointing to Wiener as the murderer was Wiener's writing of a fake suicide note and the absurdity of Wiener's claim that he had recovered a previously repressed memory. (*Id*. at 148.) The weakness of this theory aside,[2] however, implicating Wiener would have never resulted in the vacating of Mr. Kutska's conviction. At most, it would have converted the case of the "Monfils Six" into that of the "Monfils Seven," given the events of the morning when Monfils disappeared.

When he was asked why he had not consulted with an independent forensic pathologist, post-conviction counsel candidly responded that **"I will tell you that I didn't think of it."** (*Id.* at 168.) (Emphasis added.) He had not been concerned about Dr. Young's report and testimony because he never thought about them. (*Id.* at 170.)

His determination that trial counsel had not been ineffective was based on his conclusion that trial counsel had "reasonably" conceded the homicide and "reasonably" defended Mr. Kutska. As he testified (*Id.* at 151.):

> A. The truth is that I looked at the issue of ineffective assistance from the standpoint of whether the theory of defense presented by Mr. Finne was **reasonable** and whether it was presented in a **reasonable** fashion. And, I concluded that he did a good job of representing Mr. Kutska's interests.
>
> Q. When you made that determination did you consider he was acting reasonably in not investigating the cause of death, the issue of suicide and whether Dr. Young was right or wrong?
>
> A. **I don't think so. I think I just focused my attention on whether the theory of the case as presented**

[2] At the post-conviction hearing in August 1997, he offered the testimony of certain prison inmates who attested to statements that Wiener had allegedly made implicating himself in Monfils' murder. The Court made quick work of that evidence.

> **by Mr. Finne and others is a reasonable theory of defense.** (Emphasis added.)

The foregoing confirms that post-conviction counsel misconceived the effective-assistance-of-counsel standard that he was purportedly evaluating. Contrary to his articulation of it, the standard is not met if trial counsel adopts what appears to be a "reasonable defense" and presents it "reasonably." Rather, it was met in this case only if trial counsel investigated all relevant and potentially relevant facts and then formulated and presented a rational defense that took account of all of the facts discovered.

To know whether trial counsel's deficient representation was deficient and had prejudiced Mr. Kutska, post-conviction/appellate counsel was obligated to conduct his own investigation regarding the facts of the case, including the manner of death. Absent that investigation, there was no way for him to know what evidence could have shed light on the manner of Monfils' death. Rather than doing so, however, he read the transcript and related trial materials, talked to other lawyers, including Mr. Kutska's trial counsel, and concluded that the SODDI defense appeared to be reasonable and reasonably presented. Consequently, post-conviction counsel was at least as deficient as trial counsel.

The failure to consult with an independent forensic pathologist was all the more unreasonable because post-conviction counsel testified that he had retained independent forensic consultants in **other** cases because he could not otherwise **know** whether the State's pathologist's conclusions were accurate and reliable. Nonetheless, he offered no reason for not doing so in Mr. Kutska's case. He, like trial counsel, had the ability and obligation to retain an independent forensic pathologist and to challenge the manner of death, but failed to do so.

Because he, like trial counsel, had not investigated the manner of death and accepted the homicide concession as "reasonable," post-conviction counsel also saw no reason to investigate

the rope knots found with Monfils and to determine who, including Monfils, may have tied them. Rather, as he testified, "I **guess I thought** that the person who tied knots was obvious from the record it was David Wiener. I **guess** that's what I thought the proper conclusion should be in this case." (*Id.*) (Emphasis added.) In this case, of course, he was obligated to do more than guess and speculate. There was nothing facially "obvious" regarding the identity of the person(s) who had or may have tied them, and there was no acceptable alternative to having the knots examined by someone with the ability to identify their type and know their usage.

The prejudice from Dr. Young's autopsy conclusions infected the entire case. They sent law enforcement on the quest for homicide evidence that never existed and excluded every other possible manner of death, including suicide. (EH 7/22/15 at 53-54 and 147.) They dazzled the defense which conceded them as the "medical/scientific" proof of murder. On a retrial, the evidence that Dr. Young was wrong would, in and of itself, establish a reasonable doubt. In combination with the evidence of suicide and key witness perjury, a reasonable doubt finding would be more than "reasonably probable."

E. Defense Counsel Was Deficient in Failing to Investigate the Evidence of Suicide.

Dr. Sens testified that between 15-30% of the 3,000-4,000 autopsies that she had conducted in her career were on suicide victims. (EH 7/8/15 at 22.) Suicide accounts for more than 10 percent of the deaths of individuals between ages 15-34 in the United States, is the second leading cause of death among white males within that age group, and is far more prevalent than homicide in Brown County. According to the Center for Suicide Prevention, nearly 30,000 Americans take their lives each year. The actual incidence of suicide is, no doubt, even greater because it may be difficult to confirm in certain cases. (Ex. 97.)

Notwithstanding the highly sensitive nature of suicide, defense counsel was obligated to investigate the evidence and determine where it might lead. Until they had conducted a thorough "psychological autopsy" on Monfils and consulted with an independent forensic pathologist, Mr. Kutska's counsel could never concede Dr. Young's conclusions and the State's homicide theory. Unless and until a defense lawyer had done that, he could never tell the jury that he would not be "foolish enough to try and persuade you…that Thomas Monfils killed himself." (2 at 113.)

1. Numerous Witness Statements Pointed Toward Suicide.

The police investigation files included a host of witness statements addressing Tom Monfils' mental and emotional condition, obsessions with death and drowning, history of depression, anxiety, and stress, and likely suicide. They included his (a) detailed stories of recovering the bodies of drowning victims while in the Coast Guard, including those victims who had drowned themselves by tying chains or heavy objects to their bodies and (b) discussions about how much weight a person would need to tie to his body to remain submerged. Even if the police dismissed them in reliance on Dr. Young's homicide findings and conclusions, there was never any basis for defense counsel to do so, given their obligation in a case of this seriousness to leave no stone unturned.

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

Dale Verheyden, a worker who had known him for some 20 years, told Winkler about a conversation that he had with Monfils. According to Winkler's report, Verheyden related that conversation as follows (Ex. 26.):

> [Tom] wanted the weekend off because of **depression** and problems with life and TOM MONFILS had mentioned the **Brown County Hospital**. Mr. VERHEYDEN asked me if we had checked the Brown County Hospital for records of TOM MONFILS being treated there. Mr. VERHEYDEN stated that TOM MONFILS had two different personalities, and **it would be like him to commit suicide**. Mr. VERHEYDEN stated that TOM MONFILS was in the Coast Guard, and **TOM MONFILS would talk about pulling bodies out of the water**, and this was another reason why he believed that TOM MONFILS committed suicide. (Emphasis added.)

Verheyden also asked Sgt. Brodhagen whether the police had checked with the Brown County Hospital to see if Monfils had been treated there for depression. Brodhagen told him that the death was not a suicide "even though there were a great number of people that wanted to foster the belief" that Monfils had done so. Nonetheless, Verheyden maintained that Monfils had taken his own life. (*Id.*)

Steve Stein, who had also known Monfils well and worked with him for several years, told police that Monfils had long needed "psychiatric help." He testified at the evidentiary hearing that a few years before Monfils' death, Stein and his wife had struggled with their daughter's premature birth and resulting lengthy hospitalization. Monfils' response to the Steins' ordeal was to post a mocking version of a newspaper article about the remarkable efforts to save the baby and give her a chance for a normal life. (Ex. 34; EH 7/9/15 at 89-91.)

In response, the mill advised Stein that it was prepared to terminate Monfils. (*Id.*) Stein, however, told the mill to get Monfils mental help, rather than fire him. Soon thereafter, Monfils went on a leave from the mill for as long as a month. (Ex. 34; EH 7/9/15 at 91.) Stein understood that Monfils went on that leave to get help. (EH 7/9/15 at 91-92.)

Stein confirmed that Monfils frequently told co-workers, often in morbid detail, about his Coast Guard experiences recovering the bodies of those who had committed suicide by tying

heavy objects to their bodies and drowning. Stein also recounted Monfils' strange fascination with death and drowning, and Monfils' relating of detailed stories regarding the particular bridges from which these suicide victims had jumped with weights, chains, or tire irons holding their bodies under water. (Ex. 34; EH 7/9/15 at 93-94.) He recalled Monfils' telling him how much weight Stein would have to tie to his body to remain submerged while Stein was scuba-diving. (EH 7/9/15 at 96-97.)

Stein further attested to Monfils' obsession with death by referencing the occasion when Monfils had resuscitated a man whose heart had stopped. After saving him, Monfils repeatedly contacted this gentleman to ask him to describe the experience of dying in detail. (*Id.* at 95.)

Just prior to his death, Monfils' behavior was particularly odd. Stein testified that he had seen Monfils handling the same weight found tied to his body in the vat. (*Id.* at 102-103) Monfils was also noticeably quieter than usual in the days just before his death. Although he was usually talkative after finishing his shift, on those days he quickly left without speaking with those who were beginning the next shift on the machine. (*Id.* at 103.)

Stein confirmed that there were rumors in the mill that Monfils and his wife were about to divorce. (*Id.* at 105.) Stein affirmed, as did many others, that Monfils' job was highly important to him. (*Id.* at 103.) Stein, like others who knew Monfils well, understood the profound effect on Monfils of being exposed as the 911 caller. For Stein, Monfils' death was always a likely suicide. (*Id.* at 97.)

The statements of other mill employees attesting to Monfils' mental health and obsession with death and drowning included (1) Marlyn Charles' statement that Paul Bader and Charles Hagerty had told him about Monfils' hospitalization for a mental breakdown; (2) Charles' statement that, according to Stein, Monfils' suicide had been "coming on for 5 years;" (3) Robert

Gerbensky's statement that, in the days before his death, Monfils had not been himself and had been "in one of his moods"; (4) Randy LePak's description of Monfils' as stupefied and having "snapped" after Kutska played the tape for him; (5) Dennis Servais' description of Monfils as appearing defeated and resigned after being confronted with the tape; and (6) Connie Jones' description of Monfils as "having a pensive look" and appearing "deep in thought" when she passed by him that morning. (7 at 76; Exs. 36-42.)

In the days immediately before his death, Monfils was sleep-deprived, isolated, fearful, and anxiety-ridden, as his repeated calls to the police and District Attorney's Office seeking to suppress the tape of his 911 call demonstrated. He was emotionally disconnected from his wife who claimed not to have noticed anything wrong with or unusual about him in the days just before or, indeed, on the morning of his death. The couple had been in marriage counseling earlier in 1992 in the months before his death.

When Monfils disappeared, many who knew him feared that he had harmed himself. Indeed, a search for him soon began along the Fox River behind the mill. While he was still missing, his wife, Susan, stated that he **was** capable of harming himself because **"his life is the mill."** (Ex. 29.) While he was still missing, she searched for him at various local hospitals, including the Bellin Hospital psychiatric facility. (8 at 32-33.) She fully appreciated what his exposure as the 911 caller posed for him and their family, both financially and socially.

Echoing her concern that he might have harmed himself because "his life is the mill," another worker, Jim Seidl, told police that the mill was Monfils' first priority and that Monfils'

wife was his last. Seidl told them that Monfils was "ingenious" and "the type of person who would kill himself and make it look like someone else did it." He stated that (Ex. 33.):[3]

> Tom Monfils was in the Coast Guard & **knows how to tie knots** concerning the weight tied to him…[H]e fully understood the **need to tie the weight to his body** in order to overcome the instinctive resistance of a fully conscious person to drowning himself. (Emphasis added.)

Seidl added that "Tom Monfils was smart enough to know that he would have to sink to the bottom & that's why he used a weight, so he would sink & not attempt stopping the suicide." (Ex. 33.) At the evidentiary hearing, Cal Monfils described his brother's personality and emotional make-up in terms that confirmed his susceptibility to being overwhelmed by events and circumstances of the type that unfolded after his 911 call to the police became known. (EH 7/9/15 at 50-53 and 59-60.)

After Mr. Kutska exposed him that morning as the 911 caller, Monfils knew that he faced enduring censure, black-balling, and shunning in the mill and the wider community as word of what he had done traveled. He saw the looks and finger-pointing of his fellow workers. He heard the disappointment, frustration, and condemnation from LePak, Piaskowski, and Hirn when they spoke to him that morning. He knew that his job—the greatest priority in his life—was in jeopardy and that his life could never be the same. He had damaged his family's name at the mill where his father and other family members had spent their careers.

