STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff

Case No. 95-CF-238

v.

KEITH M. KUTSKA,

Defendant

DEFENDANT'S POST-HEARING REPLY BRIEF

Despite the central importance of Mr. Kutska's ineffective assistance of counsel claim, the evidence refuting the State's manner-of-death theory, and other evidence confirming critical fact-witness perjury, the State clings to its procedural bar defenses. It labels the current motion as nothing more than a "repackaging" of previously-advanced claims, notwithstanding this new evidence, new witnesses, and new manner-of-death contentions that would be a dramatic game-changer at a retrial. The State dances around the evidence and both misstates and misapplies the law supporting Mr. Kutska's grounds for relief.

I. MR. KUTSKA HAS PRESENTED CREDIBLE NEW EVIDENCE THAT STRIKES AT THE HEART OF THE STATE'S CASE AND ESTABLISHES A REASONABLE PROBABILITY THAT A JURY WOULD ACQUIT HIM ON RETRIAL.

The substantive legal question is whether (a) a jury **could** find the newly-presented evidence credible and (b) such evidence creates a "reasonable probability" that the jury **would** find reasonable doubt if the case were retried. As stated in *State v. Avery*, 826 N.W. 2d 60 (Wis.

2013), a defendant establishes a right to a retrial when the newly-presented evidence strikes at "the heart of the State's evidence at trial."

When the new evidence impacts the old evidence sufficiently to create a reasonable probability of an acquittal on retrial, the conviction must be vacated. *State v. McCallum*, 561 N.W. 463 (Wis. 1997); *State v. O'Brien*, 572 N.W. 2nd 870 (Wis. Ct. App. 1997); *State v. Love*, 700 N.W. 2d 62 (Wis. 2005); *State v. Edmunds*, 746 N.W.2d 590 (Wis. Ct. App. 2008) (the record established that "there was a reasonable probability that a jury, looking at both the new medical testimony and the old medical testimony, would have a reasonable doubt" as to guilt); *State v. Plude*, 750 N.W. 2d 42 (Wis. 2008) (reasonable doubt found when the reliability of a witness critical to the State's case was completely called into question by newly-discovered evidence).

A. Mr. Kutska's Former Counsel Were Deficient and Prejudiced His Defense Because They Failed to Consult With an Independent Forensic Pathologist and Investigate the Manner of Tom Monfils' Death Before They Conceded That He Had Been Beaten and Murdered and Resorted to a Doomed SODDI Defense.

Mr. Kutska's newly-presented evidence attacks Dr. Young's autopsy assumptions, findings, and conclusions that served as the purported "medical/scientific" foundation for the State's beating/homicide theory and that dictated the direction of the police investigation from the outset. Dr. Sens' report and testimony cogently explain why Dr. Young's analysis was unreliable, speculative, and wrong.

The medical and scientific literature fully supports Dr. Sens' conclusions that a forensic pathologist performing an autopsy on a body that was in the condition of Tom Monfils' could never have reliably or accurately determined the cause and timing of any of his injuries and determined, to a reasonable degree of medical certainty, that he had been beaten and murdered.

As Dr. Sens explained, a forensic pathologist could not exclude suicide as the possible manner of death and, consequently, the manner of death, based on an autopsy, would be "undetermined."

The State would diminish the effect of Dr. Sens' report and testimony on the ground that they do not expressly affirm that the death was a suicide or negate the possibility that it was a homicide. Of course, the very point of Dr. Sens' analysis is to refute Dr. Young's purported ability to determine accurately and reliably that the death resulted from a beating and a homicide and not from a suicide.

Dr. Sens' report and testimony affirm the imperative need for an investigation into the manner of death, including the possibility of suicide, that was never conducted by law enforcement or the defense. If the jury had heard from both Dr. Young and Dr. Sens, it would have had every reason to question the "medical/scientific" basis for the State's case, particularly given the complete absence of any trace evidence and eyewitness testimony to support the theory that Tom Monfils had been brutally beaten into a state of semi-or-complete unconsciousness.

Mr. Cicero's deposition testimony should also have informed defense counsel, as well as law enforcement, that Dr. Young's underlying assumptions regarding the consistency of the vat liquid, the purported buoyancy of Tom Monfils' body in it, and his presumed movements at any time in the vat were patently wrong.

That Dr. Young's assumptions were wrong should not have surprised Mr. Kutska's defense counsel who also represented him in the wrongful death litigation in which Mr. Cicero provided his deposition. Defense counsel not only had the ability to attend Mr. Cicero's deposition, but also to study the transcript of it and understand why Dr. Young's testimony was premised on her erroneous and unfounded engineering and fluid dynamics assumptions. Mr.

Cicero's testimony should have inspired a response from any defense lawyer who compared it with Dr. Young's pretrial and likely trial testimony.

Mr. Cicero's testimony aside, the need to question and investigate Dr. Young's assumptions and analysis should have been apparent to a defense lawyer because, as a forensic pathologist, she lacked the training and expertise necessary for her to understand what she claimed to know. As Mr. Cicero made clear in his deposition, even a highly-trained mechanical engineer, such as himself, could not know how these engineering factors would have impacted the movement of Monfils' body and what injuries could have been caused in the vat at any time.

Dr. Young's autopsy conclusions sent law enforcement on its search for physical evidence and witness statements to confirm her beating/homicide conclusion. They directly affected law enforcement's perceptions of what evidence was probative, what evidence needed to be investigated, and what facts and circumstances were irrelevant. They colored law enforcement's perceptions of who was telling the truth, who was lying, and who needed to be manipulated or pressured to confirm them. They sent the police, particularly Sgt. Winkler, on their quest for witnesses who would affirm seeing the presumed confrontation with and beating of Tom Monfils and the disposal of his body in the vat. The Fox Den Bar "role-playing reenactment" scenario that Sgt. Winkler procured from Brian Kellner and Verna Kellner Irish had its genesis in Dr. Young's autopsy findings and conclusions.

That Dr. Young's testimony was crucial to the State's case at trial is irrefutable. Because its case was entirely circumstantial, the State presented her testimony to the jury as the only "scientific/medical" evidence supporting its beating/homicide theory. It told the jury that she had identified injuries that could only have resulted from a beating.

