

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Outagamie Case No. 00-CF-403

KENNETH A. HUDSON,

Defendant-Petitioner.

COMPREHENSIVE MOTION FOR POST-CONVICTION RELIEF PURSUANT TO
RULE 809.30(2), STATS.

The defendant, Kenneth A. Hudson, by Rebholz and Auberry, by James Rebholz, moves this Court pursuant both to the Court of Appeals' order, dated October 16, 2007, remanding the case to the circuit court for supplemental post-conviction proceedings and to Rule 809.30 (2)(h), Stats., for an order vacating the judgment of conviction and sentence imposed April 3, 2001, and granting such further relief this Court deems appropriate in the interest of justice.

PROCEDURAL STATUS

On April 3, 2001, Kenneth Hudson (Hudson) was sentenced on Count One to a term of life imprisonment without possibility of release to extended supervision (First Degree Intentional Homicide); to 30 years consecutive on Count Two (Attempted Kidnaping); to 60 years consecutive on Count Three (Attempted First Degree Intentional Homicide); and to 10 years consecutive on Count Four (First Degree Reckless Endangerment) in Outagamie County Circuit Court Case No. 00-CF-403, Judge Harold V. Froehlich, presiding.

The convictions in this case were the result of verdicts reached after a 5-day jury trial. For the first three days of trial, the defendant, over his objection, represented himself after the Court determined he had waived or forfeited his right to counsel by operation of law. For the last two days of trial, the defendant, again over his objection, was represented by the attorney who had been appointed to act as standby counsel during the first three days of trial--an attorney who had previously been discharged by the defendant and permitted to withdraw. The State was represented by District Attorney Vince Biskupic (Biskupic) and Assistant District Attorney Carrie Schneider.

Hudson was initially represented in post-conviction proceedings and on appeal by retained counsel, Attorney Jonathan C. Smith. Attorney Smith filed a post-conviction motion on October 30, 2001, raising eight issues, five of which related to Hudson's self-representation at trial, including whether the circuit court erred in allowing appointed counsel to withdraw; whether the circuit court erred in determining Hudson had waived or forfeited his right to counsel by operation of law; whether the circuit court erred in determining Hudson was competent to proceed *pro se*; whether the circuit court erred in denying a continuance to allow Hudson adequate time to prepare for trial; and whether the circuit court erred in reinstating appointed counsel on the fourth day of trial.

The Court conducted a post-conviction hearing on January 14, 2002, but Hudson's counsel called no witnesses to develop the factual record with regard to any of the issues raised.

Hudson appealed to the Court of Appeals. On July 10, 2002, the Court of Appeals granted Attorney Smith's motion to withdraw as retained appellate counsel, and allowed Hudson time to seek State Public Defender (SPD) appointment of new appellate counsel.

On August 7, 2002, the SPD appointed Attorney David Cook to represent Hudson's interests.

On November 12, 2002, the Court of Appeals, noting the need to avoid a piecemeal appeal, dismissed the pending appeal and remanded the case to the circuit court to allow Hudson to file a §974.07 motion for DNA testing and a supplemental post-conviction motion within 20 days of a decision on the §974.07 motion. His Supplementary Post-Conviction Motion for New Trial was timely filed on August 5, 2003..

Hudson subsequently filed a post-conviction discovery request on October 15, 2004; a motion for production and testing, filed January 26, 2005; a supplemental discovery demand, filed January 26, 2005; a second supplemental discovery demand, filed July 1, 2005; a reply, filed October 31, 2005; and amended responses, filed February 14, and October 3, 2005. The State responded. The Court conducted hearings on the motions.

Attorney Cook withdrew from Hudson's representation on October, 5 2005, because he was closing his law practice.

The SPD subsequently appointed attorney Chris Gramstrup to represent Hudson. Gramstrup appeared for Hudson, *via* telephone, at a June 27, 2006, hearing during which the circuit court ultimately denied Hudson's post-conviction claims based, in part, upon the district attorney's assertion that Hudson's post-conviction claims had been previously litigated and denied on January 14, 2002. The Court took testimony from Hudson by telephone and denied his sole remaining claim--that he was denied a fair trial as a result of the State's use of a stun belt on him during trial--based on a finding the stun belt did not prevent Hudson from representing himself or from presenting his defense to the jury.

The Court of Appeals permitted Attorney Chris Gramstrup to withdraw from Hudson's

representation on May 15, 2007.

On October 16, 2007, the Court of Appeals ultimately determined this matter should be remanded to the circuit court for resolution of all pending discovery requests; review of any additional discovery requests; and to resolve a “comprehensive post-conviction motion including issues previously presented but that have court’s remand in 2002 WI App 374, and any new claims that will be identified during the post-conviction discovery process.”

Following remand, Hudson filed additional supplemental requests for discovery, testing, and inspection. This Court conducted status hearings on January 7, March 7, and June 19, 2008. Evidentiary hearings on the motions were conducted on March 13, April 17, and August 18, 2008. The final post-conviction transcript was prepared and filed on October 13, 2008. The circuit court permitted Hudson to file his “comprehensive motion” on or before January 30, 2009.

RELEVANT FACTS IN SUPPORT OF PETITION

Hudson provided his first account of his involvement in the events of June 25, 2000, at a hearing conducted on May 27, 2003, in support of his motion for DNA testing. He testified that on the day of the incident, he returned to the Appleton area after a weekend camping trip, driving his truck, and pulling a boat and trailer. After arriving in Appleton, he purchased a knife at K-Mart to clean two northern pike he had caught and which were in a cooler in the back of his truck. He had not been able to clean the fish earlier because his girlfriend left the campsite and locked up their shack before he did (Tr. 5/27/03, pp. (112-13). He then drove to Kaukauna to look at a roofing job he had been working on a couple of weeks earlier, but which he had not completed, located near the scene of the incident

(p. 113). When he approached the house, he saw the homeowner's vehicle in the driveway. He did not want to talk to the homeowner because he had not finished the work, so he drove straight onto Plank Road rather than driving past the house.

As Hudson drove down Plank Road, he saw a young woman standing on the left side of the road, waving her arms (p. 115). He testified his window was down, and when he drove up to the woman, she was just screaming (p. 115). He looked to see what was going on, and then drove 30 to 40 feet down the hill to a turn-around, where he turned around to come back up the hill and stop where the woman was standing (p. 115). As he drove back toward the woman, she was on the right side of the road and the passenger side of his truck (p. 115). He stopped his vehicle on the left-hand side of the road, got out, walked over to where the woman was standing and asked her what was going on (p. 116). He asked her if she needed any help and she could not say anything. He opened up his passenger-side door and told her to sit on the seat, which she did (p. 116). He said he then heard a man's scream, coming from the woods, and he got scared because he had seen the woman was bleeding, and did not know what happened. He testified "I ran around to the driver's side of the vehicle and the victim got out and she ran in front of my vehicle and fell over on the left hand side of the road." As he was standing there looking at the victim, a man came running out of the woods with a rake in his hand, and came running toward him. Hudson thought the man was coming to hurt him, so he got in his vehicle and the man came running right at his truck (p. 117). Hudson was standing by the door of his truck, holding onto the door. His truck was still running. He saw the man emerge from the woods about 50 to 60 feet from his truck (p. 118). When the man emerged from the woods, the victim was already laying in the road. Hudson testified that at no time did he have any

physical contact with the victim (p. 119). He stated:

I thought this man was going to come and hurt me. And I got in my vehicle and he was coming running straight down toward the vehicle. I swerved to avoid him. And I hit the gate.

(p. 120). Hudson said that before he hit the gate, the man ran in front of his truck and jumped on the fence and, when he hit the gate, the man jumped over and stood on the other side of the fence (p. 120). His truck got caught on the fence and he was finally able to get it off and proceed up the road. He testified he was trying to get away from the scene because he was afraid of the man and did not know what had happened to the victim (p. 121).

Hudson testified that, as he drove away, he heard his boat dragging on the pavement and he stopped and tried to pull the boat back onto the trailer. He grabbed the boat by the stern, tried to pull it and crank it back on, but could not. He said, at the time, he was not aware witnesses were observing him trying to put the boat back on the trailer (p. 122).

Hudson testified he first became aware the police were chasing him after he turned onto Highway 41, proceeding to his home (p. 122). He testified he continued to flee from the police after getting away from the Plank Road area because he had marijuana on him, his driver's license was revoked and he was scared (p. 124). After his arrest, Hudson said he fell asleep and woke to an officer with a "cup . . . pouring blood on his leg" before Hudson hollered and kicked the cup from the officer's hand (Tr. 5/27/03, p. 125).

Hudson testified that after he was cleared from the hospital, he was interviewed by Assistant Chief Manion and Lieutenant Shepardson (p. 128). He told Manion he wanted an attorney and refused to sign two forms they wanted him to sign. Hudson said Manion

pointed to his leg and accused him of stabbing the girl because his leg was bloody. Hudson told Manion his officer poured blood on him. Hudson testified that at no time during the interview did he admit to the stabbing (p. 129).

CLAIMS FOR POST-CONVICTION RELIEF

I. HUDSON WAS DENIED HIS FUNDAMENTAL RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE 1, §7 OF THE WISCONSIN CONSTITUTION; *GIDEON v. WAINWRIGHT*, 372 U.S. 335 (1963); and *STATE v. CUMMINGS*, 199 Wis.2d 721, 546 N.W.2d 406 (1996). THE CIRCUIT COURT ERRED IN DETERMINING HUDSON FORFEITED HIS RIGHT TO COUNSEL BY OPERATION OF LAW AND REQUIRING HUDSON TO PROCEED TO TRIAL WITHOUT THE ASSISTANCE OF COUNSEL. *STATE v. HASTE*, 175 Wis.2d 1, 22, 500 N.W.2d 678 (Ct. App. 1993); and *STATE v. WOODS*, 144 Wis.2d 710, 715-16, 424 N.W.2d 730 (Ct. App. 1988). HUDSON WAS NOT COMPETENT TO PROCEED *PRO SE*, AND DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HIS RIGHT TO COUNSEL. *PICKENS v. STATE*, 96 Wis.2d 549, 292 N.W.2d 601 (1980).

In finding Hudson forfeited his right to counsel by operation of law, the circuit court relied generally on the record of attorney withdrawals made in a previous case (Outagamie County Case No. 00-CF-90), in which four successive attorneys were retained or appointed for Hudson, and on representations made by the State with regard to the reasons why four attorneys were involved in that case.¹

To adequately develop the record on this issue, Hudson will testify and present testimony from his prior attorneys in Case No. 00-CF-90, to establish the changes in counsel in that case were made for appropriate and lawful reasons and not as a result of non-cooperation on his part (See Undersigned Counsel's Affidavit, Attached as Exhibit A).

¹ In denying Hudson's motion for an adjournment to hire new counsel in the homicide case, this Court took judicial notice of the procedural history of Case No. 00-CF-90 and found Hudson "delayed sufficiently" in that case to justify a denial of his adjournment motion (Tr. 2/19/01, p. 5).

The testimony will establish:

- A. Hudson initially retained a family friend, Attorney Robert Sisson, a recent law graduate and who was married to Hudson's brother's former wife. Hudson's personal relationship with Sisson deteriorated as a result of a domestic incident between Sisson and his wife and in which Hudson was involved. Sisson was legally inexperienced.
- B. Hudson then retained Attorney Casey Schneider, who moved to withdraw because Hudson was unable to pay the balance of the fees owing after Hudson was placed in custody on the present case.
- C. The SPD then appointed Attorney Gary Schmidt, with whom Hudson had no problems but sought to discharge on what he believed was the advice of his counsel on the present case to avoid obtaining a criminal conviction in advance of the pending homicide trial.
- D. Hudson had no problems or conflicts with Attorney Len Kachinsky, who ultimately resolved Case No. 00-CF-90 with a guilty plea prior to the trial proceedings in the instant case.
- E. Hudson had no conflicts or problems with his representation by appellate counsel, Attorney Michael Yovovich, who was appointed to handle the appeal in Case No. 00-CF-90.

Hudson will also testify and present testimony from his prior attorneys in the present case to adequately develop the record with regard to the reasons why counsel was discharged or allowed to withdraw (See Undersigned Counsel's Affidavit, Attached as Exhibit A). The testimony will establish, in significant part:

- A. Attorneys Bartman and Figy had to withdraw from the case due to a conflict of interest which arose with one of the State's witnesses (Schultz).
- B. Attorney Nila Robinson's conflict with Hudson centered around (1) his unwillingness to consider any plea negotiations; (2) his insistence he was innocent and the case must proceed to trial; (3) his insistence the State was hiding exculpatory evidence—hospital tape—and destroyed exculpatory evidence—interrogation video; and (4) his insistence Attorney Robinson locate this evidence prior to trial so that he could present his defense of choice at trial.
- C. Attorney Carns' conflict with Hudson and removal similarly centered around

Hudson's refusal to (1) consider any plea agreement; (2) his insistence on proceeding to trial with his claim of innocence; (3) his insistence the State was hiding and had destroyed exculpatory evidence; and (4) his insistence Carns locate and present this evidence at trial.

Hudson will present testimony that Attorney Robinson's trial evaluation and potential strategies would have been affected, and the attorney/client relationship likely maintained, by the eventual pre-trial disclosure of the hospital audio tape in which Hudson requested an attorney and the eventual disclosure that the KPD video/audio was destroyed because the equipment was unable to erase itself, as KPD police reports alleged.

Hudson will present testimony that Attorney Carn's trial evaluation and potential strategies would have been affected, and the attorney/client relationship likely maintained, by the eventual pretrial disclosure of the hospital audio tape in which Hudson requested an attorney and eventual disclosure that the KPD video/audio was destroyed because the equipment was unable to erase itself, as KPD police reports alleged.