He could only sit alone in the No. 7 coop and contemplate what his 911 call had brought down on him. He weighed that reality as he performed the 7:34 a.m. turnover on the No. 7 machine. After Monfils completed that turnover, Pete Delvoe saw him at approximately 7:40-

[3] This evidence and that of similar nature is not hearsay because it is offered to show what diligent defense counsel could have discovered by investigating statements of this nature, including by contacting witnesses who would testify to the likelihood of suicide. It is not offered to prove that Monfils had, in fact, taken his own life. Wis. Stat. §908.01(3)

7:42 a.m. walking toward the No. 7 coop entrance. (Exs. 8 and 9.) Just outside of that entrance was the weight that was later found tied to Monfils' body. Inside that entrance were two doors. One of them led into the No. 7 coop and the other led into the "3-4 room" storage area where Monfils' jump rope hung on a railing. When Delvoe saw Monfils walking toward that entrance, he naturally assumed that he was about to enter the No. 7 coop because those who worked on the No. 7 machine often went there after completing a task on it and to await the next.

Monfils, however, did not enter the No. 7 coop where Piaskowski and Servais were then sitting. Instead, after picking up the weight near the entrance and entering the airlock, he went through the door leading to the "3-4 room," took his jump rope off a railing, and walked through an isolated area of the mill to the vat.

Diligent defense counsel reviewing the police investigation files would have found strong indications of possible suicide that begged for further investigation. Given the stakes—life in prison for the most serious offense in the State's criminal code—**and** the lack of any direct evidence of murder, there was no strategic justification for failing to investigate and challenge the State's manner of death theory. The need to (1) consult an independent forensic pathologist **and** (2) investigate the evidence that pointed toward suicide was overwhelming.

2. <u>The Absence of Another "Dude" Further Pointed to and Necessitated Investigation of a Suicide Defense</u>.

If Mr. Kutska's counsel were going to concede the homicide and thereby reduce the entire trial to the single issue of who had murdered Tom Monfils, the question then became what evidence, if any, they had showing who, other than Mr. Kutska, had killed him? Trial counsel knew what Dr. Young, Brian and Verna Kellner, David Wiener, and the two jailhouse snitches, Gilliam and Charleston, would say. He knew that the prosecution would paint Mr. Kutska as the

person with a palpable motive to take revenge against Monfils and lead the "angry mob" that killed him.

As should have been evident, a SODDI defense was doomed unless there was some compelling evidence pointing to someone to whom Mr. Kutska could not be connected. Obtaining such was complicated by the ironic reality that there was no trace evidence and no eyewitness testimony proving that **anyone** had beaten and murdered Monfils. At trial, counsel never told the jury who had killed Monfils, and it predictably convicted Mr. Kutska.

3. Tom Monfils Had Previously Tied the Exact Type of Knot Found Around His Neck and the Weight Handle.

The significance of the rope knots was never lost on law enforcement. If it could connect one or more individuals to the knots, it would have powerful evidence of that person's involvement in the alleged murder. Of course, if it were shown that Tom Monfils had or may well have tied those knots, law enforcement would have had to confront the reality of his suicide, particularly because his death in the vat so closely mirrored the drownings that he had so vividly detailed for his co-workers when talking to them about his Coast Guard service days.

Early on, the police sent the rope and the two knots to the State Crime Lab for examination, hoping to find fingerprints or trace evidence on them. After examining the knots, the Crime Lab advised the police that it had not found any such evidence. At the same time, however, the Crime Lab instructed the police to have the knots examined by the Navy or the Coast Guard, a clear indication that the knots were or might be nautical in type or use. (Ex. 43.)

During the investigation, Cal Monfils told Winkler that the rope knots "looked familiar" to him and were of the type that his brother could have tied. (EH 7/9/15 at 55-56.) He saw how accurately and carefully to the end of the rope handles the knots were tied and how they did not appear consistent with someone hastily tying them to a body lying on the floor. He wanted

Winkler to know this because the investigation had then "stalled," and he thought that an expert should examine the knots. (*Id at* 74 and 55-56.) Winkler ended that discussion by telling him that the police had already looked into the knot question. (*Id.* at 57.)

The police investigation file does not indicate whether they followed the Crime Lab's directive and anyone requested that the Navy or Coast Guard examine the knots. Moreover, at the evidentiary hearing, Winkler disclaimed any knowledge regarding the Crime Lab's instruction, whether anyone in law enforcement had investigated the knots, ascertained their type and uses, and/or determined whether they were of the type that Monfils may have tied. (EH 7/22/15 at 72-74.)

Had Winkler or others in law enforcement followed the Crime Lab's instruction, he or they would have found a person with George Jensen's training and experience in the Coast Guard and Merchant Marine. At the evidentiary hearing, Mr. Jensen examined photographs of the knots tied around Monfils' neck and to the weight handle and identified each of them as a "two half-hitch knot." (Exs. 128, 129, and 143.)

He further explained the extensive knot training that Coast Guard seaman received and confirmed that the "two half-hitch knot" is one that the Coast Guard taught them to use during his service. He also described some of the nautical purposes that this knot serves. (*Id*. at 80-81.) There can be little doubt that the Coast Guard had trained Tom Monfils to tie a "two half-hitch knot."

Mr. Jensen next examined photos of knots that Cal Monfils obtained from his brother's home after his death and that Cal Monfils believed were of the type that he had seen his brother tie. (Exs. 143-146; EH 7/9/15 at 55.) Mr. Jensen identified each of those as a "two half-hitch knot," the identical type found tied around Monfils' neck and the weight handle. (*Id.* at 83-84.)

In short, the evidence proved that Tom Monfils had the ability and propensity to tie the same knot found with his body.

The State suggested at the hearing that a "two half-hitch knot" could be tied by anyone because it is not difficult to learn and Coast Guard training was not a prerequisite to learning how to tie it. What the State failed to note, however, is that there were only seven people whose ability and propensity to tie this type of knot mattered—the six defendants and Tom Monfils. Of those seven, the only person ever shown to have the ability and propensity to tie that type of knot, particularly with the care and accuracy shown in the photos, was Tom Monfils.

Had the State connected any defendant to that type of knot, it would have proffered that evidence as powerfully incriminating. **That these knots can instead be connected to Tom Monfils makes them no less probative that he had or may have tied them in the course of committing suicide.** This knot evidence again confirms the logic and merit of a suicide theory, particularly because Monfils' death with a weight tied to his body so closely mimicked those of the suicide drowning victims about whom he had spoken so often.

4. Susan Monfils' Actions and Statements Support a Suicide Defense.

Susan Monfils' statements and actions immediately following her husband's death were ignored in prior proceedings, but merit close attention. First, she came to the mill on the morning of her husband's disappearance and learned that he had admitted being the 911 caller. Before that time, he had lied to her when he told her that he had not reported Kutska. After being asked if he might have been capable of harming himself, she responded in a telling manner. Yes, she said, he was capable of harming himself because "his life is in the mill." (Ex. 29.) She later went to the Bellin Hospital psychiatric facility as part of her search for him.

Immediately after learning of her husband's death, Susan was admitted to a psychiatric ward. (EH 7/9/15 at 61.) When she was discharged a few days later, Cal Monfils picked her up and drove her to the funeral home to make certain arrangements. (*Id.* at 62.) From there, they drove to a floral shop. As they were pulling into the shop's parking lot, they heard a radio report stating that Tom had been found in the vat with a rope and weight tied to him. That was the first time that the family or the public learned that information. (*Id*.)

Upon hearing that news, Susan slumped over in the passenger seat and, after several seconds of silence, asked Cal to drive her to the bank where she and Tom had a safe deposit box. After arriving there, Cal entered the bank with Susan and waited while she went to the box. She returned about 10-15 minutes later and asked Cal to drive her home. (*Id.* at 63.)

Susan never told Cal why she had abruptly interrupted these funeral arrangements to inspect the contents of a safe deposit box, but her doing so posed obvious questions that a defense lawyer would want to explore: Had the radio report induced her to look for a suicide note and/or to review Tom's life insurance policies to determine whether they might be affected by suicide? She had, no doubt, heard him tell the stories about recovering the bodies of those who had taken their own lives by tying chains or heavy objects to themselves. The connection between what she heard on the radio and those stories could not have escaped her, any more than it did the mill workers who drew it.

Susan was, however, direct with her mother-in-law, Joan Monfils. She told her that Tom had committed suicide and further intimated to her that he had left a note to that effect. As Cal Monfils testified at the hearing, he had a conversation with his mother during which she:

> …brought up the time where Susan, right after it happened, was at their house at the kitchen table saying that Tom had committed suicide. She kept repeating it. And as my mother was telling me the story, of course, she was under

> the impression that Sue was just talking foolish. (EH 7/9/15 at 68.)

Later, Mrs. Monfils told Cal that at another time Susan told her that "she found some notes above the ceiling tiles in their bedroom. Didn't exactly say what the notes said, but it was implied that they were notes that Tom had written possibly, but I don't really know the subject of the notes." (*Id.* at 69-70.). Mrs. Monfils again rejected Susan's comments as "foolish" and was plainly upset by them. (*Id.* at 70.) That Susan made those statements was well-known within the immediate Monfils' family. (*Id.*)

Susan's statements to Mrs. Monfils are admissible because they were against Susan's pecuniary and social interests. Susan's wrongful death litigation was premised on a homicide theory, and suicide was contrary to her pecuniary interests. Moreover, both she and the rest of the Monfils' family had rejected the notion, discussed in the media and the community immediately after Tom's death, that he would ever take his own life. Susan's statement to Mrs. Monfils **and** Mrs. Monfils' statements to Cal and his other siblings were each against their social interests and Susan's financial interests, and are admissible for those reasons. Wis. Stat. §§ 908.045(4) and 908.05. Moreover, they have independent legal effect and are not hearsay because any defense lawyer investigating the manner of death could have learned about and pursued these leads. Wis. Stat. § 908.01(3)

F. Mr. Glynn Explained Why Mr. Kutska's Counsel Were Deficient and Prejudiced the Defense.

The report and testimony of Wisconsin criminal defense lawyer, Stephen Glynn, examined the performance of Mr. Kutska's trial and post-conviction counsel and determined that each of them had failed to provide diligent, thorough, and skillful representation. He further determined that their deficient representation had prejudiced Mr. Kutska's defense. (Ex. 138.) As Mr. Glynn has stated in that report and testified at the hearing:

1. Defense counsel was obligated to (a) consult with and retain an independent forensic pathologist to review and, if possible, challenge Dr. Young's homicide testimony **and** (b) investigate the possibility that Monfils had committed suicide. (EH 7/8/15 at 184-186.). It was, he noted, defense counsel's duty to "find out what the State can prove" and establish the basis for reasonable doubt. (*Id.* at 186-187.)

2. Defense counsel is obligated to consult with a forensic pathologist when "the case is likely to turn on what the forensic pathologist employed by the State has said" and to ascertain whether the pathologist's report is "strong," well-written, well-prepared, and "makes sense." (*Id.* at 187-188.) Here, Dr. Young's report was "not very solid. That is, it talks about an area which is by itself subject to great dispute among pathologists…It also involves a decedent who, as a consequence of the manner of death, had some deterioration of the body…That makes it more difficult for a pathologist." (*Id.* at 189)

Dr. Young's autopsy report was not "tight" because there were "different ways it could be challenged, and "there were all kinds of things that jumped out at you and really pretty much hollered to a lawyer to say, 'Get somebody to take another look at this case.'" Defense counsel was obligated to do that, no matter how much respect he may have had for Dr. Young. (*Id.* at 190.*)* The existence of the large propeller in the vat also posed a "question as to whether injuries are caused by the propeller or the vat or by something or someone else." (*Id.*)

3. Mr. Glynn summarized the duties of post-conviction counsel as being (*Id.* at 203.):

> Very similar to those of trial counsel in a sense, except more complicated, because there's more information available to post-conviction counsel in the sense that there is now a record of trial testimony. But it's to review the record. It's to conduct an investigation. It's to consult with the client. It's to consult with prior counsel. All in an

> effort to determine whether or not the case was properly tried by the trial lawyer and whether the person on trial received the effective assistance of counsel.