Confronted with the damaging effect of her assumptions, findings, and conclusions, the response of Mr. Kutska's trial counsel was to accept them unquestioningly and without any effort to investigate and/or challenge them. Believing that Dr. Young was "state of the art" and could not possibly be wrong or challenged, trial counsel never lifted a finger to evaluate the testimony that he knew that Dr. Young would give at trial.

Moreover, defense counsel made no effort to investigate any fact or circumstance relating to whether Monfils' death could have been the result of a suicide because, as counsel asserted at the evidentiary hearing, he did not **think** that he could prove a suicide and that raising the specter of suicide in that circumstance would upset the jury. Accordingly, he proceeded on the assumption that Monfils was beaten and murdered and that his client could only be defended on a SODDI theory.

To prevail on that defense, however, counsel would need some evidence to support the contention that one or more persons, acting independently of Kutska, had beaten and murdered Monfils and carried his body to the vat. As counsel knew or should have known, however, he had no such evidence and, at trial, he never identified any such person.

In failing to consult with an independent forensic pathologist, trial counsel failed to satisfy his obligation in this case to investigate thoroughly **all** relevant and potentially relevant facts, circumstances, issues, and questions bearing on the State's case and Mr. Kutska's potential defense(s) to them.

When a defendant faces first-degree intentional homicide charges, whether in a capital or non-capital murder case, defense counsel bears a heightened obligation to leave no stone unturned in investigating and countering the State's evidence and theories, as the U.S. Supreme Court and Wisconsin Supreme Court have each held. *Williams v. Taylor*, 529 U.S. 362 (2000);

Wiggins v. Smith, 539 U.S. 510 (2003); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005); *State v. Pitsch*, 369 N.W. 2d 711 (Wis. 1985) (the *Strickland* standard obligates defense counsel "to conduct a prompt investigation of all 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. Sanchez*, 548 N.W. 2d 69 (Wis. 1996); *State v. Thiel*, 665 N.W. 2d 305 (Wis. 2003) (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. Moffet*, 433 N.W. 2d 572 (Wis. 1989); *Dixon v. Snyder*, 266 F.3d 693 (7th Cir. 2001).

When the State presents the testimony of a forensic pathologist to prove a fact central to its case, defense counsel's duty to investigate includes the consultation with an independent forensic pathologist or similarly qualified medical expert. *State v. Zimmerman*, 669 N.W. 2d 762 (Wis. 2003); *Rogers v. Israel*, 746 F.2d 1288, 1294 (7th Cir. 1984); *Dugas v. Coplan*, 428 N.W. 3d 317, 329-30 (1st Cir. 2005); *Thomas v. Clements*, Seventh Circuit Court of Appeals, No. 14-2539, slip opinion, June 16, 2015; see also *Hinton v. Alabama*, 134 S. Ct. 1081 (2014) (counsel was ineffective in failing to consult with a qualified arson expert).[1]

[1] Shortly after submission of our initial post-hearing brief, the Seventh Circuit vacated the conviction in *Jensen v. Clements*, No. 14-1380, September 8, 2015. There, the State supported its claim that a husband murdered his wife with (a) forensic pathology testimony and (2) the wife's written note identifying her husband as her murderer if she later turned up dead. The defendant countered with evidence of the wife's suicide, including the testimony of her physician describing her as depressed, distraught, and "frantic" just before her death. The district court (Hon. William C. Griesbach) vacated the conviction on the ground that admission of the deceased wife's note violated the Confrontation Clause and prejudiced the defendant. After reviewing the parties' **conflicting medical testimony**, the Seventh Circuit affirmed, finding that the State's homicide case "was no slam dunk" and the admission of the note had prejudiced the defendant. *Jensen* emphasizes defense counsel's obligation to investigate the manner of death

Although there are many steps and decisions that a criminal defense lawyer may decide to take or not take based on past experience and training, the need to consult with a forensic pathologist in a first-degree intentional homicide case where the State relies on its own forensic pathologist to prove facts basic to its case is not one of them. In such circumstances, there can be nothing "strategic," "reasonable," or "effective" about the failure to consult with an independent forensic pathologist, such as Dr. Sens.

This is not a case in which some obstacle precluded defense counsels' consultation with a forensic pathologist. Neither Mr. Finne nor Mr. Connell suggested that they could not have made that effort and/or that they could never have located an independent forensic pathologist if they had wanted to do so. Indeed, both Mr. Connell and Mr. Finne testified to having consulted with forensic pathologists in connection with their other criminal cases.

As both Dr. Sens and Mr. Glynn testified, there was nothing tell-tale or self-evident about the cause(s) of Tom Monfils' various injuries. There was no physical trace evidence of a beating or any eyewitness to any alleged beating. The physical and testimonial evidence that should have existed if the State's beating/homicide theory was solid did not exist. The condition of the body itself cast doubt on a forensic pathologist's ability to reach Dr. Young's conclusions. Mr. Connell acknowledged that the condition of the body can impact a forensic pathologist's ability to make findings and conclusions based on an autopsy examination.

There was, furthermore, strong reason to investigate the possibility of suicide based on the statements of several witnesses, including Susan Monfils who admitted that her husband was capable of harming himself after being exposed at the mill as the anonymous 911 caller.

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and consult with medical or other experts to determine whether the State's manner-of-death expert witnesses can be challenged.

Defense counsel were obligated, **as a matter of law**, to consult with an independent forensic pathologist, investigate the evidence of possible suicide, and not passively and unquestioningly accept the State's forensic pathology testimony and homicide theory based on their unexamined assumptions and beliefs.

That Mr. Kutska's lawyers (and those for the other defendants) may have believed that there was nothing to be gained by consulting with an independent forensic pathologist and investigating the manner of death is irrelevant because their obligations were objectively defined by the federal and Wisconsin constitutions and not by what they **believed or assumed** was reasonable or sufficient. The constitutional standard of effectiveness obligated them to investigate the case thoroughly, consult with one or more independent forensic pathologists, attack the heart of the State's case, and formulate a logical defense theory that took account not only of the evidence that existed, but also of the evidence that did not exist.

As the State would have it, however, defense counsel had no such obligation, even though Dr. Young's testimony went to the most basic issue in a first-degree intentional homicide case, namely whether the deceased was murdered or had died in some other manner. The State reaches that conclusion by labeling any defense counsel decision not to consult with an independent pathologist or to investigate the evidence of suicide as "strategic" or "reasonable."