Further, Hudson will present testimony and physical evidence that the State was aware Hudson was making legitimate efforts to obtain discovery through Attorneys Robinson and Carns; but then, later, was required to make good faith efforts to obtain private counsel who would more aggressively seek to obtain physical evidence which Hudson knew existed (hospital tape) and which was referenced in KPD Officer Sanderfoot's police report. The State was aware of Hudson's good faith efforts to retain counsel from listening to telephone calls by Hudson from the jail. However, the State mis-represented the content of these telephone calls in court appearances. When Hudson demanded copies of transcripts of the telephone calls to which the State listened, the State failed to disclose and then allowed the locked-in and recorded calls to be purged from the telephone

system. This deprived Hudson of the trial adjournment he sought and an effective attorney/client relationship with “private” counsel. (See Investigator Malchow’s February 21, 2001 Report and Notes).

Hudson will also testify and present testimony from Danita Scharenbroch (A) regarding Hudson’s efforts to retain private counsel after a conflict developed with Attorney Carns regarding the nature of his defense; (B) to establish resources were available to retain counsel through family and friends; (C) to establish a \$5000 payment was made to Milwaukee Attorney William Reddin during December, 2000, to review Hudson’s case and to eventually represent Hudson at trial for additional fees; (D) to establish additional funds (\$21,500) were available to further retain Attorney Reddin or other private counsel; (E) to establish Reddin met with Biskupic and then declined to represent Hudson; and (F) to establish Hudson’s efforts to communicate by telephone with his family members in order to retain counsel were unconstitutionally hampered by actions of the State in the weeks just prior to trial (See Scharenbroch’s Affidavit, Attached as Exhibit B).

Hudson will ask this Court to take judicial notice of Judge Des Jardins’ finding in Case No. 00-CF-90 on August 17, 2000, that Hudson’s case “has not been delayed before” and had “apparently got bogged down” (00-CF-90 Tr. 8/17/00, p. 7).

Finally, Hudson will explain how the Court’s decision forcing him to represent himself while in jail, even though incompetent to do so, prejudiced his ability to investigate; obtain discovery; interview witnesses; cross-examine witnesses; present evidence; and prepare and present his own testimony.

The Court also found in its January 14, 2002 decision denying Hudson’s Petition for New Trial, that Hudson’s defense strategy had been “unreasonable.” Hudson’s defense

was only unreasonable, because, as his claims in support of the instant petition for new trial document, the State's failure to disclose and its destruction of exculpatory evidence, along with tampering with inculpatory evidence, resulted in Hudson's defense only appearing unreasonable to the Court and Hudson's lawyers.

II. _____ HUDSON WAS DENIED DUE PROCESS AND HIS RIGHT TO A FAIR TRIAL BY PROSECUTORIAL MISCONDUCT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE STATE OF WISCONSIN ISSUED LEGALLY AND FACTUALLY BASELESS CRIMINAL CHARGES AGAINST HUDSON'S GIRLFRIEND IN *STATE v. SCHARENBRUCH*, CASE NUMBER 01-CM-167, TO PREVENT HUDSON AND SCHARENBRUCH FROM COMMUNICATING WITH EACH OTHER BETWEEN FEBRUARY 8, 2001 AND FEBRUARY 19, 2001 FOR PURPOSES OF RETAINING PRIVATE COUNSEL TO REPRESENT HUDSON AT TRIAL. THIS CAUSED HUDSON TO BOTH REPRESENT HIMSELF AT TRIAL WHILE INCOMPETENT TO DO SO AND LATER HAVE STANDBY COUNSEL ABANDON HUDSON'S CHOSEN DEFENSE. *STRICKLAND v. WASHINGTON*, 466 U.S. 668, 683 (1984); *STATE v. LETTICE*, 205 Wis.2d 347, 556 N.W.2d 376 (Ct. App. 1996); and *STATE v. ORLIK*, 226 Wis.2d 527 595 N.W.2d 648 (Ct. App. 1999).

At the time of Hudson's arraignment on June 27, 2000, the magistrate entered an order prohibiting Hudson from communicating with anyone named in the criminal complaint. Danita Scharenbroch (Scharenbroch) was Hudson's girlfriend and was named in the probable cause section of the complaint because she was interviewed by police regarding her and Hudson's camping and fishing weekend in Langlade County on June 23, through June 25, 2000. No court order or statute prohibited Scharenbroch from communicating or visiting with Hudson and Hudson remained in the jail until trial.

From June 27, 2000, until Scharenbroch's arrest² on February 12, 2001, Hudson

² The criminal complaint against Scharenbroch in Case No. 01-CM-167 asserted Malchow only became aware of these calls in November, 2000 (See Criminal Complaint, p. 3). Curiously, ADA Schneider told the court on May 17, 2001 in State v. Scharenbroch that she didn't know

placed 1434 calls to Scharenbroch, of which 146 were completed. The prosecution was immediately aware of these calls and assigned DA investigator Stephen Malchow (Malchow) to listen to telephone calls between Hudson, Scharenbroch, and others for purposes of obtaining incriminating information against Hudson to assist in the homicide prosecution. In that capacity, Malchow "locked in" (preserved) 25 calls from Hudson to Scharenbroch between July 1, through August 18, 2000. Following Attorney Robinson's motion to withdraw on November 22, 2000, the SPD appointed Attorney Ed Carns to represent Hudson. Before Carns visited with Hudson for the first time at the Outagamie County Jail on December 15, 2000, Hudson and Scharenbroch paid Attorney Reddin \$5000 to evaluate Hudson's case and decide whether to represent Hudson at trial. Reddin declined shortly after Christmas, 2000, after speaking with District Attorney Biskupic.³

Carns visited Hudson again on January 15, 2001, and told Hudson he would not seek discovery of any hospital audio tape and would not seek to suppress Hudson's statement allegedly made at the Kaukauna Police Station without the audio tape. Carns' investigator told Hudson on January 23, 2001, he would try to provide a copy of Carns' discovery to Hudson in the jail.

On February 8, 2001, Hudson told the Court that Carns was not adequately

whether the State was listening to telephone conferences before November, 2000, even though Malchow had locked in 25 calls prior to August 18, 2000, and the State eventually produced (to Attorney Cook) three Labor Day cassettes of telephone communications between Hudson and Scharenbroch. The prosecution also elected not to lock in and preserve the nine calls for which Scharenbroch was criminally charged, presumably because disclosure of the content of these telephone communications (critical to the Scharenbroch prosecution) would have supported Hudson's contention to Judge Froelich that he was financially able and needed only a short amount of time to retain counsel.

³ Scharenbroch visited Hudson on 14 occasions at the jail between July 25, November 15, 2000, and visited three times between January 3, and January 23, 2001.

representing him because Carns would not seek discovery of the hospital audio tape (in order to seek to suppress Hudson's alleged confession). Hudson told the Court he wanted a different attorney appointed or adequate time and an adjournment to locate and hire a private attorney. The Court adjourned the hearing until February 19, 2001, to allow Hudson time to seek and retain private counsel and to advise the Court accordingly before ruling on Hudson's adjournment motion.

On February 8, 2001, following the hearing, Hudson called Scharenbroch and asked her to now make even more serious attempts to locate and hire an attorney and to contact additional family members to help pay for a new attorney because the Court would not appoint new counsel. Investigator Malchow was listening to these calls between February 8 and February 12, 2001.

On February 12, 2001, the prosecution arrested Scharenbroch and charged her with nine counts of criminal contempt in violation of the magistrate's arraignment order of June 27, 2000 (Case No. 01-CM-167). Blocks were also placed on both Scharenbroch's and her mother's (Luella Wilbur's) telephones so there could be no communication between them and Hudson. Biskupic directed the jail to prevent visit with Scharenbroch and Luella Wilbur, who was not a State's witness. Despite the fact that evidence of these nine telephone calls was required to prosecute Scharenbroch, the State effectively destroyed evidence when it intentionally failed to lock in the calls with the telecommunications provider. The State caused this evidence to be destroyed because the substance of the calls constituted good faith evidence of Hudson's attempt to hire an attorney and obtain an adjournment solely for purposes of preparation for trial and not for any dilatory purposes.

On February 19, 2001, District Attorney Biskupic misrepresented Hudson's financial

circumstances and told the Court it should deny Hudson's request for an adjournment in order to seek private counsel because there was no "reality" that Hudson knew "people ready and willing to try and get him a private attorney." Biskupic knew otherwise from the content of the telephone conferences between Hudson and Scharenbroch between February 8 and February 12, 2001, and as a result of his conference with Attorney Reddin, who had been paid to investigate Hudson's circumstances. In other words, Biskupic knew Scharenbroch, her mother and sister (Donna Goeser) and Hudson's family members had the financial resources to hire private counsel before February 19, 2001.⁴

Instead, the prosecution had Scharenbroch arrested to (A) prevent Hudson, Scharenbroch, Luella Wilbur and Donna Goesser from using their financial resources to identify and hire counsel before February 19, 2001, and so advise the court (B) prevent Hudson from hiring private counsel who would aggressively seek discovery of the important hospital audio tape and then seek to suppress Hudson's alleged confessions with the assistance of the audio tape; and (C) cause Hudson to either represent himself at trial or proceed with Attorney Carns, who Biskupic was informed would not seek disclosure of the hospital audio tape or to suppress Hudson's statement. Biskupic's misconduct in this particular respect again manifested itself during trial when Hudson requested a suppression hearing and disclosure of the hospital audio tape (to which Biskupic had necessarily listened) as he and his lawyers had been requesting for almost nine months. On March 5,

⁴ No request had been made of the Court by Hudson and Hudson was not aware of his right to seek an exemption of Scharenbroch from his No Contact Order in order solely to assist him in retaining private counsel. Nor had Scharenbroch claimed "intimidation" by Hudson.

2001, Biskupic told the Court⁵ there was no basis for a suppression hearing because Hudson's request for an attorney was "ambiguous."

On May 17, 2001, the circuit court granted Scharenbroch's motion to dismiss all pending telephone contact charges against her in Case No. 01-CM-167 because no case authority or applicable statute created criminal liability for Scharenbroch from Hudson's No Contact order. The Court of Appeals affirmed the circuit court's order in an unpublished decision. While Scharenbroch was duly employed during this period and had financial resources to assist Hudson, her arrest required her to post bond and hire private counsel for herself and compensate counsel with money (\$11,500) which was then no longer available to assist Hudson (See Hudson' Unnotarized Affidavit, Attached as Exhibit C).⁶

III. HUDSON WAS DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE I, §§ 1,7 AND 8 OF THE WISCONSIN CONSTITUTION AND UNDER §§ 971.23; 971.24; 971.25; AND 968.17, STATS., WHEN THE STATE FAILED BEFORE AND DURING TRIAL TO DISCLOSE EVIDENCE SOUGHT BY HUDSON PRIOR TO AND DURING TRIAL. *BRADY v. MARYLAND*, 373 U.S. 83 (1963); *KYLES v. WHITLEY*, 514 U.S. 419 (1995); and *STATE v. DELREAL*, 225 Wis.2d 565, 574, 593 N.W.2d 461 (Ct. App. 1999) (DEFENDANT HAS A RIGHT TO EVIDENCE WHICH TENDS TO MAKE HIS GUILT "LESS PROBABLE"). HUDSON WAS FURTHER DEPRIVED OF THESE CONSTITUTIONAL RIGHTS WHEN THE STATE ALSO ENGAGED IN MISCONDUCT IN INTENTIONALLY HIDING, DESTROYING AND TAMPERING WITH EXCULPATORY EVIDENCE TO CAUSE HUDSON'S CONVICTION. *STATE v. GREENWOLD*, 181 Wis.2d 881, 512 N.W.2d 237 (Ct. App. 1994); and *ARIZONA v. YOUNGBLOOD*, 488 U.S. 51 (1988).

⁵ The prosecution later attempted to intimidate Scharenbroch's sister, Donna Goeser, from financially assisting Hudson by contacting Goeser's foster care agency and informing them that Goeser was associating with Hudson.

⁶ Hudson's notarized affidavit will be filed once it has been notarized by Green Bay Correctional officials.

- A. The State of Wisconsin Violated §971.23, Stats., and Hudson's Right to a Fair Trial and Due Process When It Withheld Both Before and During Trial a Hospital Audiotape Which Indicated Hudson's Invocation of His Right to an Attorney Following His Arrest and *Miranda* Warnings.

Following Hudson's arraignment, his counsel filed a discovery demand and motion with the trial court, specifically demanding the State turn over copies of all of Hudson's "recorded statements" to the police for discovery and inspection, pursuant to §971.23, Stats. The State delivered two pretrial itemized discovery packets to Hudson's lawyers on July 31 and August 28, 2000, in which the hospital tape was not itemized as having been provided (See Exhibit G, Attached).

On September 11, 2000, Biskupic sent defense counsel a letter, telling them the defense had been in receipt of all discovery in the case for several weeks. On October 10, 2000, defense counsel filed a "Notice of Motions and Motions in Limine" advising the Court counsel would be addressing Hudson's discovery issues at an October 13, 2000 hearing.

At the October 13th hearing, the Court allowed defense counsel to withdraw based upon their prior representation of Shirley Schulz, a state trial witness against Hudson. At the same hearing, the State filed a "speedy trial motion" (Tr. 10/13/00, p. 4). Hudson's pending discovery motion was not addressed at the October 13, 2000, hearing and was never addressed throughout the remainder of his prosecution by Attorneys Robinson or Carns, the Court or Biskupic.

On October 19, 2000, Biskupic sent successor counsel, Attorney Nila Robinson, correspondence advising the State had previously turned over all discovery in two packets to prior counsel and that Attorney Robinson should obtain this discovery from previous counsel.

At the February 8, 2001, hearing on Hudson's request for appointment of new counsel, Hudson told the Court the State still had not provided all discovery, including the hospital tape. Biskupic disagreed, telling the Court that Carns had received all of the discovery from prior counsel (Tr. 2/8/01, pp. 6-7; 13-16; 38; 40; 43-44). At the same hearing, Biskupic told the Court he would make a second copy of the discovery "from start to finish" for delivery directly to Hudson but, specifically, did not claim the State had ever turned over a copy of the hospital tape to Hudson or his prior attorneys.