Mr. Glynn testified that he could not "imagine someone going through the record of Mr. Kutska's prosecution and defense in this case and not coming away with serious questions about the pathology, for example." (*Id.* at 204.). The failure to investigate and present evidence of suicide was prejudicial because it deprived Mr. Kutska of the strongest defense that he had at trial. (*Id.* at 205.) That defense was far more viable than the SODDI defense. (*Id.*)

4. The State sought to prove the cause of death through Dr. Young whose testimony defense counsel never effectively challenged. (*Id.* at 192.). It was necessary for Mr. Kutska's counsel to create a reasonable doubt regarding the cause of death. (*Id.* at 193.). Dr. Young's determination that all of his pre-mortem injuries had been suffered before he entered the vat was the key piece that "turned this case into a murder case." (*Id.* at 189-190.). Had she concluded that "these injuries were all postmortem or the best that she could say is that they could be postmortem, this would have been an entirely different prosecution." (*Id.* at 190.).

5. The SODDI defense is "basically the weakest defense there is to start with. And under the circumstances of this case it was even weaker than that." (*Id.* at 194, 220.) There was, after all, a limited universe of potential murderers in the mill and the "earlier confrontation between Mr. Kutska and Mr. Monfils with the tape recording" would have made the SODDI defense "very much" more challenging. (*Id.*) There was no doubt that the earlier confrontation with Mr. Monfils regarding the tape made Mr. Kutska "the clearest and easiest suspect in the case" if the death were a homicide. (*Id.*) Moreover, defense counsel never told the jury who he believed had caused the death. (*Id.* at 195.)

6. Defense counsel could not have conceded that Monfils had been beaten and murdered until after he had "exhausted all efforts to try to determine that this was anything but a homicide." (*Id.* at 195.) Defense counsel cannot make a "good strategic decision" to concede that the manner of death was a homicide "without first investigating the basis" for that concession. (*Id.* at 196.) Without consulting an independent forensic pathologist to review Dr. Young's report and conclusions, it was impossible for defense counsel to make an intelligent and informed decision about whether Monfils had been beaten and murdered. (*Id.* at 201.) Defense counsel could not know whether or not to challenge the cause of death that the State was advancing unless counsel "has done an investigation into the cause of death, and the people who do that are forensic pathologists." (*Id.* at 218.)

7. There was evidence that Monfils could have committed suicide, including the fact that the mill was a large portion of his life. It was necessary for counsel to investigate any history of depression, anxiety, or other emotional problems. (*Id.* at 197.) It was necessary for defense counsel to investigate Monfils' discussions about death and drowning and his Coast Guard service, including Monfils' experience with drowning victims who had tied weights to themselves with knots. (*Id.* at 198.) It was also relevant to investigate Monfils' marriage and whether it was a source of anxiety and stress. (*Id.*)

8. The evidence of suicide would have fit perfectly with the absence of any trace evidence or eyewitness testimony of a beating. (*Id.* at 199.) Defense counsel should have explored the evidence of suicide and also shown why the police had not been able to find any trace evidence of blood, notwithstanding the availability of black lights and luminal. (*Id.* at 201.) Washing the floor would not have removed the evidence of any blood that had been there. (*Id.*)

9. **A suicide defense, aided by the testimony of someone like Dr. Sens, would have presented a reasonable doubt and was far stronger than the SODDI defense. (*Id.* at 202.) It would have completely changed every phase of the trial. (*Id.* at 219.) Calling a forensic pathologist to challenge Dr. Young's ability to determine what injuries were suffered before death would alone have supported a reasonable doubt argument.** (*Id.*) Had defense counsel investigated Dr. Young's findings and conclusions and whether Monfils had taken his own life, they would have shown the jury why the homicide theory was not merely reasonably doubtful, but flatly wrong, and why certain key State witnesses were not credible.

10. That counsel for other defendants similarly failed to pursue these necessary issues and facts was of no consequence to Mr. Kutska's right to the effective assistance of counsel. (*Id.* at 208.)

11. Defense counsel had ample means, including through the use of formal discovery in the related civil wrongful death litigation, to obtain the evidence with which to develop a powerful suicide defense. Indeed, suicide was then, and still remains, the **only** theory that is fully consistent with the evidence that existed and the evidence that did not exist, but that should have, if Monfils had been beaten and carried to the vat. (Ex. 138.)

12. Presenting evidence of suicide would have altered every phase of the case. Law enforcement would have had to investigate and negate the possibility of it beyond a reasonable doubt. Had defense counsel likewise investigated the evidence of suicide and consulted with an independent forensic pathologist, such as Dr. Sens, the defense could never have conceded the homicide from the outset.

Attacking Dr. Young's testimony and presenting evidence of suicide would have rebutted the State's entire homicide theory and strengthened the defense attack on the credibility of the

Brian Kellner, Verna Kellner, David Wiener, and Gilliam/Charleston testimony. Instead, defense counsel's concessions and failures led the jury to assume that the prosecution's case was based on solidly reliable scientific, medical, and other evidence, including the testimony of the State's most critical fact witnesses—Brian Kellner and David Wiener—that was premised on the alleged beating and murder. (Ex. 138; EH 7/8/15 at 200.)

II. THE STATE DENIED MR. KUTSKA DUE PROCESS BY RELYING ON ERRONEOUS FORENSIC PATHOLOGY AND PERJURED FACT WITNESS TESTIMONY.

We now demonstrate why the fact witness evidence that the State relied on at trial was, at a minimum, subject to reasonable doubt and Mr. Kutska was denied due process.

Sgt. Randy Winkler's work began on the morning of November 22, the day that Monfils' body was found. (16 at 209.) He was part of the police team that unsuccessfully attempted to locate physical evidence of a homicide. (16 at 212 and 255-256.) No item of physical evidence sent to the State Crime Lab ever connected any of the defendants to the crime or crime scene. (16 at 215-20; 17 at 69.) At trial, Winkler testified that this "shortage of physical evidence" resulted in the need to obtain witness testimony to prove how and by whom Monfils had been murdered. (16 at 220-21.)

In early January 1994, some thirteen months after Monfils' death and while the enormous pressure to solve the case continued, Winkler became the lead detective. Winkler testified at the evidentiary hearing that he conducted some 500 interviews (although he apparently documented only a fraction of them). These interview/interrogation sessions often consumed several hours with the same individuals on multiple occasions.

When his interrogation subjects refused to provide the desired statements, Winkler made some or all of the following threats and statements to them: (a) he had recordings of their personal phone calls that he could publicly expose to their embarrassment; (b) they faced jail for

contempt if they did not "cooperate" with him; (c) he could have the mill fire them; (d) they could become a "suspect," rather than remain a "witness" in the case; (e) they could be charged with perjury; and/or (f) he could cause them to lose custody of their children. Winkler angrily rejected any statement they made to the effect that Monfils had killed himself. (5 at 5-11, 51, and 81-83; Ex. 26.)

Long before the release of the autopsy report in the civil wrongful death litigation in August 1994, **Winkler and his fellow detectives told their interview/interrogation subjects that Monfils had been beaten and that his injuries included one or more to his head.** (22 at 84; Ex. 50.) That Monfils had suffered a head injury was well-known to Mr. Kutska and others with whom the police spoke and interrogated long before the release of the autopsy report. (EH 7/9/15 at 106-108.) Accordingly, Winkler's attempt at the evidentiary hearing to incriminate Mr. Kutska by referencing his awareness of Monfils' head injury before he had obtained a copy of the autopsy report proved nothing. (EH 7/22/15 at 68-69.)

To explain the long delay in solving the homicide, law enforcement publicly accused unnamed individuals of lying and covering up for their "union brothers" in a misguided act of union loyalty. (*Id.*) The police told the public that they had "reason to believe that some people involved in the incident are less responsible than others and they want to come forward, but they are improperly influenced by others about the nature of their involvement." (*Id.*) The State publicly assured witnesses who had purportedly lied and failed to cooperate that they could come forward, tell the truth, and be immunized against obstruction charges. A reward fund of some $75,000 was also established to encourage witnesses to step forward. (17 at 117; Ex. 22.) Despite these and other efforts, the investigation remained stalled into late 1994.

A. Winkler Coerced Brian Kellner, Verna Kellner, and a Host of Others Regarding the "Fox Den Bar Role-Playing Re-Enactment."

According to his report of his interrogation of Brian Kellner on November 29, 1994—some two years after Monfils' death—Winkler told Kellner that the police already knew what Kutska had told Kellner about Monfils. Winkler's report stated that he told Kellner that he was now "trying to save him from having to go to the John Doe, and to do that he had to remember what Keith Kutska had told him." (Ex. 39.) Winkler told him that "the Judge may not believe" his inability to remember certain events and "could charge him with contempt if he could prove he was lying." (*Id.*)

Winkler's same report made **no** reference to the Fox Den Bar, but did include a summary of an alleged "role-playing re-enactment" of the six defendants' purported confrontation with and beating of Tom Monfils. The "Fox Den Bar" connection to the alleged re-enactment appeared only in Winkler's report for the following day, November 30, when he handed Kellner a typed statement to sign. Winkler described his preparation of that statement as follows (Ex. 51.):

> Brian was correcting the statement as I was typing it out. When the statement was completed I printed it out, and gave it to Brian along with a pen and told him to make any correction he wanted, and cross off anything he didn't want in the statement.
>
> * * * * *
>
> Brian read the statement and made several changes as he did. When Brian was done making the corrections I asked him if it was true and he said it was....When Brian got to page 6 of 12, he crossed out a sentence and said that Keith Kutska told him where the object came from that was used to hit Monfils in the head.

As is evident from Kellner's signed statement, however, Kellner made **no** such corrections. The **only** corrections were the few typos that Kellner initialed. (Ex. 27.)

B. Kellner's Trial Testimony Strongly Hinted at Winkler's Coercion.

At trial, Kellner recited the essence of his signed statement. He testified that, at the Fox Den Bar and after a day of heavy drinking, Kutska began re-enacting the confrontation and beating that had taken place at the bubbler. That testimony notwithstanding, Kellner attested to Winkler's major role in the statement's content as follows:

1. Kellner had not believed much of what Kutska told him and everything Kutska told him there was "questionable." (9 at 179 and 67.) Kellner expressed this concern to Winkler who told him "to write it down as if it were fact." (9 at 68.) Even though it was unclear to Kellner what Kutska intended to state as "a real event," Winkler told him to treat it all as fact and to include it in his statement. (9 at 69.)

2. Winkler took some things out of Kellner's statement that Kutska had told Kellner at the Fox Den Bar because they would have made the story "physically impossible." Winkler also "interjected a few things" into it to make Kellner's story "more plausible, more realistic." (9 at 216.)

3. Winkler suggested to Kellner that a wrench was used to strike Monfils. When Kellner told Winkler that he doubted that was true, Winkler told Kellner that the reference to the wrench would be in the statement and Kellner's concerns were unimportant. (9 at 68-69.)

4. There were "a lot of things" that Kellner told Winkler that Winkler stated were unimportant and that Winkler did not include in the statement. (9 at 164-65.) Because Winkler had not recorded their interviews or included all that Kellner told him in the statement, there was no record of what Kellner actually had said to Winkler. (9 at 165.)

5. Kellner and Kutska both speculated about what happened and Kutska often gave him different and inconsistent theories of what might have happened. The Fox Den Bar account was just one of them. (9 at 58 and 137.) Winkler seized on one of many stories that

Kutska told Kellner and Winkler put that theory into Kellner's statement. (*Id.*) Winkler went over the statement repeatedly with Kellner. (9 at 141.)