Under the applicable federal and Wisconsin constitutional standards, however, no decision is "strategic" or "reasonable" unless it is made **after** defense counsel has conducted an in-depth and thorough investigation of all relevant and potentially relevant facts and circumstances. The State simply fails to recognize that the duty to investigate lies at the heart of the effective assistance of counsel standard and that the failure of his former counsel to perform that duty lies at the heart of Mr. Kutska's claim.

Zimmerman and *Thomas* cannot be distinguished from Mr. Kutska's case, notwithstanding the State's tortured efforts to do so. The State argues that *Zimmerman* is substantively different from Kutska's case because the failure to consult with a forensic pathologist in that case was one of three failures by defense counsel to offer forensic or physical evidence challenging the State's homicide contentions. Of course, Mr. Kutska makes the same claim here when he contends that his counsel failed to investigate, obtain, and present numerous items of evidence forensic, physical, and testimonial evidence that challenge the State's manner-of-death theory. In both *Zimmerman* and this case, counsel's failure to consult with a forensic pathologist was prejudicial. If there is any substantive distinction between *Zimmerman* and Mr. Kutska's case, it is hardly apparent.

The State would distinguish *Thomas* on the purported ground that the Seventh Circuit found that it was counsel's failure to "think" about consulting with a forensic pathologist that was ineffective. It then notes that Mr. Finne did "think" about doing so, but rejected the notion on the ground that it would not be productive. Such is not, however, what *Thomas* holds, as the following portion of the Seventh Circuit's decision makes evident (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] version 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.)

In sum, the Seventh Circuit held that any reasonable counsel **should have known and acted on the need** to contact a pathologist. Whether counsel failed to do so unthinkingly (as Mr. Connell conceded that he had) or for some misguided reason or assumption (as Mr. Finne had)

does not eliminate the need to do what they should have been known and done. In either case, counsel would fail to do what a reasonable defense lawyer should have known needed to be done and to act accordingly. In either case, counsel would fail to satisfy the objective standard of effectiveness and the defendant would be equally prejudiced.

Consequently, a defense lawyer must consult with an independent forensic pathologist when the State presents forensic pathology testimony that is important to its case. Dr. Young's testimony was foundational to the State's case and was powerfully incriminating to Mr. Kutska.

Because Mr. Kutska's counsel were ineffective, the present attack on their work cannot be dismissed as "second-guessing" or another "kick at the can." If they were deficient, Wisconsin law allows the defendant to present the evidence that they ignored or failed to investigate what they should have. If a defendant could not do so, the ineffectiveness of his trial and post-conviction counsel could never constitute a "sufficient reason" for a second motion and would preclude a defendant from showing why his conviction should be vacated. Neither federal nor Wisconsin constitutional/post-conviction motion law is so illogical or perverse, as the Wisconsin courts have recognized.

As Mr. Kutska's trial counsel testified at the hearing, his defense was limited to the contention that Kutska was not involved in the murder and that Kutska did not know who had killed Monfils. Of course, if the defense conceded the alleged homicide from the get-go, Kutska was an easy target for the State, given Kutska's dealings with Monfils. Former counsel left Kutska with an untenable SODDI defense that was bereft of any proof that anyone whom the State could not argue had acted in concert with Kutska had murdered Tom Monfils.

Defense counsels' concession that Monfils was beaten and murdered was not merely uninformed, but prejudicial because it bolstered the credibility of Kellner's Fox Den Bar story,

James Gilliam's claim that Rey Moore had confessed that he and Kutska had each struck Monfils, and David Wiener's "repressed memory" account of seeing Basten and Johnson carrying "something" toward the room where the vat was located. It did so because that testimony was premised on Dr. Young's beating/homicide conclusions. By conceding Dr. Young's analysis, defense counsel allowed the jury to view the Kellner, Gilliam, and Wiener testimony as consistent with Dr. Young's uncontroverted "medical/scientific" testimony.

If defense counsel had investigated Dr. Young's analysis, consulted with a forensic pathologist, and presented evidence and arguments challenging Dr. Young's assertions, they would have had a compelling basis for arguing that the State's evidence fell far short of proving that Monfils had been murdered, let alone by a Kutska-led mob. Defense counsel could have not only explained the forensic pathology and engineering reasons why Dr. Young was wrong, but also shown why the absence of any blood evidence was proof that she was wrong, given her own assurances that Monfils would have bled "profusely" from his injuries. Defense counsel could have shown that law enforcement had the forensic means for locating any such blood evidence even if anyone had attempted to remove, destroy, or conceal it. At trial and more recently at the evidentiary hearing, the testimony established that the police possessed and had employed the forensic means to detect the presence of any blood that would have existed as a result of the alleged beating and that they had failed to find a single drop of such blood.

Defense counsel could have educated the jury to the evidence regarding (a) Tom Monfils' mental, emotional, physical, and psychological condition and history; (b) his obsessions with death, drowning, and suicide by drowning; (c) his frequent stories about rescuing suicide drowning victims who had tied heavy objects or chains to their bodies; and (d) the stresses and anxieties to which he was subject at the time of his death.

Counsel could have shown the strong likelihood that Tom Monfils, and not any of the six defendants, had tied the rope knots. They could have shown that his drowning with a heavy weight tied to him was the equivalent of a suicide note because it so closely mimicked his accounts of the drownings of the suicide victims whose bodies he had helped to recover.

There was no shortage of people who knew him and who told the police why they concluded that he was fully capable of taking his life and had likely done so in the manner that he had died. Susan Monfils herself acknowledged that he was capable of harming himself given the events occurring immediately before his disappearance.

All of the foregoing evidence and arguments would have pointed strongly toward a possible, if not likely, suicide, attacked Dr. Young's testimony, and cast further doubt on the credibility of the Kellner, Gilliam, and Wiener testimony. If, as Mr. Kutska's trial counsel stated, his defense was based on attacking these fact witnesses, he would have done so far more effectively by attacking, rather than conceding, Dr. Young's testimony and manner-of-death theory.

The State suggests that Mr. Glynn's testimony and opinions are somehow idiosyncratically rooted in his own notions of what defense counsel should have done in this case. Of course, the State never challenges Mr. Glynn's experience, skill, and credentials as an expert in criminal defense practice and standards. It implies that he has set the bar far too high for the local criminal defense bar, in general, or the particular group of lawyers who previously represented the defendants. Such contentions fail, however, because Mr. Glynn's opinions, conclusions, and testimony reflect what the U.S. and Wisconsin constitutions objectively required any defense lawyer anywhere in the land to do in a case of this type and in light of the relevant facts and circumstances.