At a pretrial hearing on February 27, 2001, Hudson advised the Court the State still had not turned over the hospital tape to him, or to Investigator Peter Roth (Carns' investigator), as Biskupic had promised he would do. Biskupic did not deny Hudson's contention (Tr. 2/27/01, pp. 16-17; 20).

Hudson's jury trial began on March 5, 2000, with Hudson appearing on his own behalf.

On March 6, 2001, while Hudson was representing himself at trial, he advised the Court he had still not received the hospital tape previously requested and he moved to dismiss the charges. The Court denied Hudson's motion to dismiss, even though Biskupic did not claim the hospital tape had ever been delivered to Hudson.

Following Hudson's conviction and sentence, his post-conviction counsel, David Cook, filed a post-conviction discovery demand requesting the State turn over a copy of the hospital tape. The tape was produced and delivered to Attorney Cook during October, 2004. The tape revealed Hudson had specifically requested to speak with an attorney after having been advised of his *Miranda* rights and had not, as KPD police reports asserted, ambiguously asked whether he should have an attorney.

The State's refusal to produce the hospital audio tape was misconduct and prejudiced Hudson because (1) Hudson would have been able to use the hospital audio tape to suppress the pretrial inculpatory statements which the State introduced into evidence against him; (2) hospital audio tapes would have impeached KPD Officers Manion's and Shepardson's trial testimony describing Hudson's alleged inculpatory statements made to them during interrogation, because the tape would have contradicted the false statements in their police reports regarding Hudson's request for an attorney at the hospital; (3) the hospital tape would have corroborated Hudson's contention the video/audio of this police station interrogation was erased by the KPD because he had not confessed and again had requested a lawyer; and (4) corroborated his trial defense contention that KPD Officers Manion and Shepardson fabricated their testimony of Hudson's alleged confession in order to secure his conviction.

The State also engaged in misconduct when KPD officers prepared police reports which misrepresented as "equivocal" Hudson's concise hospital request for an attorney when police knew this to be false (See Exhibit, D, p. 17, Attached).⁷ The State further engaged in misconduct when, after consistently refusing to disclose the hospital tapes, Biskupic told the Court Hudson had only ambiguously requested an attorney while on the gurney at the hospital (Tr. 3/5/01, p. 15).

The State continued to engage in deception in the post-conviction process. Its memorandum, filed December 21, 2001, again alleged Hudson's request for an attorney was "ambiguous." (p. 3). The State also informed the post-conviction court that, because

⁷ This exhibit includes 5 of 31 pages from the redacted transcript of the hospital tape.

Hudson's trial attorneys saw no merit (without having heard the hospital tape) in a suppression motion, Hudson's petition for a new trial should be denied (Tr. 1/14/02, pp. 22-23).

- B. KPD Police Officers Intentionally Caused the Video/Audio of Hudson's Interrogation at the Police Station to Erase and Then Destroyed the Tape so any Forensic Examination Could Not Determine the Exculpatory Content of the Interrogation, Including Hudson's Request for an Attorney.

KPD Officers Manion and Shepardson interrogated Hudson at the KPD station house and prepared police reports stating the interrogation had been video and audio taped by KPD equipment. The equipment was activated by a dispatcher (Michelle Madden) without police awareness. The report explained police had destroyed the video/audio tape of the interrogation following the interrogation because the equipment had self-erased the video/audio tape. Biskupic maintained this deception to the Court (Tr. 2/8/01, p. 13). However, the video was erased by police because the interrogation was exculpatory.⁸

Following Hudson's conviction and sentence, defense expert Steven Cain⁹ of Forensic Tape Analysis, Inc., was retained to examine the KPD's video/audio equipment which had been used to record Hudson's alleged confession. Cain examined the equipment at the KPD station and determined the tape could not have erased itself as claimed because the equipment did not have the capability to self-rewind and erase and that someone had to manually cause the equipment to erase the tape (See Exhibit E,

⁸ The dispatcher testified she believed she then removed the tape from the equipment after the interrogation and placed it in "their in-box in case they needed it . . . because it [tape] may have been important" (Tr. 3/13/08, pp. 68-69).

⁹ Mr. Cain's curriculum vitae (3 of 11 pages) is attached as Exhibit F.

Attached).

The police engaged in additional misconduct in causing the video/audio tape's destruction after Hudson's interrogation on the false rationale the audio/video tape had no value because the interrogation had self-erased. This was misconduct because it deterred Hudson and his lawyers from investigating the video/audio tape in the pretrial process to determine both whether he confessed to police during his interrogation and had, in fact, requested an attorney early in the interrogation, requiring police to terminate the interrogation. This obstruction caused his lawyers to believe his suppression motion had no merit and prejudiced Hudson because no suppression was attempted.

The prosecution engaged in misconduct when it used the KPD police report to support its argument Hudson should be denied a *Miranda/Goodchild* hearing to suppress his merely "ambiguous" statement regarding counsel to police, *Id.*.

Finally, the State of Wisconsin engaged in misconduct when it presented KPD police testimony at trial that Hudson confessed to causing the victim's death on Plank Road when it knew, or should have known, the testimony was false or else the police would not erased "evidence" of the alleged confession.

- C. The State Failed to Disclose Wisconsin Crime Lab (WCL) "Inventory Case Notes" for the Six Paper Bags of Materials Collected and Packaged by the WCL (John Ertl) from Within the Interior of Hudson's Truck on June 28, 2000.

After trial and on October 15, 2004, Hudson filed a discovery demand and motion demanding the State disclose all exculpatory evidence or information in the WCL's possession not previously provided in response to his specific pretrial discovery demand for these materials. On September 28, 2004, the WCL provided a copy of their file,

including two pages of Ertl's "inventory case notes" (for the materials collected from within Hudson's truck) which indicated Ertl found a "window crank" on the floor of Hudson's truck. These inventory case notes had not been provided prior to trial and were not indicated on the State's three itemized discovery packets filed with the circuit court on July 31, August 28 and November 30, 2000. At an April 17, 2008 post-conviction hearing, Ertl testified he believed he turned over a copy of these inventory case notes to the State prior to trial (Tr. 4/17/08, p. 100).

The inventory case notes are exculpatory and the State's failure to disclose them prejudiced Hudson's trial defense because these notes established the window crank the police allegedly found at the crime scene (KPD item 8; WCL item J) had been switched prior to trial with the passenger's side window crank Ertl found in Hudson's truck on June 28, 2000. The State falsely told the jury Exhibit 70 was the crank the police found at the crime scene, in order to match the police reports and prosecution's passenger-side-encounter (with Van Dyn Hoven) theory. Switching the window cranks and these misrepresentations to the jury tend to establish Hudson's trial claim the police tampered with this and other evidence introduced against him at trial. This post-conviction discovery of evidence-tampering supported his theory law enforcement removed the driver's side window crank at the arrest scene and planted it back at the crime scene in Kaukauna because the passenger side crank was still laying in Hudson's truck when it was towed to Madison.

- D. The Police Tampered with Evidence and Committed Misconduct When They Switched the Passenger Window Crank Found in Hudson's Truck by the WCL (No Item Number Assigned) with the Crank Removed from Hudson's Truck at the Arrest Scene and Transported to the Crime Scene (KPD Item

8, WCL Item J). The Police and State Committed Misconduct When They Represented to the Jury that Exhibit 70 (Window Crank) Was Found at the Scene and Allowed this False Evidence to Be Used at Trial to Convict Hudson.

At trial, the State theorized Hudson forced the victim into the passenger side of his truck, the victim then fought her way out of the truck during which her headset and headphones came off and ended up laying on the roadway next to the window crank. By inference, the State's theory of the attack also supposed the victim must have pulled the window crank off of the passenger side door, explaining why it was found next to the victim's headset on the roadway and seized by KPD officer Robert Momberg during the crime scene investigation.

Momberg testified at trial that he found the passenger side window crank at the crime scene. He marked it as KPD Item 8 and delivered it to the WCL to be examined as evidence in the homicide prosecution. WCL Technician Nick Stahlke provided his receipt. However, the window crank the State entered into evidence as Trial Exhibit 70 was not the window crank Momberg stated he found at the crime scene. It was, rather, the window crank found by the WCL in Hudson's truck and placed into Property Bag 2 (without any specific item number) and returned to the KPD inside WCL Property Bag 2 on June 29, 2000.

Following trial, Hudson advised post-conviction counsel that, when police pulled him over in Greenville, his driver's side window crank was still attached to the door, and the passenger side window crank was laying on the floor of his truck, as it had been for several weeks prior to his arrest (See Counsel's Affidavit). Hudson asserted the police must have removed the driver's side window crank from his truck at the time of his arrest and planted

it back at the crime scene in Kaukauna. On September 28, 2004, the State responded to the post-conviction discovery request and disclosed a complete copy of the WCL's entire pretrial file to Hudson.

Following a post-conviction review of the WCL file, disclosed by the State on August 28, 2004, and Ertl's inventory of the entire contents of the inside of Hudson's truck, post-conviction counsel went to the KPD to inspect and photograph the contents of the six paper bags inventoried by Ertl. Counsel found the window crank identified by Ertl was missing from Property Bag 2. Hudson then filed a demand and motion for discovery and inspection on January 26, 2005, demanding to know the location of the missing window crank from Bag 2.

On February 24, 2006, the State then claimed KPD Officers Krueger and Shepardson went to the KPD storage unit to search Hudson's truck and the window crank, which they claimed was laying on the driver's side seat of the truck, was photographed and logged into evidence by the KPD.

During the post-conviction discovery proceedings, the State attempted to establish the window crank found in Hudson's truck on the driver's seat on February 24, 2006, was the window crank Ertl found in Hudson's truck and placed into Property Bag 2.

However, the State's assertion is false because the window crank found on February 24, 2006, had a WCL sticker on it with Gerald Kortajarvi's initials on it as the WCL fingerprint expert to whom the KPD had delivered a window crank found at the crime scene (and not from Hudson's truck). Moreover, proof of the State's switch of the window cranks prior to trial is further corroborated by the fact the window crank introduced at trial (Exhibit 70) as the passenger side crank did not contain a sticker or bar code (Tr. 4/17/08, p. 89).

Ertl further testified the WCL would not have placed a bar code on the window crank found inside the truck and the bar code would only have been placed on the package into which it was placed (Property Bag 2). Finally, Ertl testified that any piece of evidence removed from the truck (WCL Item A) would have been sub-designated as "A 1-A___." Ertl testified he knew the WCL had not removed the passenger side crank from Property Bag 2, because WCL protocol would have required preparation of a report of the removal and no such report existed in WCL's files (Tr. 4/17/08, pp. 87-88).

KPD Officer Krueger testified in a post-conviction hearing that he had no explanation how the window crank originally placed into Property Bag 2 had been removed or had been placed and found on the truck's driver's side (Tr. 3/17/08, pp. 143-44). Tampering was further established at the post-conviction hearing when police identified a bar code on the passenger side window crank (Item A) which Ertl testified was a designation prohibited by the WCL protocol.

KPD Officers Rosche and Swanson were the first officers to arrive at the homicide scene, only minutes after Hudson left the scene. Neither Rosche's nor Swanson's "crime scene assessment" reports indicated the existence of a window crank on the crime scene next to the victim's walkman and headphones. Correspondingly, neither Rosche nor Swanson testified at trial they had ever seen a window crank at the crime scene next to the victim's walkman. KPD Officer Momberg indicated he arrived at the scene at approximately 7:40 p.m. (approximately 77 minutes after Hudson's arrest) and he found the window crank next to the walkman and headphones.

Evidence of tampering and misconduct prejudiced Hudson because presentation of this evidence would have corroborated his trial defense that police tampered with and

committed misconduct with this and other pieces of evidence, including evidence seized from Hudson's body and from the knife. This misconduct evidence supports the innocence defense which he tried to present to the jury.

- E. Hudson Was Denied His Constitutional Right to a Fair Trial, Due Process of Law, and Compliance with §971.23, Stats., When the State Failed to Disclose Pretrial the Serology/DNA Case Notes Compiled by the WCL Itemizing Its Inventory of the Victim's Sexual Assault (SA) Kit (WCL Item Y-Y1).

Hudson filed a pretrial discovery demand requesting the State provide copies of laboratory reports, notes, etc. and any exculpatory evidence to the defense.

Only following Hudson's post-conviction discovery motion was a complete copy of the WCL file provided to Hudson on September 28, 2004.

Contained within the WCL file were 2 pages of Ertl's notes, which revealed the SA kit contained only a single lavender stoppered tube of blood collected from the victim. Later, Ertl testified and confirmed receipt only of a single lavender stoppered tube of the victim's blood (Tr. 5/27/03, pp. 87-89) (*See also* Counsel's Affidavit).

On December 8, 2004, pursuant to Hudson's request, Ertl also sent a copy of the kit instructions for the victim's kit. The instructions required collection of a second tube of blood with a gray stoppered tube if either blood-alcohol or a drug screen was, as here, required.

The record establishes neither Ertl's serology/DNA case notes nor the SA kit instructions were turned over to the defense prior to trial because these items were not itemized in any of the three particularized pretrial discovery packets filed by the State in this action. Moreover, Biskupic represented to the Court on February 27, 2001, contrary to WCL records, that the WCL had advised him on February 26, 2001, both a lavender and

a gray-stoppered blood tube had been received by the WCL but had been used only for DNA testing, rather than for both DNA and blood-alcohol/drug screen testing as required (Tr. 2/27/01, pp. 20; 22). Critically, the record establishes a second tube of blood had been collected during the autopsy for blood alcohol and drug (toxicology) screening and custody transferred to the KPD for conveyance to the WCL (See Autopsy Report, p. 8; Coroner's Report, p. 2; Tr. 2/27/01, p. 19; Tr. 5/27/03, p. 7).

