STATE OF NORTH DAKOTA
COUNTY OF RAMSEY

IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

Werner Wolfgang Kunkel,	)	
	)	Case No. 36-95-K-04935
Petitioner,	)	
	)	**PETITION FOR POST-CONVICTION RELIEF**
v.	)	
	)	
State of North Dakota,	)	
	)	
Respondent.	)	

INTRODUCTION

[¶ 1] Petitioner Werner Kunkel is serving a life sentence for the 1986 murder of Gilbert Fassett.

[¶ 2] According to the state's theory of the case, Werner stabbed Fassett to death between 10:30 p.m. on August 1 and 1:13 a.m. on August 2, 1986.

[¶ 3] According to the state's theory of the case, during that short period of time Werner must have done the following: (1) driven Fassett from Benson County to somewhere in Ramsey County; (2) stabbed Fassett more than 100 times; (3) hoisted and crammed Fassett's body into the trunk of his car; (4) transported the body back to Benson County in the hilly, wooded terrain off Skyline Drive near Fort Totten; (5) removed the body from the trunk and dragged it more than 40 feet from

the road through the brush; (6) cleaned himself up and hid his bloody clothing; (7) then finally picked up a female passenger. And all this supposedly happened before being pulled over at 1:13 a.m. by a patrolman who noted nothing unusual about Werner's appearance, demeanor, or the inside of his car.[1]

[¶ 4] Logically, if Gilbert Fassett was alive after August 1, 1986, then Werner Kunkel is innocent.

[¶ 5] The state was acutely aware of this fact. Newly discovered evidence shows the state was also acutely aware that there existed compelling evidence that Fassett was still alive at (and after) 1:13 a.m. on August 2nd.

[¶ 6] Hell-bent on securing Kunkel's conviction, however, the state violated its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing evidence of ***three*** independent witnesses, all of whom made documented reports to law enforcement about seeing Gilbert Fassett ***after*** when Werner supposedly killed him. Documentation of these reports sat in the prosecution's files for more than three decades until the defense discovered them among documents disclosed in January 2023. In the interim, the state continued to successfully oppose

[1] The state has also suggested Werner may have had Fassett's body in the trunk during the traffic stop, disposing of if afterward. But the state has never wavered in its insistence that by the time of the stop, Werner had already committed the murder.

Werner's efforts to get a new trial, always repeating the mantra that no one saw Gilbert Fassett alive after the night of August 1st.

[¶ 7] In addition, new forensic evidence never before presented further establishes that Fassett was alive after the night of August 1st. According to new declarations from two forensic pathologists, including the medical examiner who performed Fassett's autopsy in 1986, the liver toxicity evaluation performed on Fassett was valid, confirming that Fassett did not have a detectable amount of alcohol in his system at the time of his death.

[¶ 8] According to the state's theory of the case, Fassett was highly intoxicated on the night Werner supposedly killed him. The new evidence therefore establishes that Fassett was not killed that night, and that Werner is innocent.

[¶ 9] While suppressing evidence supporting Werner's innocence, the state also allowed critical untested crime scene evidence to be lost or it intentionally destroyed it, thus preventing testing and analysis that could reveal the identity of the true perpetrator.

[¶ 10] Each of these issues in isolation, and all of them collectively, deprived Werner of his fundamental right to a fair trial. As a result, his conviction lacks any integrity and in the interest of justice must be set aside. Werner Kunkel

therefore submits this Petition for Post-Conviction Relief under N.D. Cent. Code. § 29-32.1 *et seq.*

FACTUAL AND PROCEDURAL BACKGROUND

The Crime

[¶ 11] On August 10, 1986, berry pickers discovered a body—later determined to be 29-year-old Gilbert Fassett—on a wooded slope off Skyline Drive near Fort Totten, North Dakota. (Tr. at 362:12–364:14.)[2]

[¶ 12] This portion of Skyline Drive was a "high traffic area" known as a "lover's lane" and was a popular location for locals to congregate, drink beer, or pick berries. (Tr. at 447:20–448:8; 676:12–16; 676:20–22.)

[¶ 13] The body was discovered amid dense woods, brush, and weeds. (Tr. at 369:20–25.) One had to actually clear bushes aside to reach the location of the body. (Tr. at 370:1–13; 457:12–458:14; 466:21–467:4.)

[¶ 14] The body was down the slope 40 feet and 3 inches from the road. (Tr. at 436:1–6.)

[¶ 15] Holes in Fassett's shirt suggested a stabbing, which was later confirmed at autopsy. (Tr. at 410:10 –18.) Law enforcement believed that there were more than 100 stab wounds. (Tr. at 425:19–426:2.)

[2] References to Werner's 1995 trial transcript are referred to herein as "Tr. at ___".

[¶ 16] According to Bureau of Indian Affairs Officer James Yankton, the first law enforcement officer to arrive on scene, Fassett's left hand was grasping a bush. (Tr. at 442:3–25.) This, along with the absence of any bloody path leading from the road to the body, led Yankton to the initial conclusion that "the stabbing of Gilbert Fassett occurred right there at the scene." (Tr. at 443:2–10.)

The Investigation

[¶ 17] On August 11th, Fassett's body was transported to Grand Forks, North Dakota where an autopsy was conducted by Dr. Roel Gallo. (Tr.at 1049:7–11.)

[¶ 18] Dr. Gallo removed Fassett's clothing at the beginning of the autopsy. Yankton took the clothing and "hung them out to air dry." (Tr. at 415:2–17.)

[¶ 19] At the time of the August 11th autopsy, Fassett's body was in a state of decomposition. The decomposition was advanced in some areas, while the lower extremities were "fairly well preserved." (Tr.at 1054:24–1055:1.)

[¶ 20] Dr. Gallo believed that Fassett had been deceased "seven to eight days at least." (Tr. at 1072:16–17.) Seven days before the autopsy would have been August 4, 1986.

[¶ 21] Maggots, which were still in an active state during the autopsy, were collected from the body and transported in a jar to the University of North Dakota

for analysis on August 12th. Some were still moving upon arrival. (Tr. at 1053:1–8; 1075:3–11; 1083:18–25.)

[¶ 22] A zoologist retained by the state, a man named Omer Larson, indicated in a letter to Dr. Gallo that the maggots were eight to ten days old. (Tr. at 1122:6–21.) Larson would later testify at Werner's trial that they were "at least nine, possibly ten days of age." (Tr. at 1119:6–8.) Depending on whether one counts from the autopsy or from the receipt of the maggots, a range of eight to ten days would mean a time of death as recent as August 1st through August 4th, 1986.

[¶ 23] Rumors immediately circulated about Fassett's death when his body was found, and Devils Lake Police Officer Peter Belgarde's role was to "follow down the numerous leads that would either come into the Police Department, the Sheriff's Department, or the Bureau of Indian Affairs." (Tr. at 663:7–17.)

[¶ 24] The many rumored suspects included: (1) a friend of Fassett's who, after holding two butcher knives to his girlfriend's throat shortly after Fassett's death, said, "Gilbert I am sorry, you were my best buddy," (Tr. at 813:16–814:10); (2) Hank Cavanaugh, who had threatened to kill Fassett when he began dating Cavanaugh's ex-common law wife (Tr. at 556:1–19); and (3) BIA Officer Yankton himself, who nevertheless continued to be one of the primary investigators of the case. *See* Index No. 274 (Order Denying Petition for Post-Conviction Relief) at 12–

13 ("Even without disclosure of this statement for what it might have been worth, the underlying claim in it, that is, that Gilbert Fassett was killed by another person, James Yankton, was well known. Defendant and his legal counsel were well aware of the rumors relating to this allegation.").