Mr. Glynn explained what those objectively critical obligations were in this case and what **any** defense counsel had to do before formulating and presenting Mr. Kutska's defense. Mr. Glynn applied these obligations to the specifics of this case, including the probative effect of the evidence that the State had and did not have, the reasons why it was necessary to challenge Dr. Young's testimony, the compelling evidence negating any beating or homicide that was available to a defense lawyer who thoroughly investigated the case, the prejudicial effect of defense counsels' concessions of Dr. Young's and the State's beating/homicide theory, and why a SODDI defense was doomed from the outset. If all of the defense lawyers in the Monfils case were deficient in failing to do what was necessary and by conceding the State's beating/homicide theory without investigating whether it could be challenged, there is nothing "ridiculous" about Mr. Glynn's saying so.

B. The Evidence Establishes That Key State Fact-Witness Perjury Profoundly Prejudiced Mr. Kutska's Defense.

Aside from Dr. Young's testimony, the State's basis for identifying Mr. Kutska as the ringleader of the six-person "angry mob" that beat and then drowned Tom Monfils was the testimony of three witnesses—(1) Brian Kellner's Fox Den Bar "role-playing reenactment" scenario; (2) the James Gilliam jailhouse-snitch testimony claiming that Rey Moore had admitted striking Tom Monfils and that Kutska had hit Monfils in the face; and (3) David Wiener's "repressed memory" story implicating Basten and Johnson.

The State told the jurors that Kellner's testimony was the most critical and credible evidence of guilt in the entire case and that, if they believed Kellner, they had to convict each of the defendants. Before trial, it also told the Court that it could never have prosecuted any of the defendants until Kellner provided his Fox Den Bar statement to the police. After trial, the State

publicly stated that the jury's acceptance of Kellner's testimony was the key to the convictions. There is no reason not to take the State at its word in this regard.

Evidence obtained only after the initial post-conviction motion and appeal proceedings concluded shows—in ways that were not possible in those proceedings—that the "core" of the State's case was coerced, fictional, and perjured.

1. Brian Kellner Confessed His Lies and Perjury to Steve Stein, Gary Thyes, and John Lundquist.

At the hearing, Steve Stein testified to the pressures to which Winkler had repeatedly subjected him and other mill workers, including Brian Kellner. Stein, who became Kellner's close friend in Kellner's later years, but who had known Kellner for several years before then, testified that Kellner confessed to Stein that he had perjured himself in response to Sgt. Winkler's threats to take away his children and job. Stein testified that Kellner was so distraught that Kellner admitted having sought professional help. Stein confirmed that Kellner feared what people would think of him if the truth were ever told.

Stein testified at the hearing despite his own still-enduring fear of retribution for his own refusal to lie at trial to support the State's case. There was and is no conceivable benefit to Stein for the testimony that he gave at the hearing, other than a desire to tell the truth.

Gary Thyes came forward and contacted Mr. Kutska's counsel only after seeing a media account regarding the evidentiary hearing. Before that time, he was unknown to Mr. Kutska's counsel. By coming forward, Mr. Thyes subjected himself to the State's cross-examination and to public scrutiny. He had nothing to gain from doing so, other than to satisfy his personal sense of obligation to inform the Court of the truth.

Mr. Lundquist's testimony was more than "credible." It was confirmed by his post-interview memorandum to the file and his draft of Kellner's affidavit. He knew, of course, that

Kellner would review the affidavit before Kellner would sign it and that the document had to accurately reflect what Kellner had told him. Aside from Mr. Lundquist's obligations as a lawyer, officer of this Court, and his unquestioned reputation for honesty and integrity, these documents confirm the substance and credibility of his testimony.

2. Verna Kellner Irish Confessed Her and Brian Kellner's Perjury to Jody Liegeois.

As did Mr. Thyes, Jody Liegeois came forward after learning from the media that an evidentiary hearing was being conducted. Ms. Liegeois testified that Verna Kellner Irish had confessed to her that both Ms. Irish and Brian Kellner had perjured themselves at trial regarding the alleged bar reenactment as a result of threats from a police investigator. Like Mr. Thyes, she had nothing whatsoever to gain from her testimony, other than satisfying her innate sense of obligation to ensure that the truth would be known.

3. Ardie Kutska's Testimony Confirms That the Fox Den Bar Testimony Was False and Perjured.

Brian Kellner's and Verna Kellner Irish's perjury is further confirmed by Ardie Kutska's evidentiary hearing testimony that their Fox Den Bar testimony was completely false. Her testimony was fully available to Mr. Kutska's former trial counsel who told her that he would not have her present it because, he believed, no one would believe her because she was Mr. Kutska' wife. In post-conviction and on appeal, Mr. Kutska's counsel also failed to present her testimony.

At the evidentiary hearing, the Court observed her testimony and had the opportunity to judge her credibility. Why neither of Mr. Kutska's former lawyers offered her testimony is incomprehensible. In a case that was so heavily dependent on the credibility of the Fox Den Bar scenario, there was no reason not to present Ardie Kutska's testimony to refute it. That failure

posed the risk that the jury would infer that her testimony would have supported the State's case when, in fact, nothing was further from the truth.

4. Amanda Kellner Williams Confirmed the Threats, and Pressures That Sgt. Winkler Imposed on Brian Kellner.

As Ms. Williams testified, she and her father loved each other dearly. She had no reason to taint his reputation with testimony confirming why his crucial trial testimony was false. For the same reason, Earl Kellner, Brian Kellner's son, had no reason to detail the pressures to which Sgt. Winkler had subjected them and their father. After all, this case was tried some 20 years ago, their father is deceased, and the State continues to vouch for the truthfulness of his trial testimony. Under all of these circumstances, they could well have let matters lay. After all, why would they support any effort to show that their father had perjured himself, let alone in a case of this consequence and public visibility? Their only ostensible reason for doing so is to permit the Court to know how Winkler had preyed on their father and tortured the truth.