This failure to disclose and misrepresentation to the Court was misconduct and prejudiced Hudson because he was unable to present and argue to the jury that a potential source of the victim's blood (blood vial) was available to police to tamper with and place on the physical evidence (knife, etc.) collected in his case and corroborate his trial defense that law enforcement had, in fact, tampered with the physical evidence used to convict him.

- F. Hudson Was Denied His Constitutional Right to a Fair Trial, Due Process of Law, and Compliance with §971.23, Stats., When the State Committed Misconduct and Failed to Disclose the Kaukauna Police Department (KPD) "Detailed Daily Log Report," Despite the Specific Open Records Request of June 30, 2000.

Hudson sent the KPD an open records request (ORR) on June 30, 2000, requesting copies of the "dispatch arrival and departure" times for KPD officers involved in the chase and homicide investigation on June 25, 2000 (Tr. 8/18/08, p. 28; Exhibit 42). KPD Executive Secretary Linda Conrad (Conrad) referred Hudson's request to the district attorney on July 17, 2008 (Tr. 8/18/ 08, p. 28; Ex. 42). Hudson also filed a discovery demand and motion specifically requesting the State turn over copies of all "police reports" and any "exculpatory" evidence.

On July 1, 2005, Hudson filed a post-conviction discovery demand and motion

requesting the State turn over copies of the KPD's "dispatch, arrival, and departure" times, along with the police reports not previously provided prior to trial.

On July 8, 2008, the State disclosed a "10-page detailed daily log report" dated June 25, 2000, which was not identified in the State's three itemized discovery packets filed pre-trial. On August 18, 2008, Conrad testified she referred Hudson's request to the DA's office for these materials because the reports had been given to the DA's office pre-trial and it would be up to them to determine whether these documents would be provided to the defense (Tr. 8/18/08, pp. 21-30).

Failure to disclose this information pretrial prejudiced Hudson for several reasons. One, KPD Officers Swanson (831) and Rosche responded to Plank Road regarding a female down on the roadway. They performed CPR and noticed "two wounds on her back". At trial, Swanson testified he never broadcast his examination of the victim which indicated she had been stabbed (Tr. 3/6/01, pp. 241-51). However, the KPD detailed daily log report (report) discloses that officer "831" (Swanson) radioed KPD that the victim has "three puncture wounds and is PNB" (Report, p. 9). Post-conviction discovery of Hortonville Police Officer Randy Reis' report contradicts Swanson's trial testimony. Reis' report states his Outagamie County Channel 1 disclosed to him during the chase that a hit and run may have involved the victim; the victim was PNB; and that "victim was stabbed and it was homicide" (Reis Report p. 2).

The State committed misconduct when it failed to disclose this exculpatory evidence before trial because this information would have allowed Hudson to supplement Exhibit 116

and establish police knew the victim had been stabbed when Hudson was arrested.¹⁰

At trial, Hudson was compelled to argue to the jury, without evidentiary support either from the undisclosed KPD daily log report or Reis' report, that police (including Patschke) were informed when they arrested Hudson that the victim had been stabbed. Failure to disclose this evidence was misconduct because the State knew before trial this evidence would have corroborated Hudson's trial defense that police had knowledge and motive to pull Hudson's knife from its sealed packaging behind the driver's seat and plant it on the floor of the driver's side of his car after his arrest and in order to convict him.

- G. Hudson Was Denied His Constitutional Right to a Fair Trial, Due Process, and the Requirements of §971.23, Stats., and the State Committed Misconduct When It Failed to Provide Prior to Trial the KPD's Audio Dispatch Tape; Failed to Preserve the Original Audio Dispatch Tape; and Destroyed Either Pretrial or Post-Conviction a Copy of the Audio Dispatch Tape Within the State's Possession.

On June 30, 2000, Hudson forwarded an ORR for a copy of the KPD's audio dispatch tape from June 25, 2000. The KPD responded on July 17, 2000, that Hudson's request had been referred to the district attorney who would determine whether to disclose the audio dispatch tape (Tr. 8/18 /08, p. 28).

At the preliminary hearing on July 20, 2000, KPD Officers Patschke and Rosche were questioned regarding their radio information of the sequence between the victim having been stabbed and a knife having been found on the floor of Hudson's truck. Both officers testified the KPD radio transmissions from June 25, 2000, had been recorded.

¹⁰ Exhibit 116 included the information heard by Officer Reis but without any reference to a "stabbing" or "homicide" reported by Swanson and broadcast on Outagamie County Channel 1, to which Officer Patschke was also tuned while chasing Hudson.

These questions alerted the State to Hudson's evidence-tampering defense involving the knife.

The audio dispatch tape was not provided to Hudson prior to trial and was not identified in the particularized pre-trial discovery packets filed by the State.

Hudson's post-conviction motion for discovery, filed January 26, 2005, specifically requested the State provide a copy of the KPD's audio dispatch tape. The State failed to respond to this request and failed to respond to subsequent post-conviction discovery demands for the audio dispatch on July 1, July 11, September 1, and October 31, 2005; December 6 and December 13, 2007; and February 15, 2008.

At a post-conviction discovery hearing on August 18, 2008, former KPD dispatcher Carol Prelwitz testified the KPD had "one main frequency" and "one coded frequency" in June, 2000, and KPD radio transmissions between dispatch and field officers would have been automatically "recorded in the KPD's own recording system in the KPD" (Tr. 8/18/08, p. 19). KPD Record Custodian Linda Conrad testified their system would have preserved their own radio transmissions from their system for 90 days (Tr. 8/18/08, p. 24). Conrad was uncertain whether the KPD preserved the original dispatch tape, but testified the items requested in Hudson's June 30, 2000, ORR were provided to the district attorney for his evaluation.

Failure to disclose pre-trial the KPD audio dispatch tape and preserve this evidence was misconduct and prejudiced Hudson because the tape would have established, consistent with Swanson's KPD detailed daily log report and Hortonville officer Reis' report, that Patschke was aware at the time of Hudson's arrest that the victim was stabbed. Hudson was further prejudiced because he was unable to use the radio transmissions

describing the stab wounds to cross-examine officers Patschke, Swanson, and Rosche to impeach their testimony that arresting officers were unaware of any stab wounds at the time of Hudson's arrest.

Finally, Hudson was prejudiced because he was unable to use the sequence of the communication of the victim having been stabbed and Patschke's testimony regarding finding the knife¹¹ on the floor in Hudson's truck. The audio dispatch tape would have supported Hudson's defense that police planted the knife because they were aware the victim had been stabbed when Hudson was arrested.

H. Hudson Was Denied His Constitutional Right to a Fair Trial, Due Process, and the Discovery Requirements of §971.23, Stats., and the State Committed Misconduct When It Failed to Provide a Copy of the Outagamie County Sheriff's Department Audio Dispatch Tape to Hudson Prior to Trial.

Hudson sent an ORR to the OCSD on June 30, 2000, requesting a copy of their "audio dispatch tape" for the radio transmissions of June 25, 2000. Assistant Corporation Counsel Kenneth Wagner forwarded a copy of this request to the district attorney's office on July 12, 2000 (Tr. 4/17/08, p. 6).

This request was acknowledged by Biskupic in a memo to Wagner (and Maureen Flanagan) advising Wagner not to turn over any materials at that time (Tr. 4/17/08, p. 8; Exhibit 17).

The Outagamie County audio dispatch tape was not provided to Hudson prior to trial as it was not indicated in any of the three particularized discovery packets filed with the Court.

¹¹ Evidence Technician Pamerter was not told about or directed to photograph a knife until his second set of photographs, taken significantly after Hudson's arrest.

On August 15, 2000, Attorney Figy sent a letter to OCSD Officer Mary Schuelke (Schuelke), a telecommunications supervisor for Outagamie County, asking her to “preserve the original OCSD audio dispatch tape” from June 25, 2000, pursuant to his June 30th ORR (Exhibit 18). The request was forwarded to Biskupic for response (p. 15)

Figy filed a discovery motion on October 10, 2000, to which the State responded only with a speedy trial motion, filed on October 13, 2000, advising the Court that all discovery had been provided to Hudson in the State’s particularized discovery packets. Although, the discovery motion was never heard by the trial court following the withdrawal of Hudson’s successive trial attorneys, Biskupic sent Hudson trial attorney Nila Robinson a letter on October 19, 2000, in which he again asserted all discovery in the case had been provided to Hudson in discovery packets dated July 31 and August 28, 2000.

At trial, the State presented an edited version of the June 25th OCSD audio dispatch tape (Exhibit 116) without having provided Hudson with the unedited copy he previously demanded (Tr. 3/6/01, pp. 86-87).¹²

A post-conviction motion demanding the original OCSD audio dispatch tape Hudson requested to have been preserved pre-trial was also sought for testing and examination to determine the specific deletions and their timing within the radio transmissions (See Hudson’s 1/26/05 Post-Conviction Motion, pp. 1-5).

Subsequently, Hudson had a transcript of Exhibit 116 (not previously prepared or filed) prepared. The transcript indicated the radio communications heard by Hortonville

¹² Hudson’s *pro se* arguments to the Court objecting to presentation of Exhibit 116 were not reported in the transcript, despite the transcript’s indication the jury was excused by the Court to hear Hudson’s objection (See Hudson’s 1/26/05 Post-Conviction Motion, p. 3).

Officer Reis were not included in the transcript of Exhibit 116. Nor was there any indication of information from the KPD detailed daily log report in which KPD Officer Swanson advised dispatch that the victim had three puncture and stab wounds and was PNB. At the August 18, 2008, post-conviction discovery hearing, Ms. Prelwitz conceded it would have been possible the KPD radio transmissions were also taped through the Outagamie County Sheriff's Department radio system (Tr. 8/18/08, pp. 19-20). Correspondingly, Schuelke testified at the April 17, 2008, post-conviction discovery hearing that all KPD radio transmissions would have been recorded onto Exhibit 116 (Tr. 4/17/08, pp. 44-46).

Failure to preserve and disclose this audio tape prior to trial was misconduct and prejudiced Hudson's trial defense because it would have supported his defense contention that KPD officers had the information (through radio transmissions), motivation and time to remove a knife from its sealed package stored behind the driver's seat of Hudson's truck and plant it on his driver's side floor.

Further, his trial defense was prejudiced because he was unable to establish, as he contended at trial, that Grand Chute Officers Reifsteck and Jackson testified falsely regarding their involvement in Hudson's chase and finding the "bloody" knife minutes after his arrest. Their false testimony, confirmed by GCPD dispatch records indicated the officers were not dispatched until 8:01 p.m., approximately 90 minutes after Hudson was been arrested. Their untruthfulness of their testimony was further corroborated by GCPD dispatch records establishing they (Reifsteck and Jackson) were not involved in the chase and arrest, per OCSD radio records; the index photos from the arrest scene indicating Reifsteck and Jackson's vehicle was not parked next to Hudson's truck immediately after his arrest as they claimed; and Reifsteck and Jackson's police reports not indicating they

had observed any bloody knife in Hudson's truck at the time of his arrest.

- I. Hudson Was Denied His Constitutional Right to a Fair Trial and Due Process of Law and the State Committed Misconduct When It Intentionally Hid Exculpatory Information in the Preparation of Trial Exhibit 116 by Deleting Radio Transmissions Regarding the Victim's Stab Wounds and Which the State Knew Were Critical to Hudson's Defense of Police Evidence-Tampering.

KPD Officer Swanson's detailed daily log report states he told KPD dispatcher Michelle Madden the truck Patschke was chasing might have been involved with the incident on Plank Road and the victim has "three punctures/stab wounds and is PNB." The Kaukauna Fire Department's ambulance report states that when they arrived at the crime scene on Plank Road they found a female victim, she was PNB, they observed three puncture/stab wounds and they had radio communications regarding this information.

Hortonville Officer Reis reported he heard radio transmissions during the chase including that the victim had been stabbed. Grand Chute Officer Dale Knauer reported he heard transmissions over the county fire ambulance frequency during the chase which indicated the victim was PNB. KPD Officer Patschke testified at trial he heard the Kaukauna Fire Department ambulance radio transmission during the chase (Tr. 3/6/01, p. 116). Schuelke testified at the post-conviction hearing that all Kaukauna Fire Department radio transmissions were recorded onto Exhibit 116.

However, the transcript for Exhibit 116, prepared for Hudson during the post-conviction discovery process, establishes that neither Swanson's radio transmission nor any transmissions from the Kaukauna Fire Department were heard by the jury from Exhibit 116,

as they are not included in the transcript.¹³

The redacted preparation of this exhibit was misconduct because the deletion of the radio transmissions regarding the stab wounds was exculpatory. The State knew as early as Hudson's interrogation on June 26, 2000 (before the preliminary examination) that Hudson claimed the knife was planted by police, who knew before his arrest (during the chase) the victim had been stabbed. The police would have had, therefore, knowledge and motive at the time of Hudson's arrest, to plant the knife. It was misconduct to delete these exculpatory transmissions because the transmissions supported Hudson's defense that police had the motive and opportunity to plant the knife immediately following his arrest.

Police awareness of the importance of this information and the ultimate coverup by the State was transparent as early as the preliminary examination when Patschke was questioned by the State and testified he was unaware of the (broadcast) stab-wounds transmission.

J. Hudson Was Denied His Constitutional Right to a Fair Trial and Due Process of Law and the State Committed Misconduct When It Caused the Original OCSD "Reel to Reel Audio Dispatch Tape" to Be Destroyed.

On August 15, 2000, Hudson's attorney sent OCSD Records Custodian Schuelke a letter requesting she preserve the original OCSD audio dispatch tape from June 25, 2000. At Hudson's sentencing hearing on April 3, 2001, he requested the Court order the State to "preserve all the evidence in this case" because he would be appealing his case, he

¹³ Hudson's post-conviction forensic audio expert, Steven Cain, listened to a corrupted tape copy of Exhibit 116 and reports the tape seemed to contain numerous breaks and drop-outs. However, review of "single channel only reproductions for all law enforcement personnel" would be required to identify deletions; length of deletions; and sequence of transmissions deleted. "Single channel only reproductions" were never disclosed and now are apparently unavailable for examination (See Exhibit H, Attached).

continued to maintain his innocence and this evidence would eventually prove the police framed him (Tr. 4/3/01, pp. 34-35). During the post-conviction process, it was discovered the original OCSD audio dispatch tape no longer exists and the State could not provide any explanation as to what happened to the tape and why it had not been preserved.