[¶ 25] Devils Lake resident Werner Kunkel was an early suspect, having been seen with Fassett on the evening of August 1, 1986. Approximately two weeks after Fassett's body was discovered, Werner was formally interviewed by Officers Yankton and Belgarde. Werner provided them with a detailed account of his whereabouts and activities from August 1st through August 5th, 1986, when Werner was arrested for an unrelated incident. Declaration of Dane DeKrey, Ex. A.

[¶ 26] Law enforcement suspected that Werner might have killed Fassett and transported the body in Werner's 1977 Plymouth. They thus took pictures of the vehicle, and believed there might be evidence in it, but they did not search it. (Tr. at 695:12–696:13.)

[¶ 27] Despite Fassett having gotten out of jail for a DWI the morning of August 1st, 1986, shortly before he was killed, law enforcement did not investigate whether Fassett had received any threats while in jail, nor did they search Fassett's residence. (Tr. at 452:1–8.)

[¶ 28] For nearly a decade following Fassett's death, no charges were filed against anyone.

Charging Werner

[¶ 29] Because the crime appeared to have occurred on the reservation, prosecutors sought a federal indictment. But when federal grand jury proceedings did not lead to an indictment, the state changed course and brought murder charges against Werner Kunkel in Ramsey County District Court by criminal information on March 30, 1995. Index No. 43. The state's theory was now that Werner Kunkel stabbed Fassett ***off*** the reservation and then disposed of the body ***on*** the reservation.

[¶ 30] As to what permitted the state to prosecute Werner in 1995, former Assistant U.S. Attorney Lynn Crooks later explained to reporters:

> It took eight years to prosecute one case, in which the victim's mutilated body was found in a deserted area on the Fort Totten Indian Reservation. Crooks said authorities had a suspect, but only slim evidence at first.
>
> "We waited on that case for eight years," Crooks recalls. "In the end, we knew Kunkel couldn't keep his mouth shut and he'd eventually confess to other people. And he did."

Prosecutor of Peltier and Kahl Looks Back on 31-Year Career, AP, July 10, 2000.

[¶ 31] In other words, while the case against Werner had been "thin," with no witnesses and no physical evidence tying him to the crime, the state would build

a case almost exclusively on the testimony of informants claiming that Werner had to confessed to them.

Werner's Trial

[¶ 32] Werner recognizes that he was convicted by a Ramsey County jury, and that a post-conviction proceeding is not the forum merely to relitigate what was already determined at trial. But an examination of the strengths and weaknesses of the state's trial evidence is necessary background for this petition. And as explained below, the state's suppression of material exculpatory evidence deprived Kunkel of a fair trial, and the previously undisclosed evidence is sufficient to undermine confidence in the jury's guilty verdict such that it must be set aside.

[¶ 33] Determining whether the material withheld by the state is both exculpatory and material, as required under *Brady*, requires review and analysis of all the evidence in the case. *See*, *e.g.*, *United States v. Agurs*, 427 U.S. 97, 113 (1976) ("if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt"); *Wearry v. Cain*, 577 U.S. 385, 392–93 (2016) (reversing conviction in murder case lacking physical evidence in light of suppressed impeachment evidence where "[t]he State's trial evidence resembles a house of cards, built on the jury crediting [the witness's] account rather than [the defendant's] alibi").

[¶ 34] The state tried Werner Kunkel in August 1995. Their evidence included the following:

1) **Gilbert Fassett was released from jail the morning of August 1, 1986.**

[¶ 35] Fassett's friend Lori Crist testified that Fassett, after being released from jail around 10:00 a.m. on the morning of August 1, 1986, came to her house for breakfast, then left. (Tr. at 807:2–808:9.)

2) **Werner Kunkel was with Gilbert Fassett the evening of August 1, 1986.**

[¶ 36] Werner and Fassett went out drinking together on Friday, August 1, 1986. Kelly Bednardz, one of the state's first witnesses, was a part-time employee of the Sportsmen's Den, a bar just outside Devils Lake. (Tr. at 492:13–17.) He reported seeing Werner and Fassett together in the bar the evening of August 1st. (Tr. at 495:1–12.) Bednardz kicked Fassett out of the bar because "Gilbert was causing trouble … when he gets drunk, he just gets wild, I guess." (Tr. at 496:8–12.) According to Bednardz, Werner and Fassett left the bar in a Dodge or Plymouth at around 9:00 p.m. (Tr. at 497:16–487:12.) Bednardz also reported that Fassett had "a big roll of money" that night. (Tr. at 497:4–14.)

[¶ 37] Patrons at the Sportsmen's Den provided similar accounts of seeing Werner and a drunken Fassett at the bar on August 1st. Barbara Brandt testified that

she saw Fassett and Werner at the bar, and that Fassett had been "drunk." (Tr. at 545:22–546:1; 550:24–25.) Ken Larson was also at the bar that night and testified that Werner and Fassett were there, "obviously intoxicated," "staggering," and "drunk." (Tr. at 563:1–3; 571:7–11.) Brandt testified that "Werner was spending the money, but he was getting it from Gilbert." (Tr. at 548:14–20.) Larson also noted that Fassett carried a rolled-up wad of money. (Tr. at 563:14–564:12.)

[¶ 38] The next stop for Werner and Fassett after the Sportsmen's Den was the Fort Totten-area home of William and Gertrude Cavanaugh. (Tr. at 599:2–18.) The Cavanaughs had taken Fassett in as a foster child for a few years after he had completed middle school. (Tr. at 596:10–597:23.) When Fassett and Werner arrived at the Cavanaughs' house, Gertrude was at bingo in St. Michael, returning home to see them after 10:00 p.m. (Tr. at 601:19–25; 602:3–5; 616:8–9.) Gertrude testified that Fassett and Werner stayed at the house "about half an hour" after she returned home, though in an earlier statement to police she testified that the two had left the house at 10:30 or 11:00 p.m. (Tr. at 627:15–628:9; 634:21–23.) Both Cavanaughs testified that Werner was acting impatient, wanted to leave, and that he referred to being late for an appointment. (Tr. at 605:12–24; 630:20–631:21.)

3) Werner picked up a passenger before being pulled over by a patrolman at 1:13 a.m.

[¶ 39] The next trial witness to have seen Werner was Officer Stuart Klefstad, then a District Sergeant with the North Dakota Highway Patrol. (Tr. at 643–646.) Officer Klefstad, who knew Werner, pulled him over three miles south of Devils Lake on Highway 80 and issued him a warning ticket for an equipment violation, speeding, or the like. (Tr. at 643:8–25.) The radio log shows that Officer Klefstad radioed the dispatcher at 1:13 a.m., after stopping Kunkel, to see whether Kunkel had any restrictions. (Tr. at 646:5–24.)

[¶ 40] When Officer Klefstad pulled him over, Werner was driving and had one passenger—a female. (Tr. at 647:7–25.) While the young woman with Kunkel was unknown to Officer Klefstad at the time, the state subsequently tracked her down and she was interviewed by Office Peter Belgarde. (Tr. at 704:11–24.) Her name was Trina Poppenhagen. Ms. Poppenhagen confirmed that she was in Werner's car when he was pulled over by Officer Klefstad. At no point did Officer Belgarde tell Poppenhagen to keep secret the fact that she had been pulled over with Kunkel that night. (Tr. at 704:25–705:3.) The state ultimately chose not to call Ms. Poppenhagen to testify at Werner's trial.

[¶ 41] This time window—between leaving the Cavanaugh residence and the 1:13 p.m. traffic stop—is when the state insisted in its summation that Kunkel ***must*** have stabbed Fassett more than 100 times:

> There's a girl in there. Who, we don't know.[3] He's pulled over. He's given a warning ticket. No bond to pay. No court appearance. Not a public record. Nobody should know about that. ***What's significant here is no Gilbert. Gilbert's gone by this point.*** Two hours and 43 minutes after—approximately—after they leave the Cavanaughs. 10:10 to 1:13. Two hours and 43 minutes. More than enough opportunity to kill someone and dump the body. Or, for that matter, if you take his word for it in his confessions, still having it in the trunk.