C. Kellner's Post-Conviction Statements and Testimony Confirmed Winkler's Coercion.

In connection with the Dale Basten and Mike Johnson post-conviction motion, Kellner began revealing far more of what occurred during his sessions with Winkler:

In his October 7, 1996 affidavit, Kellner stated that the following had been **concealed** at trial (Ex. 55.):

i. Before Kellner signed his police statement, Winkler interrogated him for about 8 hours and threatened him with **"loss of my job, losing my children, and being put in jail."** (Emphasis added.)

ii. Winkler told Kellner that he was lying and could be treated as a hostile witness and subjected to a long and unpleasant time at a John Doe hearing.

iii. Winkler stated that they had proof that Kellner's ex-wife, Verna, was having an affair with Kutska and that "they would be bringing it out in court."

iv. "Many of the things" that Winkler put into Kellner's written statement "were [Winkler's] claims, not mine." As Keller explained (emphasis added):

> At first, I challenged Sergeant Winkler when **he wrote** that Keith Kutska told me things that Keith Kutska had never in fact told me. Sergeant Winkler kept saying that it was 'close enough' and that there was nothing in this statement that they (Green Bay Police Department) did not already know and have proof on. Sergeant Winkler said that **I would be in trouble** if I denied these things that the police already know.
>
> **The truth is that Keith Kutska never said many of the things that are in the statement.** I first heard things from Sergeant Winkler, who told me that these 'facts' came from a statement that Keith Kutska had given them (Green Bay Police Department) just days before….[Kutska] never told me that he knew about or saw what happened to Tom Monfils. All that Keith Kutska told me was about playing the tape for Tom Monfils early in the morning in the number seven coop....When Randy Winkler wrote down the statements as if Keith Kutska had actually told me what happened, **I told him this was not the truth.** Randy Winkler refused to change the statement and refused to write that Keith

> Kutska had only talked about a whole lot of different theories. **Randy Winkler also put in many details, including names and certain locations that Keith Kutska never mentioned. I signed the statement even though I did not feel that it was the right thing to do....I signed it because I was afraid of Randy Winkler's threats** and because I wanted to get it over with and go home and be alone to digest what had happened and why. The reference to Verna's affair with Keith Kutska made me want to end this all the more.
>
> About a week before the Tom Monfils murder trial I was brought into Randy Winkler's office. Randy Winkler was upset that I was trying to correct my statement to him. **At this time Randy Winkler told me that if I tried to change my statement in any way I would be looking at losing my job, jail time for perjury, and being declared a hostile witness.**

When he testified at the Basten/Johnson post-conviction evidentiary hearing in February 1997 (Ex. 56.), Kellner confessed that he had lied at trial. He admitted that Kutska had not placed himself, Hirn, Keith, Piaskowski, Moore, Johnson, and Mineau at the alleged bubbler confrontation. Winkler, not Kellner, had included those names in Kellner's statement. Those whom Kellner placed at the bubbler were merely those whom Kutska told Kellner had been in the No. 9 booth when the tape was played. Kellner also confessed that his trial testimony to the effect that Kutska had placed Basten and Johnson at the bubbler was false.

Kellner then testified that Kutska had only posed questions at the Fox Den Bar about what might have happened "if" the police theory was correct. "But [Keith] used it in the same context: This is what the Police Department says happened. This is all speculation. That is what it was—what ifs. So I didn't put any credence in it." Kutska "was the director of the scenario of what-ifs, or could-bes, or might-bes, or to put it more bluntly: This is what the police department said happened."

When asked at this post-conviction hearing why he had lied at trial, Kellner stated:

> Because I was threatened with the loss of my children, the loss of my job, and I was told that it didn't matter because everything that

> was being said and recorded in my statement was on a tape, and that they had the exact same thing, that it was right there in a written statement from Keith Kutska that they had received one or two days prior to me being down there. And [all] I was doing was acknowledging and verifying what they already knew.
>
> * * * * *
>
> [W]hen I balked at what [Winkler] was telling me was actually what happened, he got mad and said: Either you listen to me and do it this way, or we will get ahold of child welfare and remove your children from you as being an unfit parent.

After Kellner refused to sign the statement that Winkler prepared for him on November 30, 1994, Winkler turned angry and hostile. Winkler "went from having a normal complexion to red, and his voice changed. Everything changed right there. You could tell he did not like being told no." Winkler yelled that Kellner "better behave, I better do as I'm told, this is all on tape, this is all on a signed statement from Keith, and if I was going to sit there and tell lies to him, that he would take steps to either have me locked up or take away my children, or get ahold of the mill and I would lose my job." Kellner feared that Winkler would also carry out his threat to remove his child custody and cause Kellner to lose his job:

> One of the things that [Winkler] wanted was that he told me that when we were at the Fox Den....that we used the bartenders as part of this what-if scenario. And when I told him no we didn't, he got mad about that and we went back to: Do you want to lose your job? Do you want to lose your children?

Winkler would not permit Kellner to exclude Basten and Johnson from those whom Kellner would say were at the bubbler, although Winkler did permit him to remove Winkler's reference to the use of a wrench to strike Monfils' head. When their interrogation session ended, Winkler was "not a happy camper" and repeated his threat to call child welfare. Winkler then left the room and returned to tell Kellner that he had done so. During their second session,

Winkler repeated the same threats that he made during the first one. "[H]e must have repeated them 25 times. He got loud and angry again and used profanity."

When Kellner told him that things had not occurred as Winkler insisted they had, Winkler "slammed his fist down on the table and made everything jump, and just told me: "Listen, I'm not going to play with you any more [sic]. I'm tired of your fuckin' lies." "You will agree to this because this is the God-damn truth, and if you're going to be a God-damn liar, you're going to jail for obstructing a police investigation. That's what he told me." Kellner then gave in and signed the statement. "I also told him: This isn't right. You put a lot of stuff into it that I couldn't remember or was never said. You know. But he said: Don't worry about it. It's close enough. We'll straighten it out in the courtroom."

Any changes that Kellner made to the statement that Winkler wrote for him were limited because Winkler was standing there as Kellner reviewed it. Kellner did not change entire sentences or paragraphs, but mainly just spelling errors. The corrections were not those that Kellner wanted to make because those were edits that "Randy would not budge on. Those were the ones that brought up my job, my welfare, my children's welfare. Those were not corrected. Those were not amended. Those were not straightened out."

After Kellner met before trial with a defense investigator and attempted to correct some of the inaccuracies in his police statement and prior testimony, Winkler took Kellner to the police station and went back to his threats. "You know Brian, there's [sic] a lot of things that we could do to you. And he went right back and hammered on my kids." Kellner perceived it as a "real threat." Winkler told Kellner again that he was going to call child welfare. Winkler left the room about a half dozen times after threatening each time to call child welfare.

About a week before trial, Winkler told Kellner that Kellner's answers at trial were going to be "what was written down on that, that statement...And that there was no area outside of what was on that statement. That what was on the statement was gospel, so to speak, and there was no left or right."

Shortly before trial, Kellner's children were late coming home from school, and he received a phone call telling him that Oconto County Child Welfare had picked them up at the school and was investigating an "incident of child abuse" that both of his children denied. They did not return home until about 4 p.m. when Winkler arrived with them. Winkler told Kellner that Winkler had gotten a call from child welfare, but Kellner knew that was a lie because there had been no reason for Child Welfare to call Winkler.

Nonetheless, the incident made Winkler's threats believable to him. As Kellner put it, "it made [me] stop a lot of times" when he testified at trial. When he was questioned at trial by defense counsel about having been harassed or threatened by Winkler, Kellner "didn't cross the line. I didn't tell them what he did. I did not tell them....I was not about to take the chance."

Kellner rationalized his false trial testimony on the ground that it was unimportant. He did not contact anyone to say that he had lied at trial because he did not believe anyone would listen to him. As Kellner stated, "[g]iven the facts, and what was all said and done in the media and everyone else prior to this thing going to court, these guys were tried and convicted by a witch hunt. And nobody was going to listen to me any more [sic]." Because of Winkler's threats, Kellner had not thought that he had any choice but to testify falsely.

D. Winkler Used Brian Kellner's Children as Pawns to Coerce His False Statement and Testimony.

At the hearing, Amanda Kellner Williams' presented her troubling account of how she had been used to pressure her father, Brian Kellner, to give the police what they were demanding

from him. Her experiences as a child of thirteen confirm Winkler's campaign of threats and coercion to secure the statements and testimony that he demanded from Kellner.

Ms. Williams testified that, during the investigation, her father was "stressed." She saw that he wanted to "protect us kids from as much of this as possible. So, we started changing our phone numbers a lot." (*Id.* at 20). He believed that they were being watched by people in a car parked near their home. (*Id.*)

On one occasion, a woman confronted Amanda at her school and began talking with her about her family and whether there was any "abuse" in the Kellner home **and** about the Monfils case. (*Id.* at 21.) This person, whose face is still imprinted in Ms. Williams's mind, communicated a series of threats that were intended to induce her father to "cooperate" in the Monfils case. The woman then told her that they needed to speak "in a more private setting" and took Amanda to a police station near the school where she was made to sit alone before being allowed to go home. (*Id.* at 21-22.). Once home, she told her father about what had happened to her. He "got quiet" as he digested what she told him. (*Id.* at 22.)

On another occasion, Amanda came home from school to find Winkler waiting for her there. He followed her into the house where he then questioned her alone for approximately two hours. He asked her what she understood about the Monfils case, whether she believed it was a murder, and whether she wanted "to stay living at my home" where he primary caregiver was her father. (EH 7/9/15 at 13-14)

Winkler told her that "if my dad didn't cooperate that he could be looking at a lot of problems." (*Id.* at 15.) "The problem that he meant or that I assumed that he meant was jail…Like he was going to get involved in this to the point where he could be implicated as well with the six." (*Id.* at 16.) Winkler also asked her whether she wanted to get her brother, Earl,

"in trouble." (*Id.* at 15.) Winkler's demeanor intimidated her and was intended to send the message to Brian Kellner that Winkler could gain access to his children at any time that Winkler wanted.

What Amanda Kellner Williams experienced is confirmed by Earl Kellner's March 23, 2015 statement describing the pressure tactics to which he was subjected at his school and other tactics to which his father was subjected (Ex. 122.)[4] He states that 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, when he was introduced to a woman. She described herself to Earl as a social worker and began inquiring about the relationships within his family and what he and his sister were experiencing during their parents' divorce.

After about an hour spent discussing the family's relationships, this woman began asking Earl about Keith 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," she asked him if he "knew that my father was involved in this case and that he had helped cover up the murder of Tom Monfils?"

Following dinner that evening, Earl states that his father told him that:

[4] Earl Kellner resides and works in Winnipeg, Manitoba, Canada and was not in attendance at the hearing. His statement is fully consistent with his sister's and others attesting to Winkler's child custody threats to Brian Kellner/

> 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 care 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.

Brian Kellner "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."

The overwhelming testimony proves that Winkler used the Kellners' impending divorce and Brian Kellner's child custody concerns to compel the false statement from Kellner on November 30, 1994 and Kellner's perjured testimony. To do so, Winkler enlisted the assistance of one or more imposters to pose as social or child welfare workers in this deceit. This ploy and other pressure tactics and threats achieved their purpose. Winkler prepared no detail sheets regarding these incidents at the Kellner children's schools to avoid documenting them.

E. Kellner Confessed to Steve Stein That Winkler Coerced Him By Threatening to Take Away His Children.

Steve Stein, a long-time mill worker, testified to the repeated pressure that he received from Winkler who wanted Stein to state falsely that he had seen Monfils being beaten at the bubbler. (EH 7/9/15 at 107-109.) Stein testified at the hearing that, after he refused to say that he had witnessed any beating, Winkler "told me that he could take my job away from me at any moment, that I'd never work again in Green Bay, my family would not want anything to do with

me when they found out how much of a scumbag I was." (*Id.* at 109.) Because men at the mill had lost their jobs for purportedly not cooperating with the police, Winkler's threats were hardly idle. (*Id.* at 110-111.)

Stein further testified that he had known Brian Kellner since high school and had become a close friend of his during the last couple years of Kellner's life. (*Id.* at 114.). Stein described his conversations with Kellner regarding Kellner's Monfils case testimony as follows (Id. at 114-117.):

> Q. Did he ever make any statement to you, sir, about the truthfulness of any statement or testimony he had given in the Monfils case?
>
> A. Yes.
>
> Q. Can you tell us on how many occasions, as best you can recall, that you had conversations with Mr. Kellner about any police statements he had given or any testimony had given in any proceeding in this case?
>
> A. I'd say five, six times for sure.
>
> Q. Was it a subject that weighed on his mind heavily?
>
> A. Yes.
>
> Q. Was it a subject that bothered him emotionally or psychologically as best you can tell?
>
> A. Yes.
>
> Q. Do you know whether he had ever consulted with any professionals with regard to any statement that he had given or any testimony he had provided?
>
> [Objection overruled]
>
> A. Yes.
>
> Q. Do you know whether he sought any professional counseling, emotional in nature?

A. He told me he did.

Q. And do you know whether he had consulted with any attorney?

A. Yes; he told me he did?

Q. He said that?

A. Yes.

Q. Did he ever tell you whether and to what extent any statement or testimony he had given in the Monfils case was false?