This misconduct by the State prejudiced Hudson because it has prevented him from conclusively establishing (1) exculpatory evidence was intentionally suppressed by the State in preparing Exhibit 116 for trial; (2) Officer Patschke testified falsely at trial when he said he was unaware the victim had stab wounds prior to Patschke's "finding" the knife in Hudson's truck; (3) Officer Rosche radioed Patschke during the chase and told him the victim had been stabbed and that Rosche's testimony at trial was false in this respect; and (4) Officers Reifsteck and Jackson had not been involved in Hudson's chase and arrest (because they were in fact only dispatched at 8:01 p.m.) and had not seen a bloody knife immediately after Hudson's arrest.

- K. Hudson Was Denied His Constitutional Right to a Fair Trial, Due Process, and Compliance with §971.23, Stats., and the State Committed Misconduct When It Failed to Disclose and Preserve the Wisconsin State Patrol (WSP) Audio Dispatch Tape.

Hudson sent an ORR, dated June 30, 2000, to the Wisconsin State Patrol requesting a copy of their June 25, 2000 "audio dispatch tape." On July 18, 2000, Carol Pierstorff (WSP) forwarded to Hudson's attorney a copy of the WSP's June 25th audio dispatch tape. A copy of correspondence and the dispatch tape was forwarded to the district attorney for response.

When the Court directed Hudson on February 19, 2000, to proceed *pro se*, Attorney Carns provided Hudson's file to DA investigator Steve Malchow (consisting of two sealed

boxes) for delivery to Hudson in the OCJ to prepare for trial. OCJ Officers Twombly and Schaffer searched and removed audio cassette tapes from the file because these tapes were in violation of jail regulations. Investigator Malchow testified at the April 17, and August 18, 2008, discovery hearings that he had no information regarding what happened to the audio tapes removed from Hudson's file, pursuant to OCJ regulations. Malchow's February 27, 2001 report indicates he provided Hudson's file to Investigator Roth on that same date, with the exception of the VCR and audio cassette tapes. These reports support Hudson's claim he never received the "audio dispatch tapes."¹⁴

On August 18, 2008, the State informed the Court it no longer had any copy of the WSP dispatch tape and had no explanation why a copy of the tape was no longer in its file (DA's 8/18/08 Response, p. 2).

The State's failure to disclose and preserve the WSP dispatch tape is misconduct and prejudices Hudson because it would have established the integrated radio transmissions between several police communication systems as the police chased Hudson through several jurisdictions disclosed the victim had been stabbed and it was a homicide.

- L. Hudson Was Denied His Constitutional Right to a Fair Trial, Due Process, and the Discovery Requirements of §971.23, Stats., When the State Failed to Disclose the "Index Photos" Taken by Police at the Arrest Scene.

Hudson sought disclosure of all "photographs" in an August 8, 2000, pretrial discovery motion. On September 16, 2000, the defense became aware the State had not turned over "police photographs" to the defense. On February 9, 2001, Biskupic delivered

¹⁴ It is doubtful, moreover, whether Hudson would ever have had the opportunity to listen to the tape in the Outagamie County Jail prior to and in preparation for trial.

approximately “500 pages of discovery” to OCSD Jail Officer Captain Herbert Schmolz for delivery to Hudson. The discovery included no “photographs or photo index cards.”

Following Attorney Robinson’s appointment and then withdrawal, she sent Attorney Carns a letter advising him she had obtained only a “small portion” of the available photographs and Carns might want to obtain all photographs in representing Hudson’s interests at trial. At trial, Hudson was unaware which of the police photos taken might assist him to prepare for and conduct his trial.

During the post-conviction process, it was determined the smattering of photographs previously copied (by Attorney Robinson) did not provide the critical sequence of the photographs to support Hudson’s evidence-tampering claims. Specifically, the photos copied did not include photograph index cards.

The first set of photograph index cards established, contrary to Reifsteck’s trial testimony, that his and Jackson’s Grand Chute squad was “not parked next to Hudson’s truck” and “behind the driver’s door of Hudson’s truck” at the time of Hudson’s arrest and, rather, only appeared at the arrest scene much later (Tr. 3/18/08, p. 22, Exhibit 1). Records indicated the squad did not arrive until 8:01 p.m., 90 minutes after Hudson’s arrest (p. 41). In fact, Reifsteck’s squad is only depicted next to Hudson’s truck in Pamerter’s second set of photos and after Pamerter is told about the presence of the knife in the truck. There is also no indication in Reifsteck’s report that he saw or found a knife at the time of Hudson’s arrest (Tr. 3/13/08, pp. 318-29).¹⁵

¹⁵ KPD Evidence Technician Pamerter testified it was only his second roll (of 3½ rolls) of film that depicted Reifsteck’s and Jackson’s squad and it had arrived significantly after Hudson’s chase and arrest (Tr. 3/18/08, p. 23; Exhibit 5). Patschke’s white squad was parked behind Hudson’s truck with Hudson in the back seat (3/13/08, p. 16). Pamerter further testified that he

OCSD Staff Sargent Spaeth instructed Pamerter to shoot film of the interior and exterior of the truck upon Pamerter's arrival at the arrest scene. Pamerter was provided no information regarding the knife until Pamerter later spoke to officer Patschke regarding the knife. More curious, Spaeth testified he first saw the "knife laying on the passenger side floor of Hudson's truck, underneath" where the passenger would sit in clear contradiction to testimony that the knife was observed by officers (Reifsteck, Jackson, Patschke, and Zolkowski) on the driver's side floor under the break pedal (Tr. 3/13/08, p. 49).

Hudson was prejudiced by the unavailability of the "sequenced" photo index cards and all photographs prior to trial because it prevented him from establishing the police had sufficient time and opportunity to search through his truck and find the sealed knife package behind the driver's seat; to evaluate and compare the knife's significance as it related to victim's cause of death; to plant the knife either on the passenger or driver's side flooring of the truck; and then inform Pamerter about the knife evidence and instruct him to take photographs.

M. The State Committed Misconduct When It Overstated the Number of Hudson's Prior Convictions and Understated the Number of Two State's Witnesses Prior Convictions at a §906.09, Stats.

On March 7, 2001, the State filed a §906.09, Stats., notice claiming Hudson had "seven prior criminal convictions."¹⁶ The Court accepted the accuracy of the notice and told Hudson he would have to acknowledge the seven convictions, should he testify (Tr. 3/7/01,

also was not advised of the existence of any knife in the truck at the time he arrived and was first instructed to shoot film both of the interior and exterior of the truck.

¹⁶ No information regarding Hudson's or the witnesses' convictions was provided pretrial as required in Hudson's discovery demand.

pp. 14-15). The Court re-affirmed its earlier ruling regarding Hudson's convictions on March 9, 2001, and again told Hudson he would have to acknowledge those seven convictions to the jury should he testify (Tr. 3/9/01, pp. 27-29).

In order to adequately develop the record, Hudson will testify at a post-conviction hearing regarding the accuracy of the records submitted to the Court by the prosecution and the correct number of his prior convictions. (See Counsel's Affidavit).

The State's misrepresentations to the Court regarding the accurate number of Hudson's prior convictions were misconduct because it resulted in Hudson having to tell the jury he had been previously convicted seven times, when it will be determined in the post-conviction process by post-conviction counsel that Hudson had less than seven convictions. If the State had accurately represented Hudson's convictions, the Court would have been compelled to find Hudson was guilty of less than seven convictions for purposes of his trial testimony and this evidence would have affected the jury's evaluation of his credibility.

The State's misconduct also resulted in two prosecution witnesses' (Schultz and Theis) testimony appearing more "credible" because the State understated the number of their prior criminal convictions and the witnesses testified consistent with the lower number of convictions, thereby enhancing their credibility to the jury.

- N. Hudson Was Denied His Constitutional Right to a Fair Trial, Due Process, and the Discovery Requirements of §971.23, Stats., and the State Committed Misconduct When It Failed to Provide a Copy of the WCL Blood Spatter Diagram Prior to Trial.

Prior to trial, Hudson told Carns the police planted the knife on the floor of his truck, he was innocent and had not stabbed the victim. Police testimony at trial established that, following Hudson's chase and arrest, they found a "bloody knife" on the driver's side floor

of Hudson's truck and Hudson's hands, legs, feet, and body were covered in blood.

The State argued to the jury that Hudson stabbed the victim, then threw the bloody knife on the floor of his truck and then led the police on a high speed chase before he was arrested and the police found the knife in his truck.

After trial, Attorney David Cook obtained a copy of a WCL diagram prepared by technicians Ertl and Kortajarvi depicting where they did and did not find blood on the inside and outside of Hudson's truck. This diagram corroborated Hudson's defense that the police planted the knife in his truck and he had not stabbed the victim. The color diagram revealed the WCL found no blood on the driver's side floor where police and the prosecution claim they found the bloody knife, and where blood should have been found if, in fact, Hudson had thrown the knife there after he stabbed the victim. The color diagram also revealed no trace of blood was found on the "steering wheel, gear shift, the driver's side seat and floor, and the driver's side door handle" where blood should have been found if, in fact, Hudson's hands, legs, feet, and body were covered in the victim's blood after he stabbed her.¹⁷

The blood spatter diagram was not provided to Hudson prior to trial and the State committed misconduct in not divulging this diagram because the State knew (1) the evidence scientifically established none of the victim's blood was found in Hudson's truck in the location where blood should have been found to corroborate the prosecution's theory and (2) the evidence corroborated Hudson's evidence-tampering theory of defense.

¹⁷ Nor was blood detected on the boat and trailer Hudson's truck was towing from the crime scene, even though testimony described the boat falling off the trailer and Hudson's attempt to pull the boat back onto its trailer following the encounter with Van Dyn Hoven and Carnot.

- O. Hudson Was Denied His Constitutional Right to a Fair Trial, Due Process, and the Discovery Requirements of §971.23, Stats., When the State Failed to Disclose the WCL Test Results of the DNA from Hudson's Truck Capper.

Failure to disclose this evidence constituted misconduct by the State because it allowed the prosecution to argue Carnot was credible and Hudson attempted to kill Carnot with his truck, causing Carnot to fly onto Hudson's truck to escape injury with his bloody left leg. Failure to disclose this DNA evidence to Hudson pretrial prevented Hudson from cross-examining Carnot with this DNA evidence and arguing to the jury that Carnot's testimony was incredible because there was no blood (or fingerprint) evidence from Carnot found on Hudson's truck.

Finally, the State committed misconduct when KPD Lt. Shepardson was specifically provided these DNA results by the WCL, as indicated in the WCL "Case Communication Record," but the KPD failed to disclose this evidence prior to trial.

- P. Hudson Was Denied His Constitutional Right to a Fair Trial, Due Process, and Discovery in Compliance with §971.23, Stats., When the State Failed to Disclose Pretrial WCL Opinion Trial Testimony Regarding the Nature and Cause of the Blood Stains and Spatters on Hudson's Truck.

Attorneys Bartman and Figy filed a pretrial discovery demand requesting the State turn over copies of all experts' reports or written summaries of their findings and projected testimony. §971.23(1)(e), Stats.

On the third day of trial (3/7/01) while Hudson was representing himself, the State presented testimony from WCL Expert Nick Stahlke, who said he examined the blood stains and spatters on Hudson's truck and it was his opinion to a reasonable degree of scientific certainty that the blood stain on the right front fender of Hudson's truck was a "contact

stain” and the passenger side door was likely open when the blood impacted the door. This testimony was presented and argued in support of the State’s prosecution theory (Tr. 3/7/01, pp. 117-141).

However, the State had not, in violation of § 973.21, Stats, provided Stahlke’s test procedures, findings and projected opinion testimony to the defense prior to trial.

The failure to disclose this information pretrial, present opinion testimony and argue this evidence to the jury was misconduct because the State knew no test procedures had been conducted by Stahlke at the WCL; Stahlke’s findings were only observations and not a product of scientific procedures; and this evidence would surprise and prejudice Hudson, because the State argued to the jury that the evidence supported its theory that Hudson stabbed and killed the victim.

During the post-conviction process, Ertl testified his laboratory had no test procedures for blood spatter and that Stahlke could not have, therefore, conducted any test procedures in support of his observations and opinion.

Q. The Prosecution Committed Misconduct When It Told the Jury in Closing Argument that the Bloody Papers Found Near the Crime Scene Were Thrown by Hudson from His Truck after He Used the Papers to Wipe the Victim’s Blood from His “Arms, Chest, Torso, Stomach, and Hands” as He Left the Crime Scene.

A wad of bloody paper was found near the crime scene, although there were conflicting reports where the bloody papers were found and conflicting reports regarding who had located and first seized the bloody papers. Prior to trial, the State apparently never had the bloody papers examined or tested to determine whether the papers contained the victim’s blood and DNA. No discovery or WCL test results were provided,

in any case, to Hudson despite his pretrial discovery request.

During opening statement and in closing argument the prosecution argued their theory that, after Hudson stabbed the victim, Hudson used the papers (taken from his glove compartment) to wipe the victim's blood from his "arms, chest, torso, stomach, and hands" as he was leaving the crime scene in order to conceal evidence of his guilt. However, WCL analysis on August 2, 2000 of these swabs concluded both the victim's blood was found only on the swab from Hudson's right hand (Item T2) and no human DNA was found on the swab from his left foot area (Item T1) (See Exhibit I (4 pgs.), Attached).