(Tr. at 1223:13–23.) (emphasis)

[¶ 42] Officer Klefstad nevertheless testified that there was nothing unusual about the vehicle. (Tr. at 644:15–17.) During the three-to-five-minute stop Officer Klefstad, using a flashlight, checked the front and back interior of Werner's car, and saw neither blood nor anything else unusual. (Tr. at 654:20–655:24.) He also did not smell anything out of the ordinary. During their interaction, during which Werner handed Officer Klefstad his ID, Werner showed no signs of being agitated, nervous, or upset, and there was nothing remarkable about his appearance—no blood, scrapes, or scratches. (Tr. at 652:22–653:5; 653:15–654:24.)

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[3] This is misleading. As noted above, the state did know, and even conducted an interview of Werner's female passenger, who confirmed that she was in the car during Officer Klefstad's stop.

4) The state claims Werner burned his car to conceal evidence.

[¶ 43] The state also offered testimony from Aaron Rash, an employee of the state's forensic science division. (Tr. at 1129:8–13.) Rash described performing an examination of Werner's burned-out Plymouth in 1992. (Tr. at 1130:13–21.)

[¶ 44] Rash testified that "typically" fires that originate under the hood of a car "are contained there because of the fire wall in the vehicle preventing it from getting into the passenger compartment." (Tr. at 1134:6–16.) He explained that in examining Werner's vehicle he identified "three very intense sources of heat … one of them being under the hood, the second one in the passenger compartment, and the third ... either in the trunk area or the back seat." (Tr. at 1135:2–6.) Rash said this was "consistent with" the use of an accelerant to create more intense burning, the most common accelerant being gasoline.[4] (Tr. at 1135:8–19.) The state would later argue: "[t]hat car was torched." (Tr. at 1228:14.)

[¶ 45] Importantly, Rash offered no testimony as to how long before his 1992 examination the car had burned. While the state elicited testimony from other "confession" witnesses (*see infra*) relating to the car, none of those witnesses

[4] Perhaps the most prominent current example of shifted science potentially calling into question hundreds or even thousands of convictions that occurred over the past few decades is the "science" of arson investigation. *See* JOHN J. LENTINI, SCIENTIFIC PROTOCOLS FOR FIRE INVESTIGATION (2006) (lengthy discussion of the myths that pervaded the science of arson investigation).

reported Werner confessing to deliberately setting his car on fire. The only witness who placed a timeframe on the burning of the car was Rodney Maier, whose testimony suggested a timeframe of 1992,[5] about four years after Werner learned he was a suspect in Fassett's murder. This matches the fact that law enforcement's investigation included taking photographs of Werner's completely intact Plymouth in the course of their initial investigation of the case. As the state conceded in its closing: "The car later burned up. When exactly, not sure. That wasn't brought out. But the car was later burned." (Tr. at 1219:4–7.)

[¶ 46] Rash, not limiting his "expertise" to just fire investigation, also testified about how the tears in Fassett's clothing represented multiple "stab holes." (Tr. at 1137–1144.) Rash testified from just pictures; the jury did not see the actual clothing. In fact, at the time of his testimony, Rash said that the clothing worn by Fassett at the time of his death was in the trunk of Rash's car. (Tr. at 1136 2–8.) Rash testified that he left all the clothing in the trunk of his car at the request of the state, because the clothing had an objectionable odor. (Tr. at 1136:9–12.)

[¶ 47] On information and belief, the clothing worn by Fassett at the time of his death—which, given the violent physical intimacy of the crime, may contain the

[5] As discussed below, Maier claimed Werner told him in 1994 that Werner had lost the car a year and a half earlier.

perpetrator's DNA—has been lost or intentionally destroyed by the state in violation of standard local, state, and federal practices and policies, even though the clothing could exculpate Werner, who is serving a life sentence for a crime he didn't commit.

5) The state offered forensic testimony seeking to establish a time of death.

[¶ 48] As explained above, the state presented testimony from Dr. Roel Gallo, who performed Fassett's autopsy on August 11, 1986. Dr. Gallo testified that he believed Fassett had been deceased "seven to eight days at least." (Tr. at 1072:16–17.) Again, seven days before the autopsy would have been August 4, 1986.

[¶ 49] Omer Larson, the zoologist who was asked to examine the entomology evidence, indicated in a letter to Dr. Gallo that the maggots he received on August 12, 1986 were between eight and ten days old. (Tr. at 1122:6–21.) Larson would later testify that the maggots were "at least nine, possibly ten days of age." (Tr. at 1119:6–8.) Depending on whether one counts from the autopsy or from the receipt of the maggots, a range of eight to ten days would mean a date of death as recent as August 1st and as late as August 4th, 1986.

[¶ 50] The state took liberties with this testimony in its summation:

> That body was lying up there about ten days. That's what Mr. Yankton said, officer—experienced police officer. That's what Dr. Larson said. That's what Dr. Gallo said. Ten days. August 1st.

(Tr. at 1284:17–21.)

6) Witnesses testified that Werner confessed.

[¶ 51] Other than the "Werner Kunkel was the last person seen with Gilbert Fassett" evidence and argument discussed below, the state's case 100% hinged on testimony of alleged confessions by Werner. As the state acknowledged in closing, the reported confessions were inconsistent both with each other and with the known facts about Fassett's death. (Tr. at 1297:13–18) ("I think common sense tells you they aren't literally true. We all know that. Of course, they aren't all literally true.").

[¶ 52] First, jailhouse informant Christopher Anderson testified that although Werner did not ***confess*** to Fassett's murder, he ***implied*** that he had some involvement when he threatened Anderson through the bars of their prison cells that "you are going to get the same thing as Gilbert got."[6] (Tr. at 371:16–738:12.)

[¶ 53] The next jailhouse informant was Mark Demarce, who testified that Werner confessed to, among other things, "capping" Fassett (*i.e.*, shooting him), cutting off Fassett's penis and leaving it Fassett's mouth,[7] and—after committing

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[6] Anderson also claimed that from fifteen feet away, he could observe that Werner was wearing a gold or bronze ring "with a cat on the top"—Anderson could not say whether it depicted "a house cat, a lion, tiger," or any other sort of cat—that was the same ring he had seen Fassett wearing before his death. (Tr. at 731:2–733:24.) There was other testimony, however, that Werner was in possession of such a ring of his own before Fassett's death. (Tr. at 1165:7–1166:20.)

[7] While the state claimed in closing that the supposedly non-public detail about the penis being cut off made Demarce's account more credible, (Tr. at 1293:7–8), this

the killing in or near a bar in Devils Lake called "Mac's,"—dumping the body on the reservation. (Tr. at 756:4–14; 758:3–6; 760:4–24.)

[¶ 54] After discussing his motivations from coming forward, Demarce first insisted that he did not receive, nor had he ever expected to receive, any benefit in exchange for his testimony against Werner. (Tr. at 763:14–22.)

[¶ 55] To its credit, the state cleared up this falsehood by getting Demarce to admit that he had in fact received a sentence reduction in exchange for his assistance in the case against Werner.

[¶ 56] Nick Elston was the state's third jailhouse informant. He testified that Werner confessed to him in the months just before Werner's trial was set to begin. (Tr. at 911:15–21.)

[¶ 57] Months before trial, Elston spoke at length with investigators, replete with bizarre and contradictory details and obvious efforts by law enforcement to salvage a narrative that could be used against Werner:

- Elston claimed Werner told him that Werner ***did not*** dispose of Fassett's body, but rather "another guy that lives above Nellie's … took the body and disposed of it." DeKrey Decl., Ex. B at 3 (Elston's pretrial statement was also entered into evidence at trial as Defense Exhibit F).

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amputation of the penis was ***not*** confirmed at autopsy, nor was there any evidence that anything had been stuffed in Fassett's mouth. (Tr. at 1063:1–10.)