* * * * *

[Objection sustained. Offer of proof][5]

* * * * *

A. **He told me that he lied about what he had told the police because he was afraid. He was scared.** (Emphasis added.)

Q. Did he tell you what he was afraid or scared of?

A. Of losing his job, losing his family.

* * * * *

Q. Do you recall any other fears that he expressed to you that he had had?

A. Just basically what people would think of him if he changed his story and was allowed to tell the truth.

[5] This testimony was admissible because it was (a) offered to show what evidence would have been available to effective defense counsel, rather than to prove the event occurred; (b) it was a statement against the declarant's penal, pecuniary, and/or social interests; and (c) it was a statement evidencing the declarant's mental and emotional state. Wis. Stat. §§ 908.01(3), 908.03(3), and 908.045(4).

Kellner told Stein how the pressure relating to the loss of child custody had weighed on him and induced him to lie. When Kellner did so, he referenced the incidents at his children's' schools. As Stein testified (Id. at 120-121.):

> Q. Did he ever offer you any explanation of why he had not told the truth?
>
> A. One that really bothered him was the police had gone and taken his kids out of school, and he was told that's how easy it is.
>
> Q. How what is easy?
>
> A. To get to his family. And that really bothered him. That bothered him big time.
>
> Q. That the police had contacted his children at their schools?
>
> A. Yes. They went and took them right out of school.
>
> Q. Did he associate that event with any particular police officer?
>
> A. Randy Winkler.

In sum, Kellner confessed to Stein that he had been coerced to lie with threats that he would lose his job and children. (*Id.* at 119.) Kellner further told Stein that he feared what people would think of him if he changed his statements and told the truth. That Kellner fully appreciated the adverse social consequences of telling the truth about his perjury and role in the "Monfils Six" convictions was evident from Stein's testimony. Wis. Stat. § 908.045(4)

Stein's evidentiary hearing testimony attested not only to the threats imposed on mill workers during the investigation, but also at trial. As he testified (*Id.* at 121-122.):

> A. I had an individual basically tell me that they could take my life from me. Not my life, but they could take my job. Once I wasn't making any money then they could promise me that I wouldn't have a job anywhere in Green

> Bay. My family would no longer care for me. They wanted me to lie for them is what they wanted me to do, and I refused.
>
> Q. And what was the nature of what you regarded as a lie?
>
> A. They wanted me to say that Mike Piaskowski had told me that he knew what happened, which he never did. And I said, 'He never said that.' And they said, 'All we need you to do is tell us, when we ask you, to say that Mike knew what happened. Not that he ever told what happened, but that he knew what happened.' And I said, 'I'm not going to lie. He never said that to me.'
>
> Q. Again, without naming the individual, was it somebody within the police department of Green Bay or was it somebody within the Brown County District Attorney's Office who had this conversation?
>
> A. I don't really want to answer that.
>
> Q. Are you afraid of some retribution?
>
> A. Oh, you bet.
>
> Q. But, we can say this. That it was somebody who was in intimately involved in the prosecution of the State's case against Mr. Kutska and the other defendants?
>
> A. Yes.

More than twenty years after the trial, Stein still fears retribution for refusing to yield to the pressure on him to lie at trial and support the State's case. When asked why he had not previously reported Kellner's perjury confession, Stein pointed at Mr. Kutska and stated that he had not wanted to end up like the defendants. (*Id.* at 123.) Stein's testimony is among the most sobering and chilling in this long and sad saga.

F. Kellner Confessed to Gary Thyes That Winkler Coerced Him By Threatening to Take Away His Children.

Gary Thyes operated a barber shop where he cut Brian Kellner's hair. (EH 7/22/15 at 29-30.) During the Monfils case investigation, police detectives came into Thyes' shop on two occasions to speak with and secure statements from him regarding his alleged conversations with Brian Kellner and others regarding the case. Thyes described those police detective visits as follows (*Id.* at 30-31.):

> Q. And did you speak with them on those occasions?
>
> A. Yes. I was cutting hair, and they would sit there and they could give me things and tell me to sign them. And I told them, I'd say, 'Hey, where did you get—' They made up stuff. They kept on making stuff up. 'Sign this.' I wouldn't sign it. They would sit back down. A few minutes later they would say, 'Sign this.' And I wouldn't sign it. Twice I had to kick them out of my barber shop.

He also testified that he had multiple conversations with Kellner regarding police efforts to force Kellner to sign a false statement. Mr. Thyes testified to Kellner's state-of-mind during those conversations and the substance of them as follows (*Id.* at 32-33.):

> Q. Now, did you ever have any conversation with Brian Kellner during which he made statements to you about his contacts with the police regarding the investigation into the death of Thomas Monfils?
>
> A. Yes. Right after he signed it he came into my barber shop and told me that detectives day after day would question him, six, eight hours a day, and then finally they threatened to take his kids away. They would take his kids away, that he would never see them again unless he signed the statement. He said, 'I signed it. I went right over to a lawyer's office.' He told the lawyer he signed a false statement. Came over to the barber shop, and I told him that it was bad he signed it. He should never have signed the statement.

> Q. Had you had any prior conversation with Mr. Kellner about any pressure that was put on him to sign statements?
>
> A. Well, that's what he told me. Day after day.
>
> * * * * *
>
> Oh yes. Before he came into the barber shop, say once every three weeks or something, the detectives would keep asking him all the time. They kept on calling him in different times to the police station and have him sign statements, and he never did until they threatened to take his kids away and that he would never see them again.

When he described his sessions with the police to Thyes, Kellner was "very upset." He loved his children and did not want to lose them. (*Id.* at 33-34.)

G. Kellner Confessed to John Lundquist That Winkler Coerced Him To Give A False Statement and Testimony.

John Lundquist is a veteran and highly-respected criminal defense lawyer who is a member of Mr. Kutska's current legal team. In February 2014, he interviewed Brian Kellner regarding the alleged Fox Den Bar incident.

During that interview, Lundquist pointed out to Kellner that Winkler's November 29, 1994 detail sheets made no reference to the Fox Den Bar, but that the Fox Den Bar was a central element of Kellner's November 30, 1994 statement. At that point, Kellner told him that "there was no conversation about the Fox Den during the interview on the first day. And when he showed up on the second day, which I think was November 30th, the statement was presented to him." (EH 7/9/15 at 39.) At that point, **Kellner told Lundquist "that the Fox Den incident simply did not happen. There was no conversation by Mr. Kutska at all about Thomas Monfils."** (*Id.*) (Emphasis added.)

After Kellner affirmed his willingness to having further contact with him, Lundquist concluded the interview. After returning to his office, Lundquist prepared a memorandum

summarizing his conversation with Kellner and later drafted a proposed affidavit for Kellner attesting to the substance of what he had told Lundquist—that Kellner had perjured himself and the Fox Den Bar "re-enactment" story was a fiction that Winkler created and coerced from him. (Exs. 141 and 142.) Kellner never signed the affidavit because he died on the same day in late March, 2014 that he had arranged to meet with Lundquist to do so. (EH 7/9/15 at 42.)

There can be no doubt that the statements that Kellner made to Lundquist, like those that he made to Messrs. Stein and Thyes, were against his social interest because he was then admitting that, in the most high-profile criminal case in Green Bay history, he had not only perjured himself, but had provided the critical testimony supporting the convictions.

By the time that he met with Lundquist, Kellner had lived painfully for nearly two decades with the psychological and emotional burden of his lies. By February 2014, he had learned that he was terminally ill with cancer and had only some 2 ½ to 3 ½ years to live. (*Id.* at 39-40) He was then not only confronting his lies and what they had wrought, but also his mortality and the shortness of the time that he still had to make things right. He chose not to take his lies to the grave with him when he confessed his perjury to Mr. Kutska's counsel.

There can be no reason to question the trustworthiness of what Kellner told Lundquist because (a) it was painful for him to admit, if only because he feared what others might say about him once he told the truth; (b) he was seeking to make peace with himself and others for what he had done; and (c) he had made similar confessions to others, including Stein and Thyes. Kellner's multiple confessions are also corroborated by the overwhelming evidence that the Fox Den Bar "re-enactment" and the "bubbler-beating" never occurred.

H. Verna Kellner Irish Confessed to Jody Liegeois That Winkler Coerced False Testimony From Her and Brian Kellner.

At the hearing, Jody Liegeois testified that during and after the Monfils trial she worked at the HI way Restaurant adjacent to a gas station where Verna Kellner (then Verna Irish) worked. (EH 7/22/15 at 20.) One evening in late 1995 after the Monfils trial had concluded, Verna and her then-husband, Steve Irish, came into the restaurant to eat, as they often did. After Ms. Liegeois sat down with them and began speaking with Verna, she noted that Verna was "very upset." (*Id.*) Ms. Liegeois then described her conversation with Verna as follows (*Id.* at 24-26.):

> Q. …Did she tell you why she was upset?
>
> A. Yes, she did.
>
> Q. And what did she tell you?
>
> A. She told me that her confession [sic] was forced.
>
> Q. That her what was coerced?
>
> A. Her confession or her statement in court was forced.
>
> Q. Her testimony?
>
> A. Yup.
>
> Q. Did she say who it was forced by?
>
> A. She said the investigator at the time.
>
> Q. And did she tell you what portion of her testimony was forced?
>
> A. Yes, she did.
>
> Q. And what did she tell you?
>
> A. The reenactment that supposedly happened at the bar.

Q. Was she indicating to you that she had lied? Did you interpret her comments to say that she had lied during the trial?

A. Yes, I did.

[Objection sustained and offer of proof][6]

Q. Did Ms. Irish comment to you at the time she was talking about her own testimony with regard to the truthfulness or untruthfulness of Mr. Kellner's testimony?

A. Yes.

Q. And what did she say?

A. The same, that he was forced into making a statement.

Q. By the investigator?

A. By the investigator.

Q. With regard to the reenactment at the bar?

A. Yes.

I. Ardie Kutska Confirmed That the Fox Den Bar "Re-Enactment" Never Occurred.

Mr. Kutska's former wife, Ardie Kutska, was at the Fox Den Bar on the same early July 1994 evening when the purported "role-playing re-enactment" allegedly occurred. At the evidentiary hearing, she testified that no such incident had ever taken place and that the Kellners' trial testimony regarding it was false. (EH 7/8/15 at 224-228.) She further testified that she had not been called to testify at trial by Mr. Kutska's lawyer for the purported reason that "no one

[6] This testimony and that which followed it is admissible because it was against Verna Kellner Irish's penal, pecuniary, and social interests when she confessed her perjury to Ms. Liegeois. Her identification of Brian Kellner as her fellow perjurer was also against her interests because it confirmed her own perjury. Her confession to perjury also had independent legal effect.

would believe" her refutation of the Kellners' testimony because she was Mr. Kutska's wife. (*Id.* at 228-229.)

Her testimony is fully consistent with the trial testimony of Char and Ron Salnik (the two Fox Den Bar owners), Messrs. Servais, Boulanger, Delvoe, Kutska, each of the other five co-defendants, the pre-trial statement of Jon Mineau, and the hearing testimony of Ms. Liegeios and Messrs. Thyes and Lundquist. It is confirmed by the absence of any trace evidence of a beating. At a bare minimum, it is essential that a jury hear all of this testimony before concluding that there was any shred of truth regarding the powerfully damaging Fox Den Bar story.

J. Winkler Falsely Denied Coercing His Interrogation Subjects.

At all times, Winkler has categorically denied threatening or coercing anyone, including the Kellners. He did so again in his July 22, 2015 testimony, even when confronted with his own detail sheets documenting his threats to witnesses who had refused to tell him what he was demanding. Moreover, he continued his denials even in the face of the State's concession at trial that police had resorted to "unusual" tactics, including "maybe, threats."

In some careless moments, however, Winkler has admitted to using threats. His detail sheets provided the following summary of his interrogation of Jon Mineau (Ex. 65.):

> Jon was told that we knew he is at least a **witness** and if he wasn't going to tell us what he saw then he was going to be against us, and a **suspect.** Jon was told he could be arrested for something so simple as harassment, or **he could get tied into First Degree Intentional Homicide**. Jon was also told about getting pulled into the **Civil Suite** [sic] when [Susan Monfils' lawyer] gets this information, and that James River told us they were going to **fire** everyone who gets arrested in connection to this homicide. (Emphasis added.)