5. Cal Monfils and George Jensen's Testimony is Credible and Relevant to the Manner of Tom Monfils' Death.

There is no basis for the State's attack on the testimony that Cal Monfils and George Jensen gave at the hearing. Cal Monfils' first-hand testimony regarding Susan Monfils' actions and reactions immediately following her husband's death support the contention that she fully believed that he had, or may well have, committed suicide. Cal Monfils testified to Susan Monfils' striking responses to the radio report informing both Susan and him that Tom had been found with a rope and weight tied to his body. As Cal Monfils testified, Susan's immediate reaction was to slump over in silence for several seconds, and then to instruct him to driver her to the bank to review the contents of her and her husband's safe deposit box, rather than enter the floral shop to continue making funeral arrangements.

Susan Monfils' doing so should have prompted the obvious question of whether she felt the need to look in the box for a suicide note or to determine whether Tom's life insurance coverage might be adversely affected by a suicide.

Cal Monfils' testimony regarding his conversations with his mother, Joan Monfils, was admissible as a statement against interest by an unavailable declarant because Mrs. Monfils is deceased. Cal Monfils testified that his mother had told him that Susan had told her that Tom had committed suicide. Mrs. Monfils' rejected Susan's statement as pure foolishness because, Mrs. Monfils, like the entire Monfils' family, refuted any suggestion that Tom had any reason to take his own life. The notion that he could or would have done so was anathema to them, given the stigma and taboo that suicide presented for them and large segments of the public.

Cal Monfils' testimony is admissible because, as a threshold matter, Susan's statement to Mrs. Monfils was against Susan's wrongful death litigation/pecuniary and social interests. Similarly, Mrs. Monfils' repeating Susan's statement to Cal was against Mrs. Monfils' social interests because neither she nor the Monfils' family wished to have anyone believe for a moment that Tom may have committed suicide.

There can also be little doubt regarding the trustworthiness of Cal Monfils' testimony because he confirmed that what Susan told his mother regarding Tom's suicide was well-known within the Monfils family. For similar reasons, his testimony regarding Susan's intimating tohis mother that Tom had left a suicide note is likewise admissible as a statement to Mrs. Monfils that was against Susan's interest and a statement by Mrs. Monfils to Cal that was against Mrs. Monfils' interest.

The powerful effect of the Cal Monfils and George Jensen knot testimony and evidence cannot be diminished. As shown, the police had sent the rope and the rope knots to the State

Crime Lab for examination to determine whether the Crime Lab could find trace evidence on them that could help identify who had tied the knots. The Crime Lab found no such evidence, but instructed the police to have the knots examined by the Coast Guard or Navy, a clear sign that the knots may have been nautical in type or usage.

Cal Monfils testified that he had informed Sgt. Winkler that the photos of the rope knots found with Tom's body looked similar to the types of knots that he had seen Tom tie. When he informed Sgt. Winkler of that fact, Winkler responded by telling him that the police had already looked into the knot issue, although he never told Cal Monfils what the police had learned about them.

After Tom's death, Cal Monfils obtained knots from Tom's home that were of the type he had seen Tom tie. Cal Monfils brought those knots to the hearing with him, along with several photographs of them. When Mr. Jensen, a veteran Coast Guard and Merchant Marine seaman, examined the photographs of (a) the rope knots found with Tom Monfils in the vat and (b) the photographs of the knots that Cal Monfils had obtained from Tom's home, he identified all of them as a "two half-hitch knot." As Mr. Jensen further confirmed, the Coast Guard taught its seaman to tie this type of knot, and he further explained the nautical uses for it.

Despite Sgt. Winkler's and law enforcement's efforts to connect one or more of the defendants to the rope knots, they failed to do so. Indeed, Sgt. Winkler seized certain knots that Dale Basten had tied in just such an effort. Had law enforcement been able to do so, of course, the State would have presented that evidence at trial as devastating proof of guilt. That the knots can now be connected to Tom Monfils and that such further supports a suicide defense, cannot diminish the probative value of this evidence.

6. The Newly-Presented Evidence Establishes a Reasonable Probability of an Acquittal on a Retrial.

On a retrial, a jury would learn the following:

a. Dr. Young lacked any training or ability to know what she assumed she knew regarding the consistency of the vat liquid, the buoyancy and movements of Tom Monfils' body in the liquid, and the timing and causes of his injuries.

b. Credible independent forensic pathology testimony explains why Dr. Young could not reliably and accurately determine that (i) Tom Monfils had suffered all of his pre-mortem injuries as result of a beating and (ii) his death was a homicide and not a suicide;

c. Brian Kellner confessed on separate occasions to Steve Stein, Gary Thyes, and John Lundquist that he had signed a false police statement and/or perjured himself at trial;

d. Verna Kellner Irish confessed to Jody Liegeois that she and Brian Kellner had perjured themselves at trial regarding the alleged bar reenactment because of pressure from a police investigator;

e. Ron Salnik and Char Salnik, the Fox Den Bar owners, denied before and at trial that any "role-playing reenactment" had ever occurred at the bar, notwithstanding Winkler's threats of contempt and to report them for alleged poker violations if they refused to affirm that the reenactment had happened;

f. Ardie Kutska, who was present at the Fox Den Bar at all times on the night in question, has likewise denied that any such "role-playing reenactment" ever occurred and that the Brian Kellner and Verna Kellner Irish testimony was patently false;

g. Jon Mineau, Pete Delvoe, Don Boulanger, Dennis Servais—the four mill workers whom Brian Kellner testified Kutska had told him were witnesses to the alleged bubbler confrontation/beating—each denied ever seeing any such incident;

h. Before and at trial, Brian Kellner and Verna Kellner Irish attempted to disavow significant portions of their police statements and later sought to disavow critical aspects of their trial testimony;

i. In his 1997 post-conviction testimony, Brian Kellner confessed to perjuring himself at trial;

j. Amanda Kellner Williams and Earl Kellner, Brian Kellner's children, have attested to the threats, pressure, and mind-games to which Sgt. Winkler subjected them and their father to secure false testimony from him.