- When pressed, Elston, after mentioning statements from others that Fassett was "strangled or stabbed," decided to go with "strangled," before being fed supposed non-public information about the manner of death and being coached to change his story:

  A: And he said, he only did one thing to him and that was it.
  Q: And what was that?
  A: He put a cord around his neck.
  Q: He put a what?
  A: A cord around his neck.
  Q: Around Gilbert's neck.
  A: Yeah.
  Q: Okay. So he is inferring that he strangled him?
  A: I, that's what I think.
  Q: Okay. Did Werner tell you how Gilbert got all the stab, ***he was stabbed repeatedly***.
  A: I don't know.
  Q: He didn't tell you that.
  A: No.

  Id. at 4 (emphasis).

- Elston quickly changes course in response to this prompting from the interrogators:

  Q: So he's saying he killed him in Devil's Lake?
  A: Yeah.
  Q: By putting a cord around his neck?
  A: Yeah, he said there was, I heard there was a cord around his neck. Someone had a cord around his neck. That's what I heard. ***And, but he did tell me he was stabbed***.
  Q: WERNER told you that?
  A: Yeah.

  Id. at 4–5 (emphasis).

- Six pages later, law enforcement returns to the subject of the manner of death, and Elston confirms that he is willing to stick with the stabbing story:

  Q: Okay. But WERNER didn't, he told you that all he did was put a cord around his neck and strangle him?
  A: Yep, but it was stabbing.
  Q: He told you that he was stabbing.
  A: Yeah.

  Id. at 10.

- Elston added that Werber reported killing Fassett in front of Nellie's Bar in downtown Devils Lake, then placed Fassett's body in the trunk of a man who lives above Nellie's. *Id.* at 5. This other man left alone to dispose of the body; Kunkel was not involved in that. *Id.*

- Elston then provides a bizarre story (punctuated by the statement, "that's what I heard," making it unclear whether he is even purporting to describe a confession by Werner rather than general rumor) about a prior fight in which Fassett beat up an unnamed individual, a "really rich" guy who "owns dart machines or whatever" and who then contracted with Werner and another man to put a hit on Fassett, compensating them with "weed and cash." *Id.* at 7–9.

[¶ 58] The coaching proved effective, with Elston swearing an oath and telling Werner's jury the following:

Q: Did Kunkel explain his role in the murder?
A: That he just stabbed him. I don't know how many times or anything. But he stabbed him.
Q: He didn't explain the number of times?
A: No.

(Tr. at 915:1 –5.)

[¶ 59] The state also presented "confession" evidence from Sandra Austin, a former girlfriend of Werner's, and the mother of his two sons. (Tr. at 818:17–819:11.)

[¶ 60] Ms. Austin testified that early in their relationship Werner had discussed the Fassett murder, explaining that the allegations against him were false and that the police department was trying to set him up. (Tr. at 822:2–9.) Werner knew he was under suspicion, but he maintained his innocence. (Tr. at 822:18–25.)

[¶ 61] In around April 1991, the relationship between Werner and Austin deteriorated. (Tr. at 825:7–14.)

[¶ 62] Austin testified that during an argument, an intoxicated Werner told her that he had killed Fassett. The story of the confession as recounted by Austin was that Werner and Gilbert left the Sportsmen's Den the night of August 1st, then "drove around Lakewood" until one of them needed to stop to go to the bathroom. (Tr. at 829:1–14.) Gilbert then came up behind Werner with a knife—with the apparent intention of stealing Werner's car—and a scuffle ensued, with Werner taking the knife and accidentally stabbing Fassett. Then, according to Austin, Werner began stabbing Fassett over and over again "because he didn't know any other way to get out of it." (Tr. at 829:15–830:13.)

[¶ 63] This fairly detailed supposed confession by Werner had him murdering Fassett after leaving the Sportsmen's Den, but importantly, without the one-to-two-hour visit to the home of William and Gertrude Cavanaugh.

[¶ 64] According to Austin, Werner told her that after stabbing Fassett to death by the lake, Werner put Fassett's body in the trunk of his car, drove to his mother's house, changed clothes, put his bloody clothes in the woods behind his mother's house, and again started driving. (Tr. at 830:23–831:12.)

[¶ 65] Austin testified that Werner said then drove toward town and picked up a girl along the side of the road. (Tr. at 833:19–23.) Austin testified that Kunkel told her about the traffic stop with Officer Klefstad, and how he was worried—given that Fassett's body was still in his trunk—that Klefstad would smell Fassett's blood and urine. (Tr. at 833:24–834:7.)

[¶ 66] According to Austin, Werner said he then dropped the girl off, "and he decided he needed to get rid of the body. And he told me that it was in the wintertime, so he took the body out by the ski lift. And he thought he could bury it in the snow and cover it up." (Tr. at 834:10–14.) Werner purportedly explained to Austin that "because he was able to bury the body up with the snow," that "it wouldn't be found for a long time, he said." (Tr. at 835:2–4.)

[¶ 67] Austin said that Werner claimed that while there was blood in his trunk, he wasn't worried because on a later trip either to/from Grand Forks, "there had been an electrical fire in the car, and it had burned up." (Tr. at 835:16–24.)

[¶ 68] Werner's confession to Austin supposedly occurred sometime in April 1991. (Tr. at 842:1–5.) But she didn't report this confession to law enforcement until some 18 months later, in October 1992. (Tr. at 842:19–22.) And Austin only reported the supposed confession to law enforcement in the wake of Austin's then-husband being arrested and charged with murder, with assistance from Werner, who served as an informant against Mr. Austin, even surreptitiously recording a conversation at the request of authorities. (Tr. at 843:3–22.)

[¶ 69] Rodney Maier met Werner in January 1995 through a roommate ad in Bismarck. (Tr. at 879:3–12.) Maier testified about an alleged conversation between Werner and an old friend of his, Shelly Rutten, at Rutten's Bismarck home. (Tr. at 880:7–882:2.)

[¶ 70] The conversation concerned Sandra Austin's testimony against Werner at the federal grand jury proceedings in Fargo. (Tr. at 882:3–17.) Maier testified that Werner seemed worried about Austin testifying, and that he had been speaking with her frequently. (Tr. at 882:23–883:9.) Maier confirmed that the thrust of Werner's conversation with Rutten was Werner's dealings with Sandra Austin.

[¶ 71] According to Maier, Werner also said that he was a suspect in the murder "because he was the last person seen with that person." (Tr. at 884:18–23.)

[¶ 72] During the conversation, Maier testified that Werner told Rutten that his car was "impounded for a year and a half," and that he "wasn't worried about it, because he had said it burned up alongside of the highway." (Tr. at 884:24–885:3.)

[¶ 73] Maier also testified that Werner referenced returning to Germany. (Tr. at 885:13–18.)

[¶ 74] When asked, "did Kunkel give a description of what had occurred?" Maier responded, "only to say that the better man won that night. He didn't—it sounded like a fight and the better man won." (Tr. at 885:21–886:3.)

[¶ 75] Shelly Rutten, the subject of Maier's testimony, also testified. Rutten had known Werner "pretty much my entire life." (Tr. at 898:15–16.)

[¶ 76] Rutten confirmed that there was a conversation with Werner about Sandra Austin and her grand jury testimony, but unlike Maier, Rutten testified that Werner was not "really overly worried about it," though he was "agitated." (Tr. at 901:1–20.)

[¶ 77] As for the statements about traveling to Germany, Rutten testified that she herself brought the issue up, telling Werner that "if I thought I was going to be investigated or if somebody was going to say something about me in something like

this for—in front of a Grand Jury, I'd be gone." (Tr. at 901:10–14.) According to Rutten, Werner responded that he had "thought about going to Germany," but that "one of the biggest reasons he wasn't going to run was because he wasn't scared and that he loved his boys and wasn't going to leave." (Tr. at 901:15–20.)