At trial, Winkler admitted that his sessions with Mineau were "heated" and that he told Mineau that "you're either a witness or you're in it" or words to that effect (in flat violation of the Reid Technique's prohibitions). (17 at 28; *"Police Interrogation and Confession,"* Inbau, Reid, (5th

ed. 2013.) At the evidentiary hearing, Winkler acknowledged that the Reid Technique, which he claimed to have used, expressly prohibits threats that have "real consequences" for the interrogation subject (EH 7/22/15 at 88-92.)

At the hearing, Winkler admitted threatening Mineau, although he quickly retreated from his concession (EH 7/22/15 at 120-121.):

> Q. You threatened that he could be deemed a suspect if he didn't cooperate with you?
>
> A. Yes.
>
> Q. But, you said you don't threaten people when you interrogate them.
>
> A. That wasn't a threat. It was a technique to try to get him to talk.

In Winkler's lexicon, threats are not "threats," but merely "techniques" to inspire cooperation.

Pete Delvoe attested at trial to Winkler's attempts to coerce false statements from him regarding his last sighting of Monfils. (5 at 5-6.) Winkler interrogated Delvoe for some nine hours a couple of weeks after Winkler procured the Brian and Verna Kellner statements in an effort to convince Delvoe to change his prior statement and say that he had witnessed a confrontation at the bubbler. (5 at 31.) When Delvoe persistently denied seeing any such confrontation, Winkler "more or less" told him (as he had told Mineau) that Delvoe was either "a witness or a suspect." (5 at 32.) Winkler also pressured him to change the time that Delvoe first heard the tape and succeeded in getting Delvoe to do so because Winkler insisted on a particular time and Delvoe wanted to help the police however he could. (5 at 54.)

Delvoe described Winkler's unrelenting efforts to force him to change his recollection of the chronology of events and to support the bubbler theory. (5 at 81-83.) Winkler made it clear to Delvoe that he would lose his job if Winkler concluded that he was "withholding information"

and Winkler reported Delvoe to the mill. (5 at 27-28 and 84-85.) By late 1994, Delvoe refused to meet with Winkler because "I felt he was trying to intimidate me." (5 at 27.) Winkler succeeded before trial, however, in getting Delvoe to change his prior statements "quite often," "although it was contrary" to Delvoe's recollection of events. (5 at 54, 134-35.)

After Don Boulanger told Winkler that he had not witnessed any confrontation or beating, the mill's own investigator, Frank Pinto, went to work on Boulanger. During a lengthy and hostile interrogation, Pinto pressured Boulanger relentlessly to admit that he had seen the beating. (Ex. 95.) Boulanger steadfastly denied that he had seen any such event, until, fearing the loss of his job or worse, he finally gave in and said that he had seen the alleged confrontation at the bubbler. Even then, however, Boulanger did not provide any details of what he had purportedly seen. To his credit, Boulanger refused to perjure himself at trial where he reaffirmed that he had never seen any alleged bubbler confrontation.

Winkler told Jim Melville that he could be arrested for obstructing justice and terminated from the mill unless Melville confirmed that he witnessed the bubbler confrontation. Winkler told Al Kiley that he would lose his job at the mill unless he gave Winkler what he wanted. (18 at 165-166; Exs. 61, 66, and 67.) Winkler pressured James Maciejewski to say that Mike Johnson had stated he would not change his story for Basten, but Maciejewski refused to do so because it was false. (14 at 38.)

At the evidentiary hearing, Winkler claimed not to recall a host of key details about the investigation including whether (a) he had ever met or questioned the Kellner children; (b) the Kellners had any minor children at the time of the investigation; (c) the Kellners lived in Oconto County; (d) he had ever seen the police photos of the agitator blades or the blade impressions; (e) he or anyone else in the Police Department followed the Crime Lab's instruction to have the

Navy or Coast Guard examine the knots; (f) Tom Monfils had any skill in tying those or any other types of knots (*Id.* at 70-74.); and/or (g) he or anyone in law enforcement ever matched the blade edges to the skull fracture. (Id. at 70-74, 80, 93-94, 96, 97, and 116.) Indeed, he could not recall the documents that he had been shown just the day before the hearing as he was being prepared to testify. (*Id*. at 41, 156, 158, and 159.)

Beyond what he would not or could not recall, Winkler denied any knowledge of (a) the incidents that Earl Kellner and Amanda Kellner Williams asserted had occurred at their schools (*Id.* at 94, 96, and 116.) and (b) what his fellow detectives had stated in their detail sheets. He did so despite (a) serving as the lead detective and familiarizing himself with the entire investigation file in this high-profile murder case that consumed him for nearly three years; (b) recently spending some **12 hours** discussing the Monfils case with a filmmaker (*Id.* at 40-41, 49, and 81.); and prepping for his testimony. He could not recall or denied whatever did not fit his narrative.

K. David Wiener's "Repressed Memory" Statements and Testimony Were False and Perjured.

After attending a wedding reception in mid-May 1993, David Wiener told police that he had recovered a "repressed memory" when he heard someone at the reception mention the name "Rodell." Hearing that name, he said, triggered his recovery of a previously "repressed memory" of seeing Basten and Johnson on the morning of Monfils' disappearance walking together, bent over, and apparently carrying something heavy and/or cumbersome toward the furnace room where the vat was located. The inference, of course, was that this "something" was Monfils' body, although Wiener declined to say that it was.

The problems with Wiener's "repressed memory" statement were overwhelming. He had been drinking heavily, was under the care of a psychiatrist who had wanted to hospitalize him,

and was highly-medicated for his acute anxiety and other mental illnesses when he gave this statement to the police. A co-worker of his at the reception had feared that Wiener was having a nervous breakdown that evening.

Two months earlier at Wiener's John Doe hearing appearance, the District Attorney had repeatedly called him a perjurer and a likely suspect whom Basten was justified in investigating. Wiener had an axe to grind with Basten for that reason alone. That Wiener's hearing the name "Rodell" could have triggered a "repressed memory," let alone one of this purported significance, was beyond far-fetched.

Moreover, when he related this story to the police, Wiener **knew** that he was a suspect in the Monfils' investigation and had a strong motive to distance himself from Mr. Kutska and the other suspects, accuse others, including Basten, and curry favor with law enforcement.

Some six months after he gave this story to the police, Wiener shot his unarmed brother to death. Immediately after receiving a ten-year sentence for that crime in May 1994, Wiener publicly stated that he would not cooperate in or testify for the prosecution at the Monfils trial because he had not been given a "deal" for his testimony. When he later testified for the State at the Monfils trial, the question naturally arose whether he had obtained, or anticipated receiving, some benefit in exchange for it. At trial, Wiener denied any such arrangement or understanding.

In early March 1996, barely two months after the Monfils defendants were sentenced, Wiener filed an **unopposed** motion for a sentence reduction that was granted and resulted in his becoming statutorily eligible for immediate release. In accordance with then-prevailing Parole Commission policy, he was released in late August 1997 after serving just 39 of the 120 months to which he had originally been sentenced.

At a post-conviction evidentiary hearing just days before that August 1997 release, Mr. Kutska's post-conviction counsel examined Wiener about whether he had received or had expected to receive any benefit for Monfils trial testimony. At that hearing, Wiener denied that the State had negotiated with him regarding one, and the Court found no evidence of a deal or any negotiations for one.

By the time that the current motion for post-conviction relief was filed in late October 2014, however, Mr. Kutska's lawyers had obtained copies of certain letters from Wiener and Wiener's lawyer to the District Attorney's Office that, in the context and chronology of events, pointed to some understanding for his trial testimony.

Indeed, even without these letters, Mr. Connell testified at the hearing that he "certainly believed Mr. Wiener thought he was doing something that would get him out early." (EH 7/8/15 at 158-159) When shown a copy of the October 17, 1994 letter referencing Winkler's suggestion that Wiener could improve "his current status" by cooperating in the Monfils investigation, Mr. Connell testified that the letter was relevant to his ability to examine Wiener in post-conviction about a deal. (*Id.* at 160)

These documents support the argument presented because they reference (a) Wiener's continuing insistence on a deal; (b) Winkler's suggestion to Wiener that he could improve his "current status" by cooperating in the Monfils investigation; (c) a continuing course of communications between Wiener's lawyers and the State as trial in the Monfils case approached; (d) the absence of any communication from the State to Wiener's lawyers slamming the door on any deal-related considerations; (e) Wiener's testimony for the State at trial; (f) the prompt filing of an unopposed sentence reduction motion after sentencing in the Monfils case; and (g) the

Wiener's early release. We have also previously explained why the State would never have willingly settled for offering Wiener's deposition testimony as a substitute for his trial testimony.

At minimum, Wiener surely believed that he would benefit from testifying at the trial, a belief that the State apparently did little, if anything, to extinguish.

Although at the close of the hearing, the Court expressed itself plainly regarding the merits of this contention, Mr. Kutska maintains that the documents and circumstances regarding Wiener's testimony point to Wiener's expectation of a deal, benefit, or other inducement for his trial testimony. Like Mr. Connell, any defense lawyer would have wanted these documents to make this contention and, at a minimum, the State was obligated to produce them to the defense for use at trial and in post-conviction.

This aspect of the case aside, Wiener's testimony could never support Mr. Kutska's conviction. Even the State could not swallow the notion that Wiener had recovered a "repressed memory," and it conceded that he had lied repeatedly when denying that he had authored the fake suicide note. The newly-presented evidence regarding the manner of Mr. Monfils death further impeaches his "repressed memory" account.

L. The Court Has Previously Found James Gilliam Not Credible.

On April 12, 1995, the State charged the six defendants with first-degree intentional homicide. Nonetheless, it publicly acknowledged that it still lacked any physical evidence of, or eyewitness to, the alleged beating. (Ex. 22.) On that same afternoon, Winkler approached Rey Moore to offer him an "out"—a plea deal—if Moore confessed. Moore refused to sign the false statement that Winkler prepared for him. (21 at 92-93.)

James Gilliam, a paid police informant, later appeared in Moore's cell. (17 at 117-18.) Gilliam testified at trial that, while seeking to "comfort" and "help" Moore, Moore told him that he had struck Monfils. According to Gilliam, Moore told him that Kutska had gotten

"everybody together" about two days before the confrontation with Monfils. According to Gilliam, Moore told him that Kutska and the other men "talked and they were concerned because Monfils was apparently at the mill blabbing" about all of them having stolen something from the mill and that Monfils was going to tell on all of them. (16 at 178-79.)

According to Gilliam, Moore further told him that Kutska later told Monfils to meet them in the mill "where there had two huge big machines and was somewhere like a hallway that you couldn't see from either side cause [sic] you was inside the mill." (16 at 181-83.) Kutska then allegedly arrived and hit Monfils in the face. The rest of the guys began kicking and hitting Monfils. Moore "tapped him a couple of times in the head" while Moore was standing behind Monfils. Monfils was then on the floor "laying in a ball, curled up in a ball" and still alive. According to Gilliam, Moore did not know until he watched television the next day that Monfils had been found in the vat and was then in shock at hearing the news. (16 at 183-84.)

Gilliam's testimony made hash out of Kellner's Fox Den Bar story and the State's "the-tape-is-the-epicenter-of-the-case" theory. The Brown County Jail's records also confirmed that Gilliam had **not** been in Moore's cell on the day of his alleged conversation with Moore. (21 at 24.) Nonetheless, his story supported the prosecution's case as long as no one was too fussy about its details or lack of consistency with the Kellner Fox Den Bar account. 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.

At a post-conviction hearing in November 2009 in connection with Moore's motion for a new trial, Gilliam could not keep his story and lies straight. By the end of that testimony, he had (a) testified at trial that Moore admitted striking Monfils; (b) stated in the subsequent interview with two book authors that Moore denied hitting Monfils; (c) testified at the post-conviction

hearing that Moore told him that Moore had hit Monfils; and (d) testified at the hearing that Moore told him that Moore had not hit Monfils.

He also testified at the hearing that he had lied to the University of Wisconsin Law School students who were working with the Wisconsin Innocence Project on Moore's behalf. Gilliam further admitted lying about his own past conduct because of some things that he had been "involved in." Gilliam denied ever acting as an informant to gain any benefit for himself, but then admitted that he had been a paid drug informant.

In its 2010 ruling, the Court described Gilliam's testimony and recollections as being strongly influenced by the "direction of the wind." *State v. Moore*, Case No. 95-CF-240, January 20, 2010. That ruling, however, came only **after** the reviewing courts had cited Gilliam's testimony in affirming the convictions of five of the defendants.