k. Winkler's denials that he threatened or coerced anyone, including Brian Kellner and Verna Kellner Irish, to affirm Winkler's bubbler-beating/homicide theory are refuted by Steve Stein, Gary Thyes, Jody Liegeois, Ardie Kutska, Amanda Kellner Williams, Earl Kellner, Ron Salnik, Char Salnik, Jon Mineau, Dennis Servais, Don Boulanger, Pete Delvoe, numerous other mill workers, John Lundquist, and the testimony of each of the defendants;

l. No blood evidence of the type that Dr. Young assured the jury would have resulted from Monfils' beating was ever located, despite law enforcement's ability and concerted efforts to find it;

m. There is no eyewitness testimony corroborating the alleged beating and no blood or other trace evidence confirming any such attack, despite its allegedly occurring in view of four mill workers and, perhaps, more;

n. Monfils was obsessed with death and drowning, including suicide by drowning with a heavy weight or chain tied to a body, had spoken about how much weight needed to be tied to a body to keep it submerged, and knew how to tie the rope knots tied to him

and the weight. His death identically mirrored those suicide drownings about which he had spoken so often; and

o. Monfils was under enormous and continuing stress after he reported Kutska to the police, as his repeated and desperate phone calls to the police and District Attorney's Office seeking to preclude any disclosure of the 911 call tape confirmed. He knew what would befall him in the mill, his family, and the wider community if he was exposed as the anonymous caller. Indeed, after his wife learned that he had been exposed as the 911 caller, she acknowledged that he was capable of harming himself.

The Court has previously commented regarding the credibility and materiality of the Kellner, Wiener, and Gilliam trial and post-conviction testimony. In denying the six defendants' initial post-conviction motions, the Court determined that the State's case would not have gone to the jury on the basis of the Kellner and Wiener testimony alone. It concluded that their testimony was "immaterial" because they were but three of the dozens of witnesses who testified and that it was the defendants' own testimony that had convicted all of them.

We respectfully ask that the Court reconsider that analysis because it was irrefutably the Kellner/Wiener/Gilliam testimony (whether or not supported by that of Verna Kellner Irish and a second jailhouse snitch, James Charleston) on which the State relied to identify Kutska as the alleged ringleader of a murderous mob. **No other witnesses** supported the State's contention that these six defendants confronted and beat Tom Monfils at or near the bubbler and/or carried him to the vat. For such reason, each reviewing court has analyzed the sufficiency of the evidence in light of the Kellner, Wiener, and Gilliam testimony.

Although the State called a host of other witnesses to testify, the vast majority of them did nothing more than (a) inform the jury of the circumstances involving Kutska's taking of the

electrical cord; (b) Monfils' 911 call and subsequent calls to the police and District Attorney's Office pleading for the non-disclosure of the 911 call; (c) Kutska's suspension and later obtaining of the 911 call tape; (d), the playing of that tape at the mill; (e) the identity and whereabouts of those who had heard the tape of that call when it was played in the No. 7 and/or No. 9 coops; and (f) Tom Monfils' disappearance after completing the 7:34 a.m. "turnover" on the No. 7 paper machine sometime between 7:40-7:42 a.m.

All such testimony was the preamble for the State's beating/homicide theory, but it was never sufficient to prove whether Monfils had been beaten and murdered, and, if so, by whom. Absent the Kellner, Wiener, and Gilliam testimony (with or without the Verna Kellner Irish and James Charleston testimony), the State could never have prosecuted, let alone convicted, any of the defendants, including Mr. Kutska. Indeed, it told this Court that it could not have done so without the Kellner Fox Den Bar statement and testimony.

That the convictions could only be sustained on the basis of the Kellner/Gilliam/Wiener testimony is further evident from the federal courts' grounds for vacating of Mike Piaskowski's conviction and the Wisconsin Court of Appeals' basis for affirming Rey Moore's conviction.

The federal courts vacated Piaskowski's conviction after finding that Kellner's Fox Den Bar testimony had not proven that he had harmed Monfils. If the testimony of the State's dozens of other witnesses had been sufficient to convict him, the courts would not have vacated his conviction. Likewise, in affirming Moore's conviction, the Wisconsin Court of Appeals distinguished Moore's case from Piaskowski's on the ground that the jury could have believed Gilliam's trial testimony to the effect that Moore had admitted to Gilliam that he had struck Monfils. On the basis of that Gilliam testimony, and not that of any other witness, the Court of Appeals affirmed Moore's conviction.

A jury on retrial certainly "could" accept the testimony and other evidence from numerous witnesses showing that Dr. Young's testimony was unreliable and wrong and that Kellner, Wiener, and Gilliam cannot be relied on to sustain the State's burden of proof, given the overwhelming reasons to doubt the truth of their testimony. As Mr. Glynn stated, he would bet money on it.

II. THE STATE'S ISSUE-PRECLUSION AND LACHES CONTENTIONS ARE IRRELEVANT BECAUSE THERE IS "SUFFICIENT REASON" WHY THE GROUNDS FOR RELIEF IN THIS MOTION WERE NOT PRESENTED AT ALL OR WERE PRESENTED INADEQUATELY IN THE INITIAL MOTION AND APPEAL.

The State' issue-preclusion/laches defenses protest that Mr. Kutska's motion is of the type that wastes judicial and prosecutorial time and money and overwhelm the courts with an "endless succession" of such proceedings.

As we have previously explained, the §974.06 "sufficient reason" standard balances the public's interest in the finality and efficiency of criminal litigation with its enduring interest in vacating convictions resulting from constitutional error. The caselaw applying this standard requires an analysis of the specific allegations, evidence, and legal arguments supporting a second motion and any reasons why these grounds for relief were not brought in the earlier post-conviction motion or appeal proceeding.

Rather than engaging in that analysis, the State does little more than reference *Escalana-Naranjo,* cite some cases that do not involve a second post-conviction motion under §974.06, and conjure the host of horrors that would befall the criminal justice system if the Court entertains this motion.

For the Court's convenience and to avoid repeating our prior responses to these procedural defenses, we have appended to this brief the relevant excerpts from prior submissions and confine our additional response to the following:

1. The State takes no account of the caselaw holding that a second motion is warranted when (1) a defendant did not receive the effective assistance of counsel and was prejudiced by his counsel's deficiencies; and/or (2) newly-discovered evidence presents a reasonable probability of a different outcome on retrial. In such cases, the defendant is entitled to present the evidence and grounds that (a) his/her former counsel failed to present because counsel was deficient and (b) did not exist or were not reasonably discoverable at the time of the prior proceedings.

2. The present motion bears no resemblance the one presented in *State v. Allen*, 453 N.W. 2d 124 (Wis. 2010) where the defendant's "sufficient reason" claim was "replete with conclusory allegations that post-conviction counsel was ineffective" and provided no specific facts or allegations supporting it.