[¶ 78] When asked if Werner talked about the car, Rutten testified that he said that the car "had been impounded and that he wasn't worried about it, because he had let other people drive it," and that he had—at some point—talked about the car being burned up. (Tr. at 903:2–12.) Neither Rutten, Maier, nor any other witness ever testified that Werner confessed to setting his car on fire.

[¶ 79] Rutten said that she asked Werner whether he had killed Fassett, and that in response, "he just kind of looked at me like, Shelley that's a stupid question to be asking me, I'm your friend." (Tr.at 903:23–904:3.) Werner described Werner's expression as "how could you think that?" and also as "more of a 'that was a stupid question to ask.'" (Tr. at 906:17–23.) Rutten testified that as Werner's friend since third grade she was "satisfied" with that response. (Tr. at 906:24–907: 2.)

[¶ 80] Rutten said Werner told her that if it looked like he would be convicted, "he would plead self-defense and only be convicted of negligent homicide." (Tr. at 904:8–12.)

[¶ 81] As for the statement "the better man won" testified to by Maier, the state formulated its question to Rutten this way: "Now, do you recall hearing Kunkel say any other comment ***about the context of what went on between him and Fassett***?" (Tr., p. 904: 11-12 (emphasis).)[8] Rutten responded: "I remember there was a statement made. And I cannot tell you what exact contents [sic] it was in. But he said that if there was a fight, the better man won." (Tr. at 904:13–15.)

[¶ 82] Finally, the state presented testimony from Fred Nakken, who had spent time in the penitentiary with both Werner and Fassett. (Tr. at 943:15–944:6.)

[¶ 83] Nakken testified that in the fall of 1994 he spent time at Nellie's Bar with Werner. (Tr. at 948:13–949:16.) At the time, Nakken was living above Nellie's Bar (Tr. at 968:23–969:7), a detail somewhat jarring given that this could make Nakken, according to Werner's supposed confession to Nick Elston (described above), the one who actually stabbed Fassett then transported and dumped his body.

[¶ 84] Nakken testified that while at Nellie's with Werner and Werner's mother, Nakken asked Werner to go to the bathroom with him, where

[8] The state used this formulation in an effort to tie the statement to the Fassett murder, knowing that in her previous interview with law enforcement Rutten had said that she remembered Werner saying, "the better man won," but emphasized that she did not remember what context it was in. DeKrey Decl., Ex. C at 4.

Nakken pressed him about Fassett's death. (Tr. at 949:11–950:17.) According to Nakken, Werner then explained that he was in "a house" holding onto Fassett when someone else came up behind Fassett and stabbed him five times, after which Fassett said, "That's enough, I quit," then died in Werner's arms. (Tr. at 950:18–951:6.)

[¶ 85] Nakken testified that Werner then said he and his male accomplice rolled Fassett's body in a blanket, put him in the trunk, then were stopped, then let go, by a highway patrolman on their way to Fort Totten to dispose of the body. (Tr. at 951:11–20.)

[¶ 86] After being interrupted in the bathroom, Nakken said he and Werner continued to discuss the murder in the bar. (Tr. at 952:4–13.) Werner supposedly told Nakken that Fassett had been murdered because he "had gotten in a little bit too deep." (Tr. at 952:4–13.) Nakken further testified that Werner told him there were two other people involved, people known to Nakken, but that he could not reveal their identities. (Tr. at 953:17–23.)

[¶ 87] In the fall of 1994, Nakken agreed to wear a wire to surreptitiously record conversations with Lori Crist, in an attempt to assist law enforcement in obtaining information about the Fassett murder. (Tr. at 981:11–21.) Nakken never, however, wore a wire in any conversations with Werner. (Tr. at 981:17–18.)

[¶ 88] In sum, three of these seven "star" witnesses did not hear actual confessions. Chris Anderson merely claimed Kunkel told him "you are going to get the same thing that Gilbert got." Rodney Maier and Shelly Rutten testified that Werner told them "the better man won," with Maier concluding the statement related to Fassett but Rutten remaining unsure.

[¶ 89] As for the content of the four supposed confessions, all were inconsistent with the known facts and with the state's theory of the case. For example, Sandra Austin testified that Werner told her he buried Fassett's body in the snow, ensuring that no one would find it. Fassett died in August. The supposed confession also has Werner stabbing Fassett after they left the Sportsmen's Den, rather than going to the Cavanaugh residence. Elston said Fassett's body was never in Werner's car; the state claims Werner not only had Fassett's body in the trunk, but that he burned his car to destroy the evidence.[9] Motives identified in the confessions included self-defense and murder for hire, but none of them mentioned robbery, which was the theory the state advanced at trial. Nakken had Werner in the car with two male accomplices when he was pulled over by Officer Klefstad, though Klefstad confirms it was only Werner and one female passenger.

[9] Elston also had this extremely violent murder with multiple participants—but apparently no witnesses—happening outside a bar in downtown Devils Lake ***on a Friday night before closing time***.

[¶ 90] The confessions were contradictory in almost every detail:

Narrator	Location	Method	People Involved	Motive
Demarce	Mac's Bar	Shooting, then removal of penis	Kunkel as shooter and penis-remover, no one else identified	Unclear
Elston	Nellie's Bar	Strangulation with ligature	Kunkel with a cord, also participation by a man who lived above Nellie's, and the rich man who paid them	Murder for hire in revenge for assault
Austin	By the lake	Accidental stabbing in self-defense, followed by deliberate stabbing	Kunkel alone	Self-defense
Nakken	In a house	Kunkel held Fassett while another man stabbed him five times in the back	Kunkel and two other unidentified men who are known to Nakken	Fassett had "gotten in too deep"

The state	Unknown, but definitely in Ramsey County	Stabbing	Kunkel, at least	Robbery of "big wad of cash"

[¶ 91] The state acknowledged, to some extent, these defects:

> I think common sense tells you they [the confessions] aren't literally true. We all know that. Of course, they aren't all literally true.

(Tr. at 1297:13–15.)

> Is it entirely different from each other? Sure. They have a little bit different place of where it occurred. Some have it out by the lake and some have it in a house up here along Sixth Street. And one outside a bar where he kind of held him and strangled him and somebody else knifed him. But always including his involvement, always including things only the murderer would know.

(Tr. at 338:11–17.)

7) The state claims the confessions contained facts only the murderer would know.

[¶ 92] Despite this admission, the state fervently urged the jury to credit the accounts of Werner's alleged confessions to third parties, first arguing that the reported admissions contained supposedly non-public information, like the fact that Werner was pulled over by Officer Klefstad and had a young woman in the car with him at the time. (Tr. at 1223:14–16, 24–25; 1290:24–1291:7.) But let's step back and consider this rationally: a brutal and high-profile murder occurred in a close-knit community and both Werner and Poppenhagen were interviewed by investigators in

the immediate aftermath. ***What a story to tell!*** It would be shocking and contrary to human nature if both Werner and Poppenhagen had ***not*** told this story, including the traffic stop, to multiple others at the time, particularly if they had no reason to believe the information needed to be kept confidential. (Tr. at 704:25–705:3.)

[¶ 93] As for other details that "only the murderer would know," there were rumors circulating about this case from the beginning. Multiple individuals were involved in the discovery of the body and thus knew the location. Several law enforcement agencies were involved in the investigation. For example, jailhouse informant Chris Anderson admitted that his own family members told him that Fassett's body had been mutilated, stabbed many times, and found on Skyline Drive. (Tr. at 737:16–738:12.) Anderson had discussions about these topics with another jailhouse informant, Mark Demarce. (Tr. at 738:21–739:16.) For his part, Demarce testified that the fact that Fassett's body had been stabbed and mutilated was common knowledge both from newspapers and the state penitentiary rumor mill. (Tr. at 784:5–23.) Fred Nakken also admitted that he learned back in 1986 that Gilbert Fassett had been stabbed to death; his friend Curtis Black, a BIA officer, told him. (Tr. at 974:4–8.) And as discussed above, investigators informed Nick Elson that Fassett had been stabbed multiple times, not the other way around.