M. The Law Requires the Vacating of a Conviction When the Prosecution Has Actual or Imputed Knowledge That It Offered False Testimony and There is a Reasonable Likelihood That the Testimony Influenced or Affected the Jury.

When the State has actual **or** imputed knowledge that false testimony material to its case has been offered at trial, the defendant is entitled to a new trial if there was a reasonable likelihood that such testimony **influenced or affected** the jury's judgment, even if the court is not convinced that the jury would have acquitted the defendant in the absence of that testimony. *State v. Pease*, 2000 Wisc. App. LEXIS 1026; *State v. Nerison*, 136 Wis. 2d 37 (Wis. 1987); *U.S. v. Young*, 17 F.3d 1201 (9th Cir. 1994). In such cases, the testimony taints the trial and casts doubt on the integrity of the state's case. *Hayes v. Brown*, 399 F. 3d 972 (9th Cir. 2005); *U.S. v. Arnold*, 117 F. 3d 1308, 1315 (11th Cir. 1997); *U.S. v. Duke*, 50 F.3d 571, 577-78 (8th Cir. 1995); *U.S. v. Bagley*, 473 U.S. 667, 678-80 (1985); *U.S. v. Agurs*, 427 U.S. 97, 103 (1976); *Giglio v. U.S.*, 405 U.S. 150, 153-54 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). In

such circumstances, a new trial may also be necessary in the interests of justice. Fed. R. Crim. P. 33; *Young*, 17 F. 3d, at 1204.

Even if the prosecution does not know that is has offered false testimony, however, such knowledge is **imputed** to it if police personnel working on the investigation and trial with it know that such testimony is false. *Curran v. Delaware*, 259 F. 2d 707 (3d Cir. 1958) (false police officer testimony denied due process, even if prosecutor was unaware of the perjury); *Schneider v. Estelle*, 552 F. 2d 593 (5th Cir. 1977) (perjury suborned by a state law enforcement officer was imputed to the prosecution for due process violation purposes); *Kyles v. Whitle*y, 514 U.S. 419, 437-438 (1995) (failure to disclose evidence of false testimony known only to police investigators and not to the prosecution violated due process); *Arnold v. McNeil*, 622 F. Supp. 2d 1294 (M.D. Fla. 2009) *aff'd sub. nom.*, *Arnold v. Secretary, Dept. of Corrections*, 595 F. 3d 1324 (11th Cir. 2010) (*per curiam*).

N. The Law Requires Vacating a Conviction When the State Unknowingly Offered False Testimony and There Is a Reasonable Probability of a Different Result at a Retrial.

Although knowing reliance on false and/or perjured testimony corrupts the proceeding and casts doubt upon the prosecution's case, the accused may be no less prejudiced when the State relies on testimony that it did not know, but should have known, was false. *White v. Ragen*, 324 U.S. 760, 764 (1945); *Hysler v. Florida*, 315 U.S. 411, 415 (1942); *Mesarosh v. U.S.*, 352 U.S. 1 (1956); *U.S. v. Wallach*, 935 F. 2d 445, 456 (2d. Cir. 1991) (prosecution disregarded evidence putting it on notice that witness was giving false testimony); *U.S. v. LaPage*, 231 F. 3d 488, 492 (9th Cir. 2000).

The State has the duty to investigate whether a witness has lied previously or may do so at trial and to disclose that evidence to the defendant. *Giglio, supra*. When it has negligently offered false testimony, vacating the conviction and ordering a new trial is necessary to vindicate

the accused's right to a fair trial if the elimination of that testimony would likely produce a different result at retrial. *Agurs*, 386 U.S. at 24; *Bagley*, 473 U.S. at 679-80 (1985) (new trial required when prosecution unknowingly proffered false testimony that probably induced the guilty verdict); *Mooney v. Holahan*, 294 U.S. 103 (1935).

Here, the State assured the jury that Winkler's interrogation methods were a lawful and necessary means for obtaining the "truth" from individuals who "lied," refused to "cooperate," and "frustrated" him during the investigation. The State knew or should have known, however, that Winkler coerced Kellner's false Fox Den Bar story. It knew that Kellner's signed statement and his later trial testimony contradicted his initial statements to the police and his pretrial statement to a defense investigator.

It knew that Kellner's Fox Den Bar story—not provided until two years after Monfils' death—serendipitously embraced Winkler's long-standing, but until-then-unproven, bubbler confrontation and beating theory. It knew that Winkler had threatened a long list of witnesses to procure statements and testimony from them, including the Kellners, each of whom had expressed their discomfort with their statements to Winkler. Indeed, it told the jury in opening statement that the interrogation tactics had been "unusual" and may have included "threats."

As Brian Kellner later testified, and as has now been proven, Winkler not only threatened him with jail, but also with loss of custody of his children and his job. *Samuel*; *U.S. v. Tingle*, 658 F. 2d 1332 (7th Cir. 1981) (threats regarding loss of access to child and long period of imprisonment were inherently coercive); *U.S. v. McShane*, 462 F. 2d. 5 (9th Cir. 1972) ("the psychological coercion generated by concern for a loved one" could impair a suspect's control and induce a false confession); *Lynumn v. Illinois*, 372 U.S. 528 (1963); *see also* "*Police*

Interrogation and Confession, *supra*, at 295, prohibiting the use of threats to have a subject's children taken away permanently.)

Winkler threatened to report Char and Ron Salnik, the Fox Den Bar owners, for alleged "poker violations" if they did not "cooperate" and state that Char had participated in the "role-playing" demonstration. (Exs. 60-61.) As they made clear at trial, they would have never tolerated any such demonstration at their bar if they had seen it. They refused to lie either before or at trial and consistently denied that either of them had seen, let alone participated, in it.

The State knew that Winkler's own detail sheets documented coercive tactics such as threatening his subjects with jail for contempt, criminal prosecution for murder, loss of child custody, loss of their employment, and/or public exposure of embarrassing information if they did not sing from his hymnal. Winkler had also sought to induce desired statements from his targets with offers of an "out" and a "comfortable seat on the bus."

Rather than questioning Winkler's conduct and ascertaining the truthfulness and reliability of the statements that he extracted from his subjects, it cast him as a valiant seeker of the truth. In fact, Winkler routinely violated the Reid Technique's prohibitions against the use of threats, coercion, and other tactics that can overcome a subject's free will, and, in the case of the Kellners, had done so in fact. Moreover, his threats made clear to his subjects that any statements that were helpful to his targets might carry a potentially heavy price.

Nonetheless, the State vouched for Winkler's interrogation tactics at trial and in post-conviction and characterized any attacks on Winkler as defense "tactics" designed to discredit him and its case. Despite the defense efforts at trial to prove that Winkler had coerced witnesses to adopt his demands, the State argued that such were an irrelevant effort "to make the case about Winkler." The Court concurred, labeled any attack on Winkler's tactics as a "straw man," and

denied any cross-examination of Winkler's professed compliance with the Reid Technique. (17 at 91.) As is now evident, however, Winkler's impact on certain key witnesses could never be separated from their pretrial statements and trial testimony.

Winkler was deeply involved from the outset in the investigation and trial. He became the lead detective in early January 1994, claimed to have conducted some 500 interviews, and obtained what the State has always pointed to as the most incriminating and credible evidence in the case—the Brian Kellner Fox Den Bar statement and testimony. Winkler worked closely with the prosecutors as they prepared for trial, and he was a key State witness at trial and in the post-conviction proceedings both in 1997 **and** now.

Whatever he did and whatever he knew about the truthfulness of witness statements and testimony, his interrogation methods, and the truthfulness of his own testimony was imputable as a matter of law to the State. Where, as here, the lead investigator has contaminated the proceedings by coercing and/or suborning perjury and/or by testifying falsely, a conviction must be vacated. *Nickerson v. Roe*, 260 F. Supp. 2d 875 (N.D. Cal. 2003).

As the federal courts held in overturning Mike Piaskowski's conviction, a conviction must be vacated if it **may have** resulted from perjured testimony that was material to it. *See also State v. Plude*, 750 N.W. 2d 42 (Wis. 2008). Because this Court concluded in post-conviction that Kellner had perjured himself either at trial or in post-conviction,[7] there was a distinct possibility that the jury relied on perjured testimony to convict not only Piaskowski, but also Kutska and the other defendants. That consideration weighed strongly in the federal courts' decision to vacate Piaskowski's conviction, as it should with regard to Mr. Kutska's.

[7] We now know that Kellner perjured himself both at trial **and** in the prior post-conviction proceedings.

Under either standard of materiality—the less stringent "likely to have an effect" on the outcome or the more stringent "likely to have changed the result"—the effect of the false and perjured testimony from key witnesses was powerfully prejudicial because it went to the heart of the State's case. Removing it from the equation, particularly in light of the other evidence challenging Monfils' manner of death, would leave the State without a prosecutable case.

III. MR. KUTSKA HAS PRESENTED "SUFFICIENT REASON" FOR THIS MOTION.

In paragraphs 10 and 11 of its pre-hearing motion in limine, the State has again sought to avoid the merits of Mr. Kutska's motion. It alleges that there is no ground for relief in the instant motion that could not have been presented in the original post-conviction motion. It insists on dismissal of the motion on issue-preclusion grounds under the *Escalona-Naranjo* decision or, alternatively, the doctrine of laches because, it contends, Mr. Kutska could have presented his grounds for relief years ago.

It further alleges that Mr. Kutska was "aware of his claims, as he was present at the trial and heard the testimony and arguments. Additionally, [he] was well aware of the possibility of a suicide theory." It argues that **his** delay has prejudiced the State because "an essential witness" is no longer available and such "unduly contravenes the victim's and community's right to finality of litigation."

As explained in our pre-hearing reply brief and again below, Mr. Kutska's right to present this motion is governed by the "sufficient reason" provision in §974.06 and not by any generic issue-preclusion and/or laches doctrines. It is only after considering each ground for relief set forth in the current motion and examining why it were not previously raised at all or was raised inadequately that the Court can resolve the State's procedural bar argument.

Furthermore, as discussed previously and again below, the State's delay and laches arguments are irrelevant as a matter of law.

A. Section 974.06 Affords a Defendant the Right to File a Motion for Post-Conviction Relief When There is "Sufficient Reason" Why a Ground for Relief Was Not Presented at All or Was Presented Inadequately in a Prior Motion.

The State's motion ignores the plain language of §974.06 that allows a second (or any successive) motion for post-conviction relief if "**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.) Because a §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). Consequently, the "sufficient reason" standard, rather than any civil or common law notions of issue-preclusion, delay, or laches, determine when a second motion for post-conviction relief under §974.06 can and cannot be presented.

As this statute and the Wisconsin courts recognize, a defendant's ability to present a meritorious ground for relief 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 need for evidence that did not then exist, had not yet been discovered, and/or was still concealed by witnesses. *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 89 (Wis. 2010); *State v. Baliette*, 805 N.W. 2d 334 (Wis. 2011); *State v. Andres Romero-Georgana*, 2014 WI 83; *Edmunds*, *supra*.

Rather than acknowledging the need for this case-specific analysis, the State points to *State v. Escalona-Naranjo*, 517 N.W. 2d 157 (1994), and argues that the current motion must be

dismissed as a matter of law. *Escalona-Naranjo* establishes no more, however, than that the defendant's claim **in that case** lacked sufficient factual support. The issue is whether sufficient reason exists in Mr. Kutska's case.

B. There is "Sufficient Reason" For a Successive Motion Where, as Here, Prior Counsel Was Deficient and Later-Discovered Evidence Establishes a Reasonable Probability of a Different Result on Retrial.

As the Wisconsin courts have recognized in such cases as *Edmunds*, *Rothering, Love, Allen, Baliette,* and *Andres Romero-Georgana, supra*, a defendant establishes the requisite "sufficient reason" when the successive motion presents (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 shows that (a) post-conviction counsel was deficient in failing to present a current ground for relief and/or evidence in support of a ground presented in counsel's prior motion; (b) 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; (c) the current motion alleges the specific "who-what-where-why-and-how" of counsel's deficient representation and the prejudice resulting from it; (d) the currently asserted grounds for relief are stronger than those previously presented; and (e) it is reasonably probable that the current grounds would change the outcome.