3. The State's suggestion that Mr. Kutska is at fault for failing to consult with a forensic pathologist, challenge the State's manner-of-death case, investigate the evidence of suicide, and for the passage of time before bringing this motion is beyond comprehension.

As the testimony of his former counsel confirmed, Mr. Kutska was an engaged client, but he never directed the conduct of any phase of the case, be it pretrial, at trial, in post-conviction, or on appeal. One might well ask why Mr. Kutska would need counsel at all if he were capable of knowing what facts, circumstances, and avenues to investigate and he had the ability to pursue and present them. Like anyone in his position, he reasonably and necessarily put his trust in his counsel to know what could and should be done and how best to attack the State's case.

After Mr. Connell completed his State Public Defender representation, Kutska was unrepresented and had no financial ability to secure any new counsel, investigators, or experts to advise him, find new evidence, or present his cause. Indeed, without a lawyer, he could never know whether he had any rights or claims to pursue.

Evidence challenging the State's manner-of-death theory was not previously presented because his former counsel failed to consult with a forensic pathologist and investigate and challenge that theory. Indeed, former counsel conceded the beating/homicide theory from the outset and without any investigation. Only after the confluence of events that began with the vacating of Mike Piaskowski's conviction and included the publication of "The Monfils Conspiracy," the involvement of unrelated individuals who searched for and eventually secured pro bono counsel, and the expenditure of an enormous amount of legal time and thousands of dollars, was it possible to present this motion.

Mr. Kutska had no ability to impact these efforts, given his incarceration and lack of resources. The circumstances leading up to this motion were fully beyond his control, as was the passage of time that predated it. In fact, some of the evidence presented at the hearing remained unknown to him and his current counsel until the hearing had begun. Needless to say, Mr. Kutska, who has been incarcerated since his arrest on April 12, 1995, has had no conceivable reason to delay any judicial proceedings that might undo the harm that he and his family have suffered for some two decades and, absent judicial relief, will continue to suffer for the duration of his life.

4. Despite the State's contention that the current motion is nothing more than a "repackaged" presentation of previously asserted grounds for relief, the motion's grounds for relief bear no resemblance to what former counsel presented. Where the present motion points to

the ineffectiveness of counsel and the prejudice flowing from defense counsel's homicide concession and other failings, the prior proceedings presumed that such were wise, strategic, and/or reasonable decisions. The present motion challenges what Mr. Kutska's former counsel conceded.

The current motion presents entirely new evidence of critical fact witness perjury that was not available to and/or discovered by former counsel. Such includes (a) Brian Kellner's confessions to Steve Stein, Gary Thyes, and John Lundquist that his Fox Den Bar story was false and the product of Sgt. Winkler's threats and coercion; (b) Verna Kellner Irish's confession to Jody Liegeois that she and Brian Kellner had perjured themselves at trial; (c) Ardie Kutska's testimony refuting the entire Fox Den Bar reenactment story; and (d) Amanda Kellner Williams' testimony, supported by her brother's statement, confirming Sgt. Winkler's coercion of the Fox Den Bar story from Brian Kellner.

The motion further the grounds for a reasonable-doubt suicide defense that takes account of Tom Monfils' life, obsessions, fears, anxieties, ability to tie certain types of knots, and susceptibility to taking his own life on the morning of his disappearance.

The testimony of each new witness supporting the motion confirms the testimony of each of the other new witnesses who appeared at the hearing. Their testimony is also fully corroborated by the "old" evidence from Ron and Char Salnik, Pete Delvoe, Dennis Servais, Don Boulanger, Steve Stein, and Jon Mineau, and a host of mill workers who have previously attested to Winkler's efforts to coerce false statements from them, and by Monfils' emotional condition and history.

III. THE COURT SHOULD RECONSIDER ITS PRIOR RULINGS DENYING THE ADMISSIBILITY OF CERTAIN DOCUMENTS AND TESTIMONY.

For the reasons stated at the hearing and below, we respectfully request that the Court reconsider its prior rulings excluding certain exhibits and testimony on hearsay grounds:

1. In many cases, the proffered exhibits had been created more than twenty years earlier. They included police detail sheets, witness interview/interrogation statements, Crime Lab documents, police personnel file documents, and attorney correspondence authored more than twenty years before the hearing. These documents are what they purport to be and the context in which they were created and maintained leaves no doubt about their authenticity. As such, they are admissible under the Wisconsin ancient-document rule and are not excludible as hearsay. Wis. Stat. §908.03(16).

2. In many cases, Mr. Kutska offered documents and testimony for their independent legal effect and not to prove the truth of the matter asserted. Wis. Stat. §908.01(3). For example, a police detail sheet documenting a mill worker's statement that Monfils had a history of depression and/or an obsession with death and drowning is admissible not only as an ancient document, but also to show the leads that a defense lawyer should have pursued to rebut the State's manner-of-death theory, rather than to prove that the statements in the document were true or that some event referenced in it had actually occurred.

Similarly, the police investigation files reflect the content and history of the investigation, identify potential witnesses, and point to leads that the police either did or did not pursue. In some cases, those documents reflect coercive interrogation tactics and law enforcement's conscious avoidance of probative evidence, as, for example, in response to the Crime Lab's instruction to have the rope knots examined by the Coast Guard or Navy.

3. Various police detail sheets and witness statements documenting Monfils' obsessions with death and drowning, including suicide by drowning with heavy objects tied to a body, are also admissible as evidence of Monfils' state of mind. Wis. Stat. §908.03(3). Testimony regarding his mental state was also presented at the hearing by Gary Thyes, Amanda Kellner Williams, Steve Stein, and Jody Liegeois who testified about the emotional effect on Brian Kellner and/or Verna Kellner Irish of the coercion to which Kellner and Ms. Irish had been subjected **and** their emotional distress at being forced to lie and perjure themselves.

4. The testimony of Messrs. Thyes, Stein, and Lundquist attested to statements that Brian Kellner made that were unquestionably contrary to his penal, pecuniary, and/or social interests. The State labels this testimony as "hearsay" without acknowledging the well-accepted hearsay exception in Wis. Stat. §908.045 governing statements against an unavailable declarant's penal, proprietary, and/or social interests.