[¶ 94] Thus, to compensate for the major discrepancies in the supposed confessions, not to mention the absence of physical evidence tying Werner to the crime and the understandable fuzziness of forensic testimony about the date of death, the state relied heavily on one thing: the notion that Gilbert Fassett was last seen alive on August 1, 1986, with Werner. The State's perpetual belaboring of this issue to the jury underscores its role as the fundamental underpinning of the State's case,[10] and highlights the materiality of the suppressed evidence described below. The state introduced the theme of Fassett having last been seen alive on August 1st in its opening statement, reinforced it ceaselessly in witness testimony, then hammered it home in summation:

- Tr. at 329:25–330:1 — state tells the jury in its opening statement about Fassett and Werner's August 1st visit to the Cavanaughs, concluding: "***That, ladies and gentlemen, was the last time that Gilbert Fassett was seen alive. With Werner Kunkel.***" (emphasis)

- Tr. at 330:14–16 — state refers in its opening statement to the 1:13 a.m. traffic stop of Werner noting, "but at this point nobody knows Gilbert Fassett is dead."

[10] While there may be some tedium in laying out all these trial references to Fassett last being seen alive on August 1st, the sheer volume of references is important to the analysis. The common refrain of prosecutors who have violated their disclosure obligations under *Brady* is that the withheld evidence is immaterial or not central to the disputed issues in the case. Here, however, the withheld evidence relates ***directly*** to when Fassett was last seen alive. Given the time and care the state dedicated to the issue at trial, the state cannot now reasonably argue that complaints about the withheld evidence of later sightings of Fassett are much ado about nothing.

- Tr. at 470:13–17 — state's witness Betty Jaeger: "Q: ***Do you remember the last day you saw Gilbert***? A: It was on a Friday. Q: On a Friday? Would that be August 1st? A: I think so." (emphasis)

- Tr. at 475:16–476:9 — state's witness Tim Rolland: "Q: ***Do you remember the last time you ever saw Gilbert Fassett***? A: About the 6th, I think, of August. Q: That was what you first said, right? A: Uh-huh … Q: Okay. And then you changed that at some point to August 1, right? A: Uh-huh. Q: Why was that? A: I got the dates mixed up." (emphasis)

- Tr. at 484:10–13 — state's witness Karen Azure: "Q: ***Do you recall the last time you saw Gilbert Fassett alive***? ... A: Yes. It was in— August 1st." (emphasis)

- Tr. at 495:1–5 — state's witness Kelly Bednardz: "Q: ***Do you recall the last time you saw Gilbert Fassett***? A: Yes. Q: What day was that? A: The 1st.")

- Tr. at 506:24–507:14 — state's witness Charles Nelson: "Q: ***Do you recall the last time you saw Gilbert Fassett***? A: Yes. Q: When was that? A: 28th or 29th, something like that, of July. Fort Totten Days was on … Q: Are you sure on that date? Could it have been August 1st? A: Could have been." (emphasis)

- Tr. at 554:11–14 — state's witness Betty Lou Whitehead: "Q: ***Do you recall the last time you saw Gilbert alive?*** A: At the bus depot. Q: At the bus depot. Do you remember what day that was? A: August 1st." (emphasis)

- Tr. at 612:11–14 — state's witness William Cavanaugh: "Q: ***After that night [August 1st], did you ever see your foster son … Gilbert again?*** A: No." (emphasis)

- Tr. at 632:23–25 — state's witness Gertrude Cavanaugh: "Q: Did you ever see Gilbert again after that [August 1st?], Ms. Cavanaugh? A: No."

- Tr. at 808:21–22 — state's witness Lori Crist: "Q: Did you ever [Fassett] again [after August 1st]? A: No."

- Tr. at 1219:9–10 — state's closing: "***So let's go back and look at the last day in the life of Gilbert Fassett. August 1st.***" (emphasis)

- Tr. at 1220:9–10 — state tells the jury in closing, "Clearly, ladies and gentlemen, early afternoon, late afternoon, early evening hours of August 1st, Gilbert is in Mel's Corner Bar. From there, Betty Lou Whitehead calls. Calls him at Mel's. He leaves. ***Nobody at Mel's ever sees him again***." (emphasis)

- Tr. at 1223:1–7 — state's closing: "This was about 10:30 when they leave [the Cavanaughs] … And nobody ever sees Gilbert alive again. ***That's the last time Gilbert Fassett is ever seen alive … The last person with Gilbert Fassett: Werner Wolfgang Kunkel***." (emphasis)

- Tr. at 1223: 17–18 — state's closing: Referring to 1:13 a.m. traffic stop: "What's significant here is no Gilbert. Gilbert's gone at this point."

- Tr. at 1230 — state's closing: "***Nobody else saw Gilbert with anyone else other than Werner Wolfgang Kunkel. Nobody. Kunkel was the last one seen alive with him.***" (emphasis)

- Tr. at 1282:13–21 — state's closing: "Mr. Fassett was seen at 10:30 on August 1, 1986, leaving … the Gert and Bill Cavanaugh home … ***That was the last time Gilbert Fassett was seen alive***. He did not get out of Werner Kunkel's car … until his body was dumped on Skyline Ridge. Those are the facts." (emphasis)

- Tr. at 1282:24–1283:2 — state's closing: "That's what the evidence shows. 10:30, he left the Cavanaugh residence with Mr. Kunkel, and he didn't get out of that car again until his body was dumped down the hill on Skyline Drive."

- Tr. at 1284:6–9 — state's closing: "***[Defense counsel] said that we questioned whether or not this death occurred on August 1st.*** I'm only

going to touch on that very briefly. ***I think, quite frankly, that's somewhat frivolous.***" (emphasis)

- Tr. at 1299:14–24 — state's closing: "But you have a setting that brings Mr. Kunkel down to a point of about 10:30 on August 1st when he's with Mr. Fassett … ***Mr. Fassett is never seen alive again … There is absolutely no evidence by any witness in this trial that Mr. Fassett got out of that car until his body was rolled down the slope.***" (emphasis)

[¶ 95] As for the motive for the killing, the state reminded jury of the witness testimony about Gilbert having a "big wad of money" on August 1st. (Tr. at 1221:11–17) ("Everybody who saw them at the Sportsmen's Den saw this big wad of money in [Fassett's] right front pants pocket."). The state concluded, "[Werner] had the opportunity. That big wad of money is the motive." (Tr. at 1230:20–21.)

Werner's Conviction, Sentencing, and Appeal

[¶ 96] The jury reached a guilty verdict on August 22, 1995. Index No. 197. On September 26, 1995, the Court entered judgment and sentenced Werner to life in prison. Index No. 206.

[¶ 97] Werner appealed his conviction, arguing that "the state presented insufficient evidence to sustain the guilty verdict," that "the verdict is unsupported by physical evidence or eyewitness testimony," and that "the existing physical evidence establishes his innocence." *State v. Kunkel*, 548 N.W.2d 773 (ND 1996).

[¶ 98] In affirming the conviction, the North Dakota Supreme Court noted that the evidence in the record supported a conclusion that, among other things, "Kunkel and Fassett were together for a significant amount of time on August 1, 1986," "***when last seen around 10:30 p.m. on August 1***, ***Fassett was with Kunkel***," and that "Fassett probably died sometime in the late evening of August 1 or early morning of August 2." *Id*. at 773–74 (emphasis).

Werner's Post-Conviction Proceedings

[¶ 99] On or about April 29, 2004, Werner filed a petition for post-conviction relief. Index No. 218. The Court held a hearing on the petition in March 2005.