The prosecution's closing argument constituted misconduct because Biskupic made an argument to the jury which he knew was contradicted by WCL lab reports in order to mislead the jury and convict Hudson. The misconduct was aggravated with the publication and ongoing display of photographs to the jury of Hudson's bloody torso and appendages (Exhibits 48-50) not supported by the WCL's blood analysis.

The prosecution committed misconduct when testimony was elicited at trial that Officer Rosche saw the bloody papers as he approached the crime scene (while police were chasing Hudson), even though his earlier sworn testimony and police reports established he only saw Hudson's boat and trailer as he approached and not the bloody papers. Because this wad of bloody papers should have been but was not, in fact, observed by Rosche as he approached the crime scene, it is likely police planted the papers near the crime scene after Hudson was arrested and the papers were removed from his glove box and transported to the crime scene.

- R. The Police Committed Misconduct When They Took the Knife from a Sealed Package in Hudson's Truck After His Arrest, Applied the Victim's Blood to the Knife, and Placed the Knife on

the Floor of Hudson's Truck.

To adequately develop the record on this claim, Hudson will testify he purchased a knife from a K-Mart store on June 25, 2000, after a weekend of fishing in order to clean fish. He will testify he placed the sealed knife package behind the driver's seat in his truck before driving near Plank Road to inspect the residence on which he was doing roofing work. He will testify the package remained sealed during the chase and his arrest.

Following Hudson's arrest, OCSD Evidence Technician Dan Pamerter's photographs of Hudson's truck show the passenger side door open and speaker wires from behind the seat hanging outside the truck, establishing a police search behind both seats. Photographs from Pamerter's second roll of film show a knife on the driver's floor of Hudson's truck.

Pamerter also collected and packaged the knife from Hudson's truck and conveyed the knife to KPD Sgt. Patschke, who ultimately conveyed the knife to KPD Evidence Technician Robert Momberg (See Momberg's "Property/Evidence Inventory Log Sheet," p. 2).

On June 26, 2000, Momberg reported he logged the knife evidence bag out of evidence, opened the evidence bag, and then resealed the bag before logging it back into evidence that same day. Momberg's report provides no explanation for opening and resealing the evidence bag, before conveyance to the WCL. On June 26, 2000, an autopsy of the victim was conducted in which two vials of blood were drawn. The blood was delivered to the KPD on June 26, 2000, for conveyance to the WCL, either before or after the evidence bag was resealed. At the DNA hearing on May 27, 2003, Momberg testified he broke the seals on the evidence bag with the knife because "Manion and they"

wanted to see what the knife looked like (despite Pamerter's having taken photos of the knife in Hudson's truck on June 25, 2000).

KPD Assistant Chief John Manion prepared no report indicating he asked Momberg to open the evidence bag to view the knife. On June 27, 2000, the KPD delivered all evidence and blood to the WCL for their inspection and testing, but as Ertl (WCL) testified, only one vial of blood was delivered to the WCL (See Counsel's Affidavit).

The WCL later reported it found the victim's blood on Hudson's knife following its conveyance by the KPD on June 27, 2000.

Other post-conviction evidence revealed a second opportunity for police tampering with the knife and the victim's blood. One, the KPD detailed daily log report from June 25, 2000, states "Korth Wrecker" towed Hudson's truck and delivered it to the KPD at 8:57 p.m. on June 25, 2000 (See Report, p. 9). Two, at trial, while Patschke suggested in his misleading testimony that the knife was delivered to Momberg on June 25, 2000, Momberg did not return to the KPD until June 26, 2000, at 12:45 a.m., when the scene was finally cleared. Momberg's report indicates Patschke conveyed the knife to him following his arrival in Kaukauna at June 26, 2000, before Momberg logged the knife into evidence (Report, pp. 1; 4). Three, the knife remained in Patschke's custody, therefore, from June 25 until June 26, 2000, and after he visited the crime scene (where there was a considerable amount of blood) with the knife during the early morning hours of June 26th (See WSP Officer Judje's Crime Scene Log Report, p. 2; KPD Officer Tony Megna's Report, p. 2).

The abject forensic impossibility of no blood from the victim having been found by

the WCL on the floor of Hudson's truck (from the knife or from Hudson's feet or body), on Hudson's driver's door handle, steering wheel, gearshift, his boat or trailer (after his attempts to replace the boat on the trailer before the chase) tends to establish the knife was planted by one or more conspiring police officers. The unexplained transportation of the knife to the crime scene; the unnecessary removal of the knife from the evidence bag; the availability (to police) of the victim's blood at the crime scene and on Hudson's truck passenger seat, along with the missing blood vial from the autopsy, establishes the knife was likely planted on the floor of Hudson's truck after the chase and Hudson's arrest.

- S. The Police Committed Misconduct When They Violated the Court's Pretrial Gag Order. The Court Entered a Gag Order to Preclude Public Comment on Hudson's Prosecution by Either Parties. The Order Was Entered by the Court to Avoid any Pretrial Poisoning of the Community Jury Pool in Order to Ensure Hudson Receive a Fair Trial Without the Trial Having to Be Moved to Another County.

After the gag order was entered and before trial, the OCSD appeared at a press conference televised by two or more Fox Valley TV stations (Fox 11; WFRV). At the press conference, OCSD Deputy Jim Kroncke discussed trial management issues, including their unilateral intention to use a stun belt on Hudson because Hudson was apparently dangerous.

Hudson proffers in support of this claim and will present at a post-conviction hearing a televised video clip of the press conference.

IV. HUDSON'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHICH PREJUDICED HIS CLIENT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 7 OF THE WISCONSIN CONSTITUTION; *STRICKLAND v. WASHINGTON*, 466 U.S. 668 (1984); *STATE v. PITSCH*, 124 Wis.2d 628, 634, 369 N.W.2d 711 (1985); *STATE*

v. GLASS, 170 Wis.2d 146, 151; 488 N.W.2d 432 (Ct. App. 1992); STATE v. MCNEIL, 155 Wis.2d 24, 454 N.W.2d 742 (1990); and STATE v. MARTY, 137 Wis.2d 352, 361, 404 N.W.2d 120 (Ct. App. 1987). COUNSEL FAILED TO ABIDE BY HIS CLIENT'S THEORY OF DEFENSE AND OBJECTIVES OF REPRESENTATION TO THE JURY, IN VIOLATION OF SCR 20:1.2(a) and STATE v. ECKERT, 203 Wis.2d 497, 510-12, (ONCE CLIENT CHOOSES THE GENERAL THEORY OF DEFENSE, COUNSEL NOT IAC FOR SELECTION OF STRATEGIES CONSISTENT WITH CLIENT'S THEORY OF DEFENSE).

- A. Defense Counsel Was Ineffective for Failing to Investigate, Discover, and Seek Expert Analysis and Inspection of the Video/Audio Equipment Which Recorded Hudson's KPD Interrogation Following the Homicide and Argue the Exculpatory Significance of the Destroyed Video/Audio Tape to the Jury.

KPD Officers Manion and Shepardson interrogated Hudson at the KPD station house and subsequently prepared police reports claiming the interrogation had been video and audio taped by KPD equipment but that there was no longer a video/audio tape of the interrogation because the equipment erased the video/audio tape.

To adequately develop the record on this issue, Hudson will testify that prior to trial, Hudson advised Attorney Carns he had not confessed to the crimes as Manion and Shepardson claimed and he repeatedly asked to speak with an attorney during his interrogation (as he had done at the hospital) (See Hudson's Affidavit, Attached). Hudson insisted Carns hire an expert to examine the video/audio equipment and to interview the KPD dispatcher to prove the tape had not erased itself and the police had erased the tape (Tr. 2/8/01, pp. 6-7; 18-19). Carns refused, telling Hudson the investigating police officers would not have lied about the tape erasing itself and, therefore, no further investigation of the video/audio tape was necessary.

After the Court ordered Hudson to represent himself, Carns' Investigator Peter

Roth¹⁸ advised Hudson he would attempt to investigate the video/audio equipment and whether the equipment could erase itself. Roth later told Hudson he had not been permitted by the KPD to examine the equipment and Carns had then advised him not to investigate the issue further.

This deficient performance prejudiced Hudson because (1) KPD officers falsely testified at trial that Hudson made inculpatory statements regarding the homicide during his interrogation; (2) proof the video was manually erased would have tended to impeach Manion's trial testimony regarding Hudson's allegedly inculpatory statements and his invocation of his right to counsel; (Tr. 3/8/01, pp. 130-134); (3) the video/audio investigation results would have caused Hudson and Attorney Carns to maintain their attorney/client relationship and would have ultimately allowed Carns and Hudson to maintain that relationship at trial; and (4) disclosure of this evidence during trial would, alternatively, have caused the Court to grant Hudson's request for a trial adjournment to retain counsel of his choice, rather than causing the Court to characterize Hudson's discovery demands and request for an adjournment to retain counsel as being simply "dilatory."

B. Attorney Carns Was Ineffective for Failing to Demand, Discover, and Obtain a Copy of the Exculpatory Hospital Tapes from the State Prior to and During Trial.

Carns knew, or should have known, Hudson's prior attorneys filed a pretrial discovery demand and motion with the trial court, specifically demanding the State turn over copies of all "written or recorded" statements made by Hudson. Further, Carns knew or should have known the hospital tapes existed, based upon KPD Officer Sanderfoot's report

¹⁸ Investigator Roth is now deceased.

provided in the discovery materials describing his placing a micro-cassette recorder on Hudson's cot at St. Elizabeth's Hospital the night of his arrest and that the recorder had been turned on to record Hudson's statements. Further, Hudson advised Carns the tapes would prove Hudson asked to speak to an attorney after he was read his *Miranda* rights at the hospital. Carns believed the State had not failed to turn over the hospital tapes to Hudson prior to Carns' appointment to represent Hudson because Carns apparently believed the tapes didn't exist.

This refusal by Carns to demand, discover, and obtain the hospital tapes from the State prejudiced Hudson because (1) the tapes existed and were in the State's possession prior to and during trial; (2) the tapes were exculpatory for pretrial suppression and trial cross-examination purposes; (3) and Carns' failure to obtain the tapes caused Hudson to terminate Carns' representation and effectively represent Hudson.

C. Attorney Carns Was Ineffective for Failing to Object to the Admissibility of Hudson's Alleged Confession at Trial and for Failing to Conduct a *Miranda/Goodchild* Hearing to Determine Its Admissibility.

Carns did not file any pretrial motions seeking to suppress Hudson's allegedly inculpatory statement, despite Hudson's claim he invoked his right to an attorney at the hospital and during his interrogation at the police station and that the hospital tapes would prove his contention.

This deficient performance prejudiced Hudson because (1) Hudson invoked his right to an attorney after being informed of his *Miranda* rights, both at St. Elizabeth's Hospital and at the KPD station house; (2) the hospital tapes corroborated Hudson's statements to his attorney that he invoked his right to counsel both at the hospital and at the police station;

(3) police interrogated Hudson despite his invocation of his right to counsel; (4) presentation of the hospital tapes at a *Miranda/Goodchild* hearing would also have corroborated Hudson's claim he invoked his rights at the KPD station house and would have caused his alleged confession to be suppressed based upon evidence the KPD erased the video/audio tape and then misrepresented how the tape had been erased.

D. Attorney Carns Was Ineffective for Failing to Request a Hearing, Pursuant to §906.09, Stats., Prior to Hudson's Trial Testimony in Order to Determine the Correct Number of Hudson's Prior Criminal Convictions and the Correct Number of Criminal Convictions for Two State's Witnesses.

On March 7, 2001, the State filed a §906.09, Stats., notice claiming Hudson had "seven prior criminal convictions." The Court accepted the accuracy of the notice and told Hudson he would have to acknowledge the seven convictions should he testify (Tr. 3/7/01, pp. 14-15).

The Court reaffirmed its earlier ruling regarding Hudson's convictions on March 9, 2001, and again told Hudson he would have to acknowledge those seven convictions to the jury should he testify (Tr. 3/9/01, pp. 27-29).

Carns was functioning as Hudson's counsel on March 9th and apparently never reviewed the prior convictions or notice with Hudson to determine its accuracy.

This prejudiced Hudson because he was compelled to tell the jury he had been convicted seven times when he had not. If Carns had reviewed the notice with Hudson and challenged the number of convictions asserted by the State, the Court would have been compelled to find Hudson was guilty of less than seven convictions for purposes of his trial testimony. This evidence would have affected the jury's evaluation of Hudson's credibility.

Failure before and during trial to determine the correct number of convictions for both

Shirley Schultz and Bud Theis prejudiced Hudson because the jury evaluated their credibility without accurate evidence regarding their criminal records. This accurate information of their convictions would have caused the jury to find them less credible (See Counsel's Affidavit, Attached).

- E. Carns Was Ineffective for Both Deciding and Agreeing to Argue the "Intent Defense" to the Jury, Which Conceded Hudson Stabbed Van Dyn Hoven and Injured Carnot, Contrary to the Defense Theory Presented by Hudson While Representing Himself During the First Three Days of Trial.

Hudson cross-examined witnesses and argued to the jury (and Court) that the police tampered with evidence and framed him and that he did not stab the victim or intend to kill or injure Carnot. On March 8, 2001, the Court reinstated Attorney Carns to represent Hudson over Hudson's objection (Tr. 3/8/01, pp. 36-45). Hudson told the Court his objection to Carns' reinstatement was based on Carns' statement to Hudson that Carns was not going to argue Hudson had committed no crimes but, instead, would argue Hudson stabbed the victim, but had not intended to kill her (See *a/so* Hudson's Affidavit).

This prejudiced Hudson because (1) it allowed an "intent" defense to be argued to the jury which was diametrically opposed to the defense objectives Hudson had been presenting *pro se* and sabotaged his trial defense on all counts; (2) this contrary argument caused the jury to reject Hudson's testimony he had not stabbed the victim and that inculpatory evidence had been planted.