Mr. Kutska's showing of "sufficient reason" is based on the evidence presented in support of this motion establishing that his conviction resulted from the denial of his right to effective assistance of counsel, the denial of his right to due process, and the unavailability of evidence that did not yet exist or could not be obtained in prior proceedings. The evidence now before the Court confirms that the current grounds for relief were not presented at all or, if presented, were presented inadequately for one of the foregoing reasons:

1. Prior defense counsel deficiently failed to investigate and challenge the State's forensic pathologist's determinations relating to the manner of Monfils' death. They failed to investigate and prove why Dr. Young could not have accurately and reliably formed her opinions and conclusions that Monfils had been beaten and murdered. They ignored the deposition testimony of the mill's chief engineer, Anthony Cicero, proving that Dr. Young's fundamental assumptions regarding the consistency of the liquid and Mr. Monfils' movements in the vat were wrong and uninformed. They failed to consult with an independent forensic pathologist to review and refute Dr. Young's conclusions and the State's homicide theory;

2. Prior defense counsel deficiently failed to investigate and present the evidence of possible, if not likely, suicide, including (a) the testimony of Cal Monfils and George Jensen proving that Tom Monfils had tied the very same type of knot—a "two-half-hitch knot"—that was tied around his neck and to the weight handle; (b) the testimony of several witnesses who had told the police why they believed Monfils had or may have committed suicide; and (d) Cal Monfils' testimony regarding (i) his brother's personality and behavior and (ii) Susan Monfils' actions and statements immediately following Tom Monfils' death.

3. Defense counsel deficiently relied on a SODDI defense that was neither informed nor strategic for the reasons that Mr. Glynn has made clear;

4. The prior proceedings were contaminated by witness coercion and/or perjury, as has now been proven by (a) the newly-obtained testimony of Gary Thyes, John Lundquist, and Steve Stein affirming that Brian Kellner confessed on multiple occasions to signing false statements and perjuring himself at trial; (b) the testimony of Jody Liegeios affirming that Verna Kellner confessed that she and Brian Kellner had lied at trial; (c) the testimony of Ardie Kutska confirming that the "Fox Den Bar role-playing-re-enactment" was a

fiction and that each of the Kellners perjured themselves when they testified that it had occurred; and (d) the testimony of Amanda Kellner Williams, confirmed by the statement of her brother, Earl Kellner, attesting to the police pressures to have Brian Kellner make certain statements;

5. The Court's assessment in 2010 of Gilliam's credibility was not available at the time of trial or Mr. Kutska's initial post-conviction motion; and

6. An analysis of Wiener's testimony in light of the newly-presented evidence and the State's subsequent own rejection of Wiener's claim that he had recovered a "repressed memory" cast further doubt on its credibility.

Until the hearing had begun, Mr. Kutska's current lawyers were unaware that Brian Kellner had confessed his false statement to Mr. Thyes and that Verna Kellner had confessed her and Brian Kellner's perjury to Ms. Liegeois. They contacted defense counsel only after seeing news reports regarding the evidentiary hearing. Likewise, it was not until a few weeks before the hearing that Mr. Kutska's counsel learned that Mr. Kellner had confessed his perjury to Steve Stein.

Until Mr. Lundquist met with Brian Kellner in early 2014, defense counsel did not know that Kellner would confess that **every** statement that he made about the Fox Den Bar, including his prior post-conviction testimony, was perjured.

Mr. Kutska's current counsel was also not aware of Amanda Kellner William's' testimony and Earl Kellner's statement until after the motion was filed in October 2014.

Ardie Kutska had not previously testified that the Fox Den Bar story was completely fictional and perjured because Mr. Kutska's trial counsel assumed that no one would believe her because she was then Mr. Kutska's wife. As a result, she was the only purported witness to the alleged Fox Den Bar "re-enactment" who had never testified at the trial. Although prior post-

conviction counsel sought to impeach Brian Kellner's trial testimony and show that it had been coerced, he never bothered to discuss her testimony with her, let alone call her as a witness.

C. The State's Laches and Delay Defenses Are Irrelevant.

Pursuant to §974.06, 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 **no Wisconsin appellate court has, to our knowledge, dismissed a successive motion under Section 974.06 on the grounds of delay and/or laches.** *State v. Brunton*, 552 N.W. 2d 452 (Wis. Ct. App. 1996); *State v. Evans*, 682 N.W. 2d 784 (Wis. Ct. App. 2004), abrogated on other grounds; *McCaughtry*, *supra*; *State v. Kelley*, unpublished opinion, No. 1990AP 14-CR (2005).

The case decisions that the State has previously cited for its issue-preclusion, delay, and laches contentions are irrelevant because none involve, as here, a second motion for post-conviction relief. See *State v. Casteel*, 2001 WI App 188 (where the issue was whether the court would consider the defendant's eighth meritless motion). None of the other cases that it has cited involve a §974.06 motion.

Although there was a twenty-year delay between the initial and successive post-conviction motions in *State v. Vollbrecht*, 2012 WI App 90, the court adjudicated the second motion on the merits and vacated the defendant's conviction. Far from being a reason to dismiss a successive motion, delay may be a necessary predicate to bringing a meritorious post-conviction motion before the court, as was the case in *Edmunds*, *supra.*

There, Wisconsin Court of Appeals granted the defendant's second motion for post-conviction relief based on medical evidence that had ripened from being the "minority view" into the "majority view"during the 9-year interval between her two motions. Accordingly, the

medical evidence supporting her second motion was of a far stronger character, a development that post-dated the first motion.

Delay may either positively or negatively affect a defendant's ability to present evidence supporting his grounds for relief. In some cases, new evidence may come into existence, as with developments in medical science, or may be located, as when an investigation uncovers previously existing evidence that prior counsel failed or had no ability to obtain. The passage of time may be necessary before a witness confesses to his lies, evidence of witness coercion can be found, or new witnesses come forward. On the other hand, the defendant may suffer from delay if witness memories fail or physical evidence is lost or destroyed. In sum, delay may well affect the motion, but it does not preclude its adjudication.

D. Mr. Kutska is Not at Fault for Any Delay.

The State argues that Mr. Kutska is at fault for the delay in presenting his current grounds for relief, although it should be self-evident that he has never willingly chosen to languish in prison for some 20 years without pursuing them. The delays that precluded the filing of this motion resulted from the prior ineffective assistance of his counsel, the perjury of certain key witnesses, the previous unavailability of certain evidence, and Mr. Kutska's lack of financial resources to pay lawyers and others necessary to investigate and present his claims.

After his prior post-conviction counsel completed his work, Mr. Kutska was unrepresented and financially unable to retain private counsel. Only a non-profit post-conviction legal services organization and/or a private law firm with the time and money required for a case of this magnitude and consequence could provide that assistance.

Mr. Kutska eventually secured counsel and the assistance of others solely as a result of events that were beyond his control. The vacating of Mike Piaskowski's conviction in 2001 inspired two authors to research the Monfils case for years. Published in 2009, their book

revealed a host of flaws in the State's case that raised serious doubt about the defendants' guilt. That book, in turn, led two individuals in the Twin Cities area to search for counsel willing and able to provide pro bono legal representation in a case of this type. In early 2013, the law firm currently representing Mr. Kutska agreed to do so. The Innocence Project of Minnesota later joined in the effort on his behalf.

After some twenty months of work and the expenditure of funds, Mr. Kutska's counsel filed this motion, together with supporting documents, expert reports, and affidavits. Mr. Kutska could never have paid a fraction of the cost of this work, and, absent the pro bono assistance provided to him, his claims would never have been asserted.

Although Mr. Kutska long believed that Monfils committed suicide, his trial counsel dismissed that notion out of hand and insisted that the case had to be defended as a homicide. The resulting SODDI defense reflected his counsel's determinations and not Mr. Kutska's. Only after reading a copy of Dr. Young's report in August 1994 did Mr. Kutska come to accept the notion that someone had murdered Tom Monfils. As did his trial counsel, Mr. Kutska's post-conviction counsel likewise failed to investigate or challenge the manner of death.

It should surprise no one that Mr. Kutska, a mill worker with a high school education, accepted and relied on his lawyers' determinations, particularly after he read a copy of the autopsy report in August 1994 and assumed that it was accurate. As his post-conviction counsel acknowledged at the hearing, Mr. Kutska was an engaged client, but he was just that—the client and not the lawyer. (EH 7/8/15 at 166.) Like anyone in his position, Mr. Kutska relied on his counsel's education, skill, and experience to represent him effectively. The question is not whether he was wrong to rely on them, but whether they failed to justify his reliance.

The State complains that it has been prejudiced by delay because a key witness, (we assume Dr. Young or Brian Kellner) is deceased. The State can, of course, offer Dr. Young's autopsy report and all of the prior testimony that she had given at her civil wrongful death case deposition, the preliminary hearing, and the trial. It can also offer the testimony of one or more other forensic pathologists at a retrial. If the State has a problem with the forensic pathology evidence that it presented at trial, it is not because Dr. Young is deceased, but because her testimony was provably wrong and/or unreliable.

Because Brian Kellner died in March 2014, literally on the day that he was to sign an affidavit acknowledging that the entire Fox Den Bar story was fictional, the party prejudiced by his unavailability is Mr. Kutska who has the burden of proof in this motion proceeding. As did Dr. Young, however, Brian Kellner left behind a wealth of statements and testimony. The Court can weigh his prior statements and testimony in light of the evidence presented at the hearing, including the testimony of those to whom he confessed his perjury and the pressures to which Winkler subjected him. At a retrial, the State can offer all of Kellner's statements and testimony.

IV. THE COURT SHOULD VACATE THE CONVICTION IN THE INTERESTS OF JUSTICE.

What occurred at the mill on November 21, 1992 was neither thoroughly investigated by law enforcement or defense counsel nor presented to the jury or the courts in any prior proceedings. Dr. Young's erroneous autopsy conclusions, the blindness of law enforcement and defense counsel to the evidence of suicide, Winkler's resort to his worst instincts, the presentation of perjured testimony, and the State's unsupported and conflicting arguments precluded the jury from knowing what happened after Tom Monfils disappeared.

The newly-presented evidence proves that Monfils' suicide was a distinct possibility and that Brian Kellner confessed on multiple occasions that his Fox Den Bar statements and

testimony were wholly fictitious. It establishes that Verna Kellner Irish made a similar confession regarding the perjury that she and Brian Kellner committed at trial. As the Steve Stein, Jody Liegeois, Gary Thyes, John Lundquist, Ardie Kutska, and Amanda Kellner Williams' testimony establishes, Winkler has falsely denied threatening the Kellners and others from whom he sought to coerce statements. Gilliam's testimony has already been exposed for what it was, and Wiener's testimony was never credible.

On a retrial, a jury would view the State's case in light of the wholesale lack of any eyewitness testimony or physical evidence corroborating its beating theory and in light of the flaws inherent in Dr. Young's erroneous conclusions. A jury would weigh the testimony of all witnesses without the profoundly damning effect of defense counsels' concession that Monfils had been beaten and murdered.

A jury would now understand that the gaping holes in the State's case could never be explained by unproven allegations of a union "conspiracy/code/veil of silence," a "twisted sense of union loyalty," and other "conspiracies" to conceal and destroy evidence. Instead, it would view that lack of evidence as consistent with the real possibility of suicide and not homicide.

The evidence and arguments on retrial would strike "at the heart of the State's evidence at trial," and there is a more than reasonable probability that a jury would have a reasonable doubt. *State v. Avery*, 826 N.W. 2d 60 (Wis. 2013); *McCallum*, *supra*; *State v. Boyce*, 75 N.W. 2d 452 (Wis. 1977). Accordingly, Mr. Kutska's conviction must be vacated in the interests of justice. Wis. Stat. §805.15(1); *State v. Vandenberg*, 2010 WI App 135; *Plude, supra; Love*, *supra*; *State v. Armstrong*, 700 N.W. 2d 98 (2005); *McCallum; State v. Harp*, 469 N.W. 2d 210 (Ct. App. 1991); *State v. Wyss*, 370 N.W. 2d 745 (1985); *State v. Cuyler*, 327 N.W. 2d 662 (1983); *Boyce*, *supra*; *Lock v. State*, 142 N.W. 2d 183 (1966).

V. CONCLUSION.

This motion explains why Mr. Kutska has consistently maintained his innocence even knowing, as he does, that such will preclude State corrections officials from releasing him. The evidence presented requires the granting of a new trial.

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Respectfully submitted,

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