[¶ 100] Werner claimed that (1) his trial attorney was ineffective for failing to retain an entomology expert or otherwise properly challenge the state's zoology witness, Omer Larson; (2) his trial attorney was ineffective for failing to properly challenge the arson testimony of Aaron Rash, or to retain his own arson expert; (3) his trial attorney was ineffective for failing to object to testimony by Officer Peter Belgarde painting him a "tracking expert"; (4) Werner's rights under the Vienna Convention were violated based on the state's failure to notify the German Consulate General of his arrest; and (5) the state violated *Brady* by failing

to disclose a sworn statement from Clifford Monteith about James Yankton having murdered Fassett. Index Nos. 218, 264, 268.

[¶ 101] At the hearing, Werner presented testimony from Dr. Neal Haskell, a forensic entomologist. Index No. 264 at 6–7. Dr. Haskell testified that Dr. Larson had been an unqualified witness whose analysis contained errors, and that the proper analysis of the entomological evidence revealed that Fassett's actual time of death was between sunrise on August 3rd and sunset on August 6th, 1986. *Id.* at 13.

[¶ 102] As part of its opposition to the petition, the state again trotted out the same, well-worn theme of no witnesses having seen Fassett after August 1st:

> What is significantly absent is the fact that consistently by everyone at trial, ***the last person seen with Gilbert Fassett was the Defendant***. Ms. Betty Jaeger, who worked at Mel's Corner Bar in Devil's Lake, saw Gilbert Fassett in the bar on Friday, August 1, 1986, ***and after he left, never saw Gilbert again*** … He was also seen in the bar by Tim Rolland and Karen Azure, at the same time. ***After Gilbert left the bar, he was never seen again by them***. Mr. Kelly Bednarz [sic] was interviewed, and indicated that on August 1, 1986, he was working at the Sportsmen's Den … About 9:00 p.m. that night, ***he saw the victim in the Sportsmen's Den Bar and thereafter never saw him alive again*** … Mr. Nelson took particular note that the Defendant was trying to get the victim out of the bar. After the victim was removed from the bar, ***Mr. Nelson never saw the victim alive again*** … After [Werner and Fassett] left [the Cavanaugh residence on August 1st] ***no one saw the victim alive again***.

Index No. 225 at 9–10 (emphasis).

[¶ 103] The state also harped on this theme in post-hearing briefing:

> What is significant is the last time Gilbert Fassett was alive, he was in with [sic] the Defendant. He was with the Defendant in Defendant's car. The opportunity for the Defendant to murder Gilbert Fassett was quite present, as he was the last one seen with the victim alive.

Index No. 266 at 3.

[¶ 104] The court denied the petition in September 2005. Index No. 274. The Court held that Werner had failed to meet his burden to establish ineffectiveness on the part of his trial counsel, or prejudice from such ineffectiveness. In finding a lack of prejudice, the Court opined that the law witness testimony was more damaging to Werner than the forensic testimony, observing:

> There was evidence that the defendant [sic: the decedent] was killed prior to the timeframe asserted by Dr. Haskell. In addition to the testimony already referred to by Dr. Gallo as well as Dr. Larson, there was the following:
>
> a. Testimony by numerous witnesses who stated that they saw Gilbert Fassett on August 1, 1986, but did not see him after that date.
>
> b. ***That neither at trial nor the post-conviction hearing, witnesses were offered to show that Gilbert Fassett was seen after August 1, 1986.***

Index No. 274 at 8, Finding of Fact 18 (emphasis); *see also id.* at 11, Finding of Fact 22d (noting trial testimony "that placed the defendant with the victim, Gilbert Fassett, on the day and evening he was last seen before his body was discovered …").

[¶ 105] As for the *Brady* claim based on the statement implicating BIA Officer James Yankton in the murder, the Court held that the statement was hearsay and lacking detail, and that "the underlying claim in it, that Gilbert Fassett was killed by another person, James Yankton, was well known [at the time of trial]." Index No. 274 at 12–13, Finding of Fact 27.

[¶ 106] In October 2009, Werner brought a second petition for post-conviction relief, ultimately attempting to litigate the claims *pro se*. Index No. 298.

[¶ 107] A hearing commenced on May 4, 2011, but Werner ultimately abandoned this effort, filed a "Motion to Withdraw Post-Conviction Hearing," after which the remainder of the hearing was canceled and the petition dismissed. Index Nos. 374, 376.

[¶ 108] While the *pro se* nature of the proceeding complicates the effort to determine what claims were asserted (then apparently withdrawn), the petition appeared to have been based on alleged false testimony by Fred Nakken, Sandra Austin and Mark Demarce (as shown by new testimony from Demarce and other third parties), as well as ineffective assistance of counsel claims relating to photos that were introduced into evidence and failure to object to mishandling of evidence. Index No. 374.

New Evidence from the State's Files

[¶ 109] In response to a discovery request, the state provided defense counsel access to materials in its files beginning on January 11, 2023. Index No. 387.

[¶ 110] Subsequent to obtaining access to these materials, defense counsel reviewed the voluminous material. This included reviewing the new material and comparing it against the documents in Werner's defense files from previous counsel, including all discovery materials previously provided.

[¶ 111] This material to which the defense was provided access included documentary evidence not contained in the defense files, and which was not provided to the defense in discovery before Werner's trial, or at any other time before January 11, 2023.

[¶ 112] The material included documentation regarding statements by witnesses claiming to have seen Gilbert Fassett alive ***after*** August 1, 1986. These documents were discovered by defense counsel between March and July, 2024.

[¶ 113] To evaluate the significance of this newly discovered evidence, it's again necessary to provide additional context from the investigation and trial.

[¶ 114] The state long knew that there was a problem with its timeline. Though Werner supposedly murdered Fassett on August 1st, two witnesses had independently told police that they had seen Fassett on August 6th. The statements

of these two witnesses ***were*** disclosed to the defense. One of them was Karen Azure, an employee of Mel's Corner Bar, one of the state's first trial witnesses:

8-12-86 6:18 p.m. STATEMENT BY KAREN L. AZURE, [redacted]

On August 6, 1986, I, KAREN AZURE, was at work at Mel's Corner Bar in Devils Lake. I went to work at 6 p.m. The following persons were in the tavern:

MARY LOUISE FASSETT SIMONSON
BETTY ANN JAGER
AMBROSE BUDDY LONGIE
Unknown male (early 60's, 5'10-1/2" (11), slim build, farm style dress)
GILBERT FASSETT

DeKrey Decl., Ex. D.

[¶ 115] Two days later, Tim Rolland, another state witness who worked at Mel's Corner Bar, had a similar conversation with investigators:

8-14-86 STATEMENT BY TIM C. ROLLAND, [redacted]

TIM stated his working hours from 11 a.m. to 6 p.m. from Monday through Saturday.

On August 6, 1986, TIM was bartending and observed GILBERT FASSETT in the Corner Bar at approximately 4 p.m. TIM stated he talked with GILBERT and threw dice with GILBERT for a couple beers.

DeKrey Decl., Ex. E.

[¶ 116] Several days later, police procured "corrected" versions of the statements:

8-18-86 11:11 a.m. STATEMENT BY KAREN L. AZURE

KAREN stated the only statement change is the date, August 6, 1986.

KAREN corrected the date to August 1, 1986, and all the other statements are correct to the best of her knowledge.

8-18-86 12:56 p.m. STATEMENT BY TIM C. ROLLAND

This report is to correct the mistake I made in the interview dated 8-14-86.

The correct date was August 1, 1986, (Friday) when I saw GILBERT FASSETT in Mel's Corner Bar and not Wednesday, August 6, 1986.

DeKrey Decl., Exs. F, G.