- F. Carns Was Ineffective for Failing to Request a Mistrial Following His Reinstatement as Counsel on the Grounds that Hudson Was Denied His Right to a Fair Trial, Due Process, and to the Presumption of Innocence When the Court Allowed an Armed Officer to Shadow Hudson in the Courtroom in Front

of the Jury Without Any Determination by the Trial Court Why Such a Drastic Courtroom Security Measure Was Necessary in the Face of Its Overwhelmingly Prejudicial Impact Without Any Evidence of Misconduct by Hudson Either Within the Courtroom or Within the County Jail. *State v. Champlain*, 2008 WI App 5 (*erroneous exercise of discretion for court to rely on law enforcement procedures without considering a defendant's risk for violence or escape*).

While Hudson represented himself during the first three days of trial, an armed deputy sheriff stood behind the defense table and shadowed him during each trip Hudson was allowed to make to the witness stand with an exhibit, or to the clerk's desk or while standing at the defense table. This armed officer stood directly next to or behind Hudson; was wholly visible to the jury; conveyed the image Hudson was violent and dangerous; and conveyed the image this armed officer was necessary to protect the Court, court personnel, and the jury from Hudson while he attempted to represent himself in the courtroom. This procedure was implemented without consideration by the Court of Hudson's risk for violence or escape.

When Carns was reinstated to represent Hudson on the fourth day of trial, Carns provided deficient performance when he failed to request a mistrial (or hearing to terminate this procedure) on the grounds Hudson's presumption of innocence was overcome in the absence of any determination by the trial court that such a drastic courtroom measure was necessary. This prejudiced Hudson because the only reasonable observation and conclusion which the presence of this armed officer "shadowing" Hudson could produce is that Hudson was dangerous, a risk for flight and could not be presumed innocent, in violation of the constitution and the Court's instructions.

Moreover, prejudice must be presumed under all of these circumstances.

- G. Carns Provided Deficient Performance After His Reinstatement on the Fourth Day of Trial When He Failed to Object to and Request a Mistrial as a Result of Sheriff's Deputies Requiring, Without a Hearing, Hudson Wear a "Shock Belt" During the Trial and Which Was Visible to the Jury, Rather than the Leg Shackles Ordered by the Court. *State v. Champlain, Id.*

While Hudson represented himself during the first three days of trial, he was compelled by deputies to wear a shock belt which was visible to the jury through Hudson's shirt and jacket and as Hudson moved around the courtroom, offering exhibits and approaching witnesses and the clerk. There was no court hearing or findings made by the Court to justify the requirement a shock belt be worn during trial. In fact, the Court had ordered "leg shackles" be worn but hidden from the jury's view, without a justifiable basis other than Hudson's presumed guilt.

Following Carns' reinstatement as Hudson's counsel on the fourth day of trial, counsel should have (1) objected to the continued use of the shock belt during trial; (2) sought a hearing on this unilateral law enforcement procedure; and (3) should have moved for a mistrial for Hudson's having to wear a shock belt visible to the jury during the first three days of trial.

This prejudiced Hudson because the jury was compelled to believe and conclude that, in combination with the armed officer following Hudson throughout the courtroom during trial, Hudson was so dangerous and such a flight risk that the jury would have been unable to comply with the Court's preliminary instructions to presume Hudson innocent.

Prejudice is presumed under these circumstances.

- H. Carns Was Ineffective for Failing to Discover Pretrial the Exculpatory Blood Spatter Diagram from Hudson's Truck Prepared by the Wisconsin Crime Lab.

Prior to trial, Hudson told Carns the police planted the knife on the floor of his truck, he was innocent and had not stabbed the victim. Police testimony at trial established that, following Hudson's chase and arrest, they found a "bloody knife" on the driver's side floor of Hudson's truck and Hudson's hands, legs, feet, and body were covered in blood.

The State argued to the jury that Hudson stabbed the victim, then threw the bloody knife on the floor of his truck and led the police on a high speed chase prior to his arrest and prior to the police finding the knife in his truck.

Carns told the jury in closing argument that he could not argue against or contradict the fact the police found the knife in Hudson's truck and the knife had been used to stab the victim. He argued Hudson had not intended to kill the victim.

After trial, Attorney David Cook obtained a copy of a WCL diagram prepared by technicians Ertl and Kortajarvi depicting where they did and did not find blood on the inside and outside of Hudson's truck. This diagram corroborated Hudson's defense that the police planted the knife in his truck and he had not stabbed the victim. The color diagram revealed the WCL found no blood on the driver's side floor where police and the prosecution claim they found the bloody knife, and where blood should have been found if, in fact, Hudson threw the knife there after he stabbed the victim. The color diagram also revealed no trace of blood was found on the "steering wheel, gear shift, the driver's side seat and floor, and the driver's side door handle" where blood should have been found if, in fact, Hudson's hands, legs, feet, and body were covered in the victim's blood after he stabbed her.¹⁹

¹⁹ Nor was blood detected on the boat and trailer that Hudson's truck was towing from the crime scene, even though testimony described the boat falling off the trailer and Hudson's attempt

This prejudiced Hudson because (1) the evidence scientifically established none of the victim's blood was found in Hudson's truck in the location where blood should have been found to corroborate the prosecution's theory; and (2) Hudson was unable to present "blood spatter" evidence at trial supporting his defense because his counsel unreasonably failed to discover this diagram prior to trial.

- I. Carns Was Ineffective in Failing to Seek Suppression of the DNA Results from the Knife Police Claim They Found on the Driver's Side Floor of Hudson's Truck Following the Chase and His Arrest.

Following Hudson's arrest, OCSD Evidence Technician Pamerter's photographs of Hudson's truck show the passenger side door open, an empty glove box and speaker wires from behind the seat hanging outside the truck, establishing a police search of the glove box and behind both seats (3/13/08 Hrg., Exhibits 1-5).

Pamerter also collected and packaged the knife from Hudson's truck and conveyed the knife to KPD Sgt. Patschke, who ultimately conveyed the knife to KPD Evidence Tech Robert Momberg (See Momberg's "Property/Evidence Inventory Log Sheet," p. 2).

Hudson incorporates Claim III, R, in support of this claim.

Carns was ineffective for failing to challenge the DNA results from the knife on the grounds it had been planted on the floor of his truck and blood must have been planted on the knife after the victim's death. Carns knew, or should have known, the evidence bag with the knife was not logged into evidence until June 26, 2000, and was also reopened and resealed on June 26th, the same day the KPD took custody of two vials of blood from the

to pull the boat back onto its trailer following the encounter with Van Dyn Hoven and Carnot.

victim without accounting for the permanent²⁰ loss of one of the vials and the same day the knife had been taken to the blood-soaked crime scene. Carns should have sought suppression of the DNA blood results from the knife due to: (1) the lack of any explanation for the whereabouts of the vial of the victim's blood while KPD personnel unsealed the knife evidence bag; (2) the discrepancies between Patschke's report and his failure to acknowledge his crime scene travel and the presence of the knife (in Patschke's custody) at the blood-soaked crime scene on June 26th; (3) the absence of Hudson's fingerprints or DNA on the knife; and (4) the utter absence of any blood from the knife (or Hudson's allegedly bloody hands) on the driver's side door handle and inside driver's side of Hudson's truck (steering wheel, gearshift, seat, floor, or pedals). These facts, supported by the trial and post-conviction record, establish the likelihood the blood was placed on the knife after the victim died during any one or more of the preceding scenarios.

This evidence, taken together, would have established police collection procedures for the knife and blood evidence were flawed and so forensically unreliable as to preclude any conclusion the blood found on the knife by the WCL was caused by stab wounds to the victim, rather than evidence-tampering by law enforcement. Counsel should have sought suppression because this lack of reliability would have required suppression.

- J. Carns Was Ineffective in Failing to Investigate, Cross-Examine Police, Present Evidence, and Argue to the Jury that Police Removed the Knife from the Sealed Package and Blood Evidence from the Knife Was Placed onto the Knife by Police after the Victim's Death.

²⁰ Post-conviction inspection of the SA kit revealed only one blood vial having been returned from the WCL prior to trial.

Hudson incorporates all of the trial and post-conviction record included in the previous IAC claim (Claim IV, Section A) and Claim III.

- K. Carns Was Ineffective in Defending Against Counts 3 and 4 by Failing Both to Discover and Argue to the Jury the Results of the WCL's Exculpatory DNA Test Results that Carnot's Blood Was Not Found on Hudson's Truck and Argue Its Exculpatory Impact to the Jury.

Prior to trial, Hudson told Carns he never hit Carnot with his truck and Carnot was never on the "capper" or anywhere else on his truck. At trial, Carnot testified Hudson hit him with his truck; he flew onto Hudson's truck to escape injury; and Hudson caused an injury to his left leg which bled badly.

The State argued Hudson attempted to kill Carnot with his truck when he drove at Carnot and caused the bloody injury to Carnot's left leg. Carns, without Hudson's approval or knowledge, argued to the jury that, while Hudson had hit Carnot with his truck, Hudson had not intended to kill Carnot.

During the post-conviction process, Hudson discovered WCL records establishing the blood on Hudson's capper was not Carnot's blood. This prejudiced Hudson because this evidence (1) was exculpatory and supported Hudson's defense he never hit Carnot with his truck and Carnot was never on the capper; (2) would have corroborated the trial evidence that no fingerprints from Carnot were found on Hudson's truck, even though Carnot testified he used his hands to push himself off Hudson's truck when he was on the capper; (3) would have caused defense counsel to argue Hudson's defense to the jury (rather than Carns' "no intent" defense) that there was no scientific or corroborating evidence Carnot was ever on the capper of Hudson's truck as Carnot testified at trial; (4) would have tended to impeach Carnot's testimony in support of the prosecution theory on

Counts 3 and 4; and (5) would have supported Hudson's defense he did not attempt to kill Carnot with his truck.

- L. Carns Was Ineffective After Being Reinstated as Counsel on the Fourth Day of Trial When He Failed to Move to Strike the Expert Opinion Testimony Regarding Blood Spatter Offered by WCL Expert Nick Stahlke; Failed to Move to Limit Use of This Evidence by the State in Closing Arguments; and Failed to Request a Mistrial Because the State Did Not Turn Over a Written Report or Summary of Stahlke's Findings and Projected Testimony from His Examination of the Blood Stains and Spatters on Hudson's Truck.

Attorneys Bartman and Figy filed a pretrial discovery demand requesting the State turn over copies of all experts' reports or written summaries of their findings and projected testimony. §971.23(1)(e), Stats.

On the third day of trial (3/7/01), while Hudson was representing himself, the State presented "surprise" testimony from a WCL expert, Nick Stahlke, who said he examined the blood stains and spatters on Hudson's truck and it was his opinion to a degree of scientific certainty that the blood stain on the right front fender of Hudson's truck was a "contact stain" and the passenger side door was likely open when the blood impacted the door. This testimony was presented and argued in support of the State's prosecution theory (Tr. 3/7/01, pp. 117-141).

This was "surprise" testimony because the State had not, in violation of §973.21, Stats., provided Stahlke's test procedures, findings and projected testimony to the defense prior to trial.

Following Carns' reinstatement on March 8, 2001, he knew or should have known (as standby counsel) Stahlke testified a day earlier regarding his findings and offered an expert scientific opinion at trial; the State neither turned over his report nor a summary of

his findings; and the State was likely to use the results of Stahlke's testimony in closing argument.

Carns' deficient performance prejudiced Hudson because the State used Stahlke's findings to support the prosecution theory (Tr. 3/9/01, pp. 98-137; 152-157). The State should have been precluded from presenting Stahlke's findings and expert opinion on the grounds the State violated §971.23, Stats., in failing to divulge the results of Stahlke's findings and opinion prior to trial.

- M. Defense Counsel Was Ineffective for Both Failing to Move *In Limine* to Preclude any Mention of the "Bloody Papers" Found Near the Crime Scene When No Discovery or WCL Test Results Had Been Provided to Hudson, Pursuant to §971.23, Stats., and for Failing to Object to the Prosecutor's Closing Argument When No Evidence Was Presented at Trial in Support of His Argument.

A wad of bloody papers was found near the crime scene, although there were conflicting reports where the bloody papers were found and conflicting reports regarding who located and first seized them. Prior to trial, the State apparently never had the bloody papers examined or tested to determine whether the papers contained the victim's blood and DNA. No discovery or WCL test results were provided, in any case, to Hudson, despite his pretrial discovery request.

During opening statement and in closing argument, the prosecution argued their theory that, after Hudson stabbed the victim, Hudson used the papers (taken from his glove compartment) to wipe the victim's blood from his "arms, chest, torso, stomach, and hands" as he was leaving the crime scene and in order to conceal evidence of his guilt. WCL analysis of two of five red-brown swabs from Hudson's torso (Item T) concluded the victim's blood was found only on the swab from Hudson's right hand (Item T2) and no human DNA

(animal blood) (T1) was found on his left foot area (See WCL Report, Attached).²¹ The other swabs were not tested.

Defense counsel was ineffective for failing to move *in limine* to exclude any mention of the bloody papers and their connection to the homicide because the State did not comply in any respect with Hudson's discovery demand for results (if any) from testing the bloody papers. Hudson was prejudiced because the Court would have been required to grant the *in limine* motion.

Counsel was also ineffective for failing to object to the prosecution's closing argument about Hudson removing the victim's blood from his entire body with the papers from his glove compartment. This prejudiced Hudson because the jury was led to believe the victim's blood was, in fact, removed from Hudson's body by use of the papers taken from his glove compartment when the WCL found the victim's blood only on Hudson's right hand and possible animal blood on his left foot. Finally, counsel was ineffective in not objecting to the publication and on-going jury exposure to photos of Hudson's torso and appendages (Exhibits 48-50) displayed in the courtroom during closing argument, for which there was no supporting forensic evidence it was the victim's blood that was depicted in these photos.

N. Carns Was Ineffective for Failing to Present the Trial Testimony of Danita Scharenbroch and Luella Wilber to Impeach Robert Huss' Trial Testimony.