Whether or not the statute of limitations on criminal prosecution had expired when he confessed his lies and perjury, and even if he was confident that it had, Kellner could never escape the risk of social condemnation as a liar and perjurer if his confessional statements to Messrs. Thyes, Stein, and Lundquist were disclosed. Indeed, Stein made this very point when he testified regarding Kellner's concern regarding how people would react if the truth were told. Kellner feared being labeled as a liar and perjurer who was, in large part, responsible for sending six men to prison for life.

Kellner's admissions and confessions, moreover, could also have subjected him to civil liability, irrespective of when they were made, because he had previously concealed them from the defendants.

His social and pecuniary interests aside, Kellner confessed in real time to Mr. Thyes that he had made a false police statement and could have been prosecuted for obstruction of justice. There can be no reason to doubt the trustworthiness of Kellner's multiple admissions and confessions on various occasions and to differing individuals. His perjury is further corroborated by the testimony of numerous witnesses denying the occurrence and/or substance of what Kellner stated regarding the Fox Den Bar.

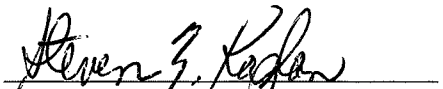
5. The applicable hearsay exceptions aside, the Due Process Clause requires the admission of any trustworthy hearsay that the defendant offers to support the defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *State v. Brown*, 291 N.W. 2d 528 (Wis. 1980); *State v. Bembenek*, 409 N.W. 2d. 432 (Wis. Ct. App. 1987) (the "'hearsay rule may not be applied mechanistically where proffered testimony is critical to the defendant's defense and bears persuasive assurances of trustworthiness'" citing *State v. Sharlow*, 327 N.W. 2d 692, 696 (Wis. 1983)); *State v. Anderson*, 416 N.W. 2d 276 (Wis. 1987).

IV. CONCLUSION.

For all of the reasons presented in this proceeding, Mr. Kutska requests that the Court grant his motion.

Dated: September 30, 2015

Respectfully submitted,



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EXCERPT FROM PAGES 12-17 OF DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR POST-CONVICTION RELIEF

1. The State's Delay and Laches Defenses.

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

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

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

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

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

Because the defendant in *Edmunds* obtained this enhanced evidence only after her conviction, she had not been negligent in failing to seek or obtain it before trial. Because it was not merely cumulative to what she had offered previously in his first post-conviction motion, the court considered her second motion on the merits. *State v. Armstrong*, 700 N.W. 2d 98 (Wis. 2005); *see also, State v. McCallum*, 561 N.W. 2d 707 (Wis. 1997). In *Edmunds*, the passage of time was critical because the same evidence that the defendant offered in support of her first motion had become far more compelling in light of the medical research that had taken place during the time between the two motions.

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

Accordingly, delay is, at most, merely one factor for a court to consider in determining whether there is "sufficient reason" for a successive motion and, in particular, whether the

defendant was personally negligent in failing to present all meritorious grounds for relief **and** all material evidence in support of them in the first motion.

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

His circumstances would later change only because of events over which he had no control. In 2001, the federal courts vacated Mike Piaskowski's conviction. Piaskowski's release then inspired two Green Bay authors, John Gaie and Denis Gullickson, to investigate the prosecution's evidence and theories in the "Monfils Six" case. They interviewed witnesses, studied the trial and post-conviction motion transcripts, examined the available police investigation files, obtained documents, and painstakingly dissected the prosecution's timeline.

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

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

Because Brian Kellner died in March 2014, literally just hours before he was to execute his affidavit confessing that the Fox Den Bar story was purely fictional, the party prejudiced by his unavailability is Kutska who has the burden of proof in this proceeding. As did Dr. Young, however, Kellner has left a wealth of statements and testimony. This Court judged Kellner's credibility at the preliminary hearing, at trial, and at a 1997 post-conviction motion hearing. In 1997, it concluded that Kellner's trial testimony was "barely credible," he had perjured himself either at trial or in post-conviction, and his 1997 recantation testimony was not credible. This Court can ably weigh Kellner's 2014 confession in its consideration of the present motion.

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

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

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

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

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

3. Winkler's personnel records—including the July 1997 draft set of charges documenting his lies, abuse, threats, and fraud. Although this Court conducted an in camera review in 1997 of certain personnel documents, Kutska's counsel did not then, and still does not, know whether they included the information obtained in 2013 pursuant to an open records law request. These documents relate to Winkler's work before, during, and after the Monfils case and **Winkler's own attribution of his psychiatric illnesses to his work the Monfils case.** They are relevant to his actions in the Monfils case and the credibility of his trial and post-conviction testimony; and

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

The case decisions that the State has cited for its issue preclusion, delay, and laches contentions are irrelevant. This is not, for example, a case in which Mr. Kutska has filed eight post-conviction motions. *State v. Casteel*, 2001 WI App 188. It does not involve a sex offender adjudication in a Chapter 980 petition proceeding, as in *State v. Sorenson*, 2001 WI App 251. This is not private civil litigation, as in *Sumpter v. Crozier*, 495 N.W. 2d 327 (Wis. 1993) and

*Matter of the Estate of Lohr v. Vine*y, 174 N.W. 2d 468 (Wis. Ct. App. 1993). It does not involve a claim of double jeopardy, as in *State v. Nommensen*, 2007 WI App 224, or the timeliness of a petition for a habeas writ, as in *State ex rel. Coleman v. McCaughtry*, 2006 WI 49 or *State v. Morgan*, 565 N.W. 2d 805 (Wis. Ct. App. 1997).

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EXCERPT FROM PAGES 80-88 OF DEFENDANT'S POST-HEARING BRIEF[1]

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.

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[1] This excerpt corrects to typographical errors in the Defendant's Post-Hearing Brief.

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.

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AFFIDAVIT OF SERVICE

I hereby certify that service of the foregoing Defendant's Post-Hearing Reply Brief has been made this 30th day of September 2015 by sending copies of it by Federal Express for delivery on the following day to:

David L. Lasee, Esq.
Karyn Behling, Esq.
Brown County District Attorney's Office
300 East Walnut Street
Green Bay, Wisconsin 54301

Steven Z. Kaplan

Subscribed and sworn to before me this
30th day of September, 2015.

Notary Public
Hennepin County, Minnesota

ROXANNE M. GANGL
NOTARY PUBLIC - MINNESOTA
My Commission Expires
January 31, 2020

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