Robert Huss, a witness for the State at trial, testified he saw Hudson with the boat and trailer, poking out of the woods near the crime scene, approximately two weeks prior

²¹ The left foot swab indicated the "brightest, deepest red" so it was chosen for testing.

to the victim's murder. The State used Huss' testimony as evidence Hudson had been stalking the victim from different points in this area on and before the day she died. Before Attorney Carns' told the Court the defense was resting, Hudson informed Carns he wanted Carns to call Danita Scharenbroch and her mother, Luella Wilber, to testify the boat and trailer belonged to Wilber and Hudson had not been in sole possession of the boat and trailer prior to June 25, 2000. Carns refused to do so. This prejudiced Hudson because Scharenbroch's and Wilber's testimony²² would have discredited the State's stalking theory and would have tended to cause the jury to disbelieve Huss' testimony in general.

O. Carns Was Ineffective in Failing to Argue to the Jury that Carnot's Fingerprints Were Not Found on Hudson's Truck.

Carnot testified at trial that, after Hudson hit him with his truck, Carnot landed on the capper of the truck and then pushed himself off the truck with his hands and jumped over the fence. Following submission of Carnot's fingerprints to the WCL, the WCL reported on July 6, 2000, that none of the fingerprints found on Hudson's truck and capper matched Carnot's.

Carns' failure to argue this evidence to the jury prejudiced Hudson because, if the jury had been informed that Carnot's fingerprints were not found on Hudson's truck and capper, it would have caused the jury to believe Hudson's testimony that he never hit Carnot with his truck.

P. Carns Was Ineffective for Failing to Impeach John Panetti's Testimony that Panetti Observed Hudson Parked at a Quarry Gate on the Plank Road Hill before Van Dyn Hoven Jogged Up the Hill Past the Quarry and for Failing to Argue to the Jury that Panetti's Testimony Was Wrong and Wholly Inconsistent with

²² Hudson is further prejudiced because Wilber is now deceased.

Other Citizen Testimony.

Panetti's testimony that he drove up the hill on Plank Road, waved to Mike Borchert, and observed Hudson at the quarry gate at approximately 6:05 p.m. was wholly inconsistent with Borchert's testimony (and Borchert's statements to police). Borchert testified unequivocally that he only saw Panetti drive down the hill toward the Marina Bar before Borchert waved to the victim who was jogging up the hill at approximately 6:10 p.m. Borchert's testimony was, in other words, critically inconsistent with the prosecution's homicide time line.

Carns' failure to impeach Panetti with Borchert's testimony prejudiced Hudson because the prosecution's stalking theory was predicated on Panetti's seeing Hudson's truck, boat, and trailer parked "in wait" at the quarry gate while Panetti drove *up* the hill and before Van Dyn Hoven jogged up the hill and was found stabbed at 6:17 p.m. This prejudiced Hudson because Borchert's testimony discredited Panetti's observations and would have likely caused the jury to disbelieve the prosecution time line and stalking theory.

Carns' performance was unreasonable because he could have recalled either Panetti or Borchert or both to clarify or impeach Panetti. This impeachment was required in order for Carns to reasonably represent Hudson in closing argument and challenge the prosecution theory that Hudson was parked his truck, boat, and trailer in wait for Van Dyn Hoven to jog up the hill and assault and kill her.

Q. Carns Was Ineffective for Failing to Argue to the Jury that the Blood Observed and Seized from Hudson's Body Was Not from the Victim.

The prosecution attempted to establish blood observed on Hudson's body and collected on swabs and tested by the WCL was from Van Dyn Hoven and splashed onto

Hudson's "arms, chest, torso, stomach, and hands" during his assault of her. The victim's blood was found only on Hudson's right hand.

WCL reports and trial testimony indicated the blood found on Hudson's left foot area (Item T1) contained no human DNA and swabs from Hudson's "arms, chest, torso, stomach . . ." had not been tested. This forensic blood evidence was consistent with Hudson's defense that police poured blood on him from a cup following his arrest while he was seated in a police vehicle.

- R. Carns Was Ineffective Both Individually and Cumulatively in Failing to Discover the Following Evidence for Which Disclosure Was Required, Pursuant to §971.23, Stats., and Hudson's Constitutional Rights to Due Process and a Fair Trial. *State v. Thiel*, 2003 WI 111, 264 Wis.2d 571, 665 N.W.2d 305.

Carns was ineffective for failing to obtain Ertl's WCL "Inventory Case Notes" for the 6 paper bags of materials he processed from Hudson's truck on June 28, 2000²³ (See Claim III, *ante*).

Carns was ineffective for failing to investigate and present evidence the police tampered with and switched the window cranks, which they allegedly found at the crime scene, with the crank Ertl found in Hudson's truck (See Claim III, *ante*).

Carns was ineffective for failing to investigate and raise the issue the police removed the driver's side window crank from Hudson's truck at the arrest scene and planted it back at the crime scene (See Claim III, *ante*).

Carns was ineffective for failing to obtain Ertl's notes (Serology DNA Case Notes) regarding the victim's missing tube of blood, from the State prior to trial (See Claim III,

²³ All IAC claims in Claim IV-R mirror the discovery/misconduct claims in Claim III, which is incorporated here by reference in support of Claim IV-R

ante).

Carns was ineffective for failing to obtain a copy of the KPD's June 25, 2000, detailed daily log report, from the State prior to trial (See Claim III, *ante*).

Carns was ineffective for failing to obtain a copy of the KPD's audio dispatch tape from June 25, 2000, and for failing to raise the issue the State intentionally destroyed and failed to preserve the original KPD audio dispatch tape (See Claim III, *ante*).

Carns was ineffective for failing to obtain a copy of the OCSD's audio dispatch tape of June 25, 2000, from the State prior to trial (See Claim III, *ante*).

Carns was ineffective for failing to investigate and raise the issue of the State suppressing information from trial Exhibit 116. Carns was also ineffective for failing to hire an expert to examine trial Exhibit 116 for tampering (See Claim III, *ante*).

Carns was ineffective for failing to raise the issue the State intentionally destroyed and failed to preserve the OCSD's original reel-to-reel audio dispatch tape (See Claim III, *ante*).

Carns was ineffective for failing to ensure the WSP preserved its original audio dispatch tape of June 25, 2000 (See Claim III, *ante*).

Carns was ineffective for failing to obtain a copy of OCSD officer Dan Pamerter's "photo index cards" for the arrest scene (See Claim III, *ante*).

Carns was ineffective for failing to have all the swabs collected from Hudson's body tested for DNA prior to trial. This prejudiced Hudson because Carns was then unable to argue to the jury that the swabs indicated the blood was either animal blood (left foot area) or was not the victim's.

V. HUDSON WAS DENIED DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO CHOOSE HIS OWN DEFENSE WHEN THE COURT PREVENTED HIM FROM BOTH PRESENTING HIS DEFENSE THEORY THAT HE WAS NOT GUILTY OF ALL COUNTS AND EVIDENCE-TAMPERING TO THE JURY WHEN THE COURT DECIDED AND INSTRUCTED ATTORNEY CARNES TO ARGUE A “NO INTENT” DEFENSE TO THE JURY ON THE BASIS IT WAS IN HUDSON’S BEST INTERESTS AND BECAUSE CARNES REFUSED TO ARGUE HUDSON’S CHOSEN DEFENSES. THIS ALSO CAUSED HUDSON TO RELINQUISH HIS FUNDAMENTAL RIGHT TO DECIDE WHETHER OR NOT TO WAIVE OR TESTIFY IN HIS OWN DEFENSE. *Brady v. U.S.*, 397 U.S. 742, 748 (1970).

Hudson represented himself during the first three days of trial and argued the evidence presented against him had been planted, he had been framed by the police and he was not guilty of the charged offenses. On March 8, 2001 (fourth day of trial), the Court reinstated Attorney Carnes to represent Hudson over Hudson’s objection (Tr. 3/8/01, pp. 36-45). Hudson’s objection to Carnes’ reinstatement was based on Carnes’ statement to Hudson that he would not argue Hudson’s defense theory to the jury in his closing argument; but that he would, instead, argue Hudson stabbed the victim but did not have the requisite intent to kill her. The Court reviewed the conflicting interests between Hudson and Carnes and, over Hudson’s objection, instructed Carnes to present the intent defense to the jury on the basis this argument and defense were in Hudson’s best interest (Tr. 3/9/01, pp. 63-70).

This prejudiced Hudson for two reasons. One, he was denied his constitutional right to have his attorney present his theory of defense. Two, he was no longer able to intelligently, knowingly, and voluntarily decide whether to testify in his own defense or waive this fundamental right. Hudson no longer had “sufficient awareness . . . of the likely consequences” for his exercise of this right because his lawyer decided to argue a contrary defense. This then compelled him to testify on his own behalf that he did not stab the

victim, in order to overcome his lawyer's contrary closing argument (See Hudson's Affidavit).

In order to develop his record, Hudson will testify that, following his trial testimony, he again told Carns not to argue the intent defense to the jury and he wanted to present his own closing argument to the jury consistent with his defense theory he was not guilty of the charged offenses. Hudson will also testify he told Carns that, if Carns agreed not to present the intent argument to the jury, he would waive his closing argument.

The Court erroneously reviewed the conflicting interests between Hudson and Carns and, over Hudson's objection, instructed Carns to present the intent defense to the jury on the basis this argument and defense were in Hudson's best interest (Tr. 3/9/01, pp. 63-70). This prejudiced Hudson both because his lawyer presented a diametrically different defense than Hudson presented on all counts to the jury during the first three days of trial and because his lawyer conceded guilt on all counts to which Hudson had entered pleas of not guilty.

VI. HUDSON WAS DENIED HIS RIGHT AGAINST SELF-INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE COURT SHOULD HAVE CONDUCTED A HEARING TO DETERMINE THE ADMISSIBILITY OF HIS STATEMENTS. §971.31(3), STATS.; *MIRANDA v. ARIZONA*, 384 U.S. 486 (1966); *EDWARDS v. ARIZONA*, 451 U.S. 477 (1981); *MINNICK Vv MISSISSIPPI*, 498 U.S. 146 (1990); and *ARIZONA v. ROBERSON*, 486 U.S. 675, 687 (1988).

The Court erred in admitting Hudson's alleged inculpatory statements to Assistant Chief Manion and Lt. Shepherdson, without holding a *Miranda-Goodchild* hearing to determine the admissibility of those statements. Hudson was denied his right against self-incrimination under the Fifth and Fourteenth Amendments because his alleged statements

were “obtained” after he invoked his right to counsel and without Hudson’s waiver of that right (See Hudson’s Affidavit).

To further develop the record, Hudson will testify regarding the circumstances of his arrest, his invocation of his right to counsel, his subsequent interrogation and alleged confession.

VII. HUDSON WAS DENIED HIS RIGHTS TO DUE PROCESS OF LAW, TO THE PRESUMPTION OF INNOCENCE, TO A FAIR TRIAL AND TO PARTICIPATE FULLY IN HIS DEFENSE WHEN HE WAS REQUIRED TO WEAR A STUNBELT DURING THE COURSE OF THE TRIAL, IN THE ABSENCE OF ANY DETERMINATION BY THE COURT THAT SUCH A DRASTIC SECURITY MEASURE WAS NECESSARY. *ILLINOIS v. ALLEN*, 397 U.S. 337 (1970); *U.S. v. DURHAM*, 287 F.3d 1297 (11th Cir. 2002); *STATE v. GRINDER*, 190 Wis.2d 541, 527, N.W.2d 326 (1995); and *STATE v. CHAMPLAIN (PREJUDICE PRESUMED)*.

To further develop the record, Hudson will testify regarding how the stunbelt was used during the course of his trial and how it adversely affected his ability to conduct his defense.

Moreover, Hudson will testify and present evidence there was no reasonable security basis requiring him to wear a stunbelt because there was no record of his ever having engaged in violent misconduct, either in a court of law or jail, and no record of his ever having attempted to escape from a court or jail, in Outagamie County or elsewhere, following his arrest on June 25, 2000, and through the conclusion of his trial.

VIII. HUDSON IS ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE, PURSUANT TO §805.15(1), STATS., and *STATE v. HARP*, 161 Wis.2d 773, 469 N.W.2d 210 (Ct. App. 1991).

Hudson should be granted a new trial in the interest of justice because the real controversy in this case was not fully tried. The combination (A) of Hudson’s *pro se*

representation; (B) his inadequate *pro se* pre-trial investigation from jail; (C) his inability to present evidence to cross-examine and impeach State's witnesses; (D) his inability to present testimony on his own behalf; (E) his inability to effectively present evidence and argue to the Court and jury that the State failed to disclose, tampered with and destroyed evidence, in violation of §971.23, Stats., in violation of Hudson's right to a fair trial; (F) the wrongful presentation of Hudson's alleged confession without his having an opportunity to challenge the admissibility of that confession with the hospital audio tapes and misconduct evidence; (G) evidence the KPD audio/video equipment could not, in fact, self-erase following Hudson's alleged confession at the station house; and (H) police destruction of the video, provides unshakeable evidence the real controversy in this case has not been fully tried.

CONCLUSION

For the reasons stated, this Court must grant Hudson's petition for new trial or, in the alternative, grant him an evidentiary hearing to prove his claims because the facts asserted in his petition, if true, require relief. State v. Bentley, 201 Wis.2d 303, 310-311, 548 N.W.2d 50 (1996); State v. Allen, 274 Wis.2d 568, 682 N.W.2d 433 (2003).

Dated at Wauwatosa, Wisconsin, this ___ day of January, 2009.

Respectfully submitted,

REBHOLZ & AUBERRY

JAMES REBHOLZ
Attorney for Kenneth A. Hudson
State Bar No. 1012144

P.O. ADDRESS:

7707 Menomonee River Parkway
Wauwatosa, WI 53213
(414) 479-9130
(414) 479-9131 (Facsimile)
jrebholz2001@sbcglobal.net