[¶ 117] The state made specific, intentional efforts to clean up these discrepancies on the very first day of trial. Tim Rolland testified as follows:

> Q: Do you remember the last time you ever saw Gilbert Fassett?
> A: About the 6th, I think, of August.
> Q: That was what you first said, right?
> A: Uh-huh …
> Q: Okay. And then you changed that at some point to August 1, right?
> A: Uh-huh.
> Q: Why was that?
> A: I got the dates mixed up.
> Q: Okay, you got the dates mixed up. You were –
> A: The days, or whatever. The days or the dates, one of the two.
> Q: Okay. So you came and got a hold of the officers and told them it was August 1st and not August –
> A: Yeah.
> Q: – 6th. Why did you change that?
> ***A: Because they wanted me to, I guess.***

(Tr. at 475:16–476:18.) (emphasis)

[¶ 118] Karen Azure's testimony was similar:

> Q: Do you recall the last time you saw Gilbert Fassett alive? ...
> A: Yes. It was in—August 1st…
> Q: Now at first, you had given a different date, right?
> A: Right.
> Q: What made you change it?
> A: Because we went back and looked at the schedule—when Peter and Yankton came down, I had thought it was the 6th the last time I seen him. Then we went back through the records through the timing on the bar, and on the 6th there, I wasn't working.

(Tr. at 484:10–23.)

As for the logistics of the correction, Azure explained:

> Q: And—okay. Do you remember whether you called [the investigators] or they called you to correct the date?
> A: After they had left—I really hate to state. I don't recall if it was me that called Peter or Yankton and told them that the date was wrong, or if they come back and questioned me again or not.

(Tr. at 485:17–22.)

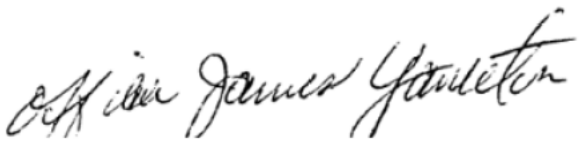
[¶ 119] Meanwhile, the state was sitting on an ***undisclosed*** statement from an additional witness associated with Mel's Corner Bar. Three days after his initial conversation with Karen Azure, and a day after his initial conversation with Tim Rolland, BIA Officer Yankton interviewed Mel Brodell, the owner of Mel's Corner Bar. In that interview, Brodell too reported seeing Fassett in his bar on August 6, 1986:

8-15-85 2:27 p.m. STATEMENT BY MELVIN BRODELL [redacted]

I, MEL BRODELL, talked with GILBERT FASSETT on August 6, 1986, at my tavern. GILBERT said he wanted to pay on his bill and gave me $5.00 and left the tavern. That's the last time I saw and talked with GILBERT.

The time of this was about early afternoon when GILBERT talked with me.

(sgd) MELVIN BRODELL



DeKrey Decl., Ex. H.

[¶ 120] Thus, not only did Brodell (nine days after the fact) have a specific recollection of seeing Fassett on August 6, 1986, he recalled the approximate time Fassett came in and the conversation the two had, with Fassett paying Brodell five dollars on his outstanding bar tab before leaving.

[¶ 121] None of the discovery material provided to the defense—either before or since trial—included documentary evidence of any "correction" made to Brodell's statement similar to those from Rolland and Azure, or evidence of any follow-up at all with Mr. Brodell. This appears to be Brodell's first, last, and only word on the subject.

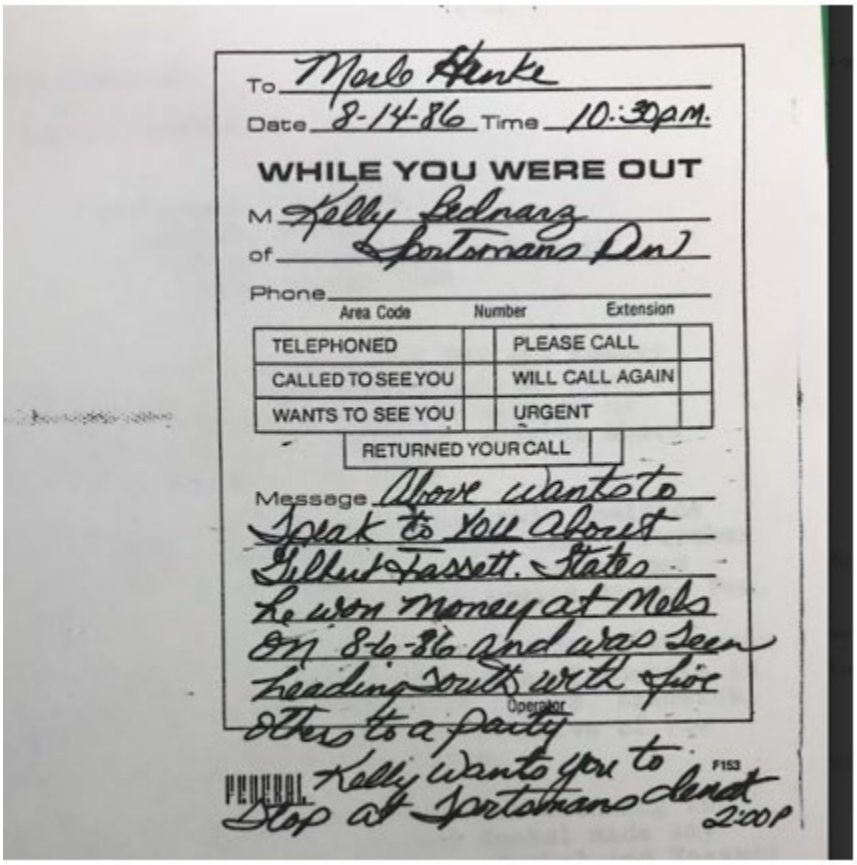
[¶ 122] Perhaps Brodell was correct, and that Azure and Rolland were right in their initial statements to police (and therefore wrong in their trial

testimony). It is also possible that Azure and Rolland testified truthfully at trial, and that Fassett was in Mel's Corner Bar on both August 1st ***and*** around August 6th, which would not be surprising particularly given that Fassett was a regular there. It is possible that ***only*** Brodell saw Fassett at Mel's on August 6th, given that Brodell's account could be interpreted as a quick visit to make a payment on Fassett's bar tab. In any of these scenarios, Werner is innocent of the murder of Gilbert Fassett.

[¶ 123] But the defense was deprived of the opportunity to explore any of these possibilities, because the state suppressed Brodell's statement.

[¶ 124] But wait, there's more. At trial, Kelly Bednardz testified about the last time he saw Fassett. Tr. at 495:1–5) ("Q: Do you recall the last time you saw Gilbert Fassett? A: Yes. Q: What day was that? A: The 1st.").

[¶ 125] Meanwhile, the state was sitting on this undisclosed piece of evidence:



To Merle Henke
Date 8-14-86 Time 10:30 P.M.

WHILE YOU WERE OUT

M Kelly Bednarz
of Sportsmans Den
Phone
Area Code Number Extension

TELEPHONED		PLEASE CALL	
CALLED TO SEE YOU		WILL CALL AGAIN	
WANTS TO SEE YOU		URGENT	
RETURNED YOUR CALL			

Message Above wants to speak to you about Gilbert Fassett. States he won money at Mels on 8-6-86 and was seen heading south with five others to a party Kelly wants you to stop at Sportsmans den 2:00 P

Operator

GENERAL F153

DeKrey Decl., Ex. I.

[¶ 126] According to this document, on August 14th Kelly Bednardz said that Gilbert Fassett won money at Mel's on August 6, 1986, and that he was then seen "heading south with five others to a party." This was reported to Merle Henke, a Special Agent with the North Dakota Bureau of Criminal Investigation.

[¶ 127] This is not merely initial confusion over a date, as the state claimed was the case with Rolland and Azure. Bedardz is describing a ***completely different*** occurrence from what he described at trial—not only a different date, but a different location (Mel's rather than the Sportsmen's Den), and different events

(Fassett winning money and going to a party with five other people rather than being kicked out of the Sportsmen's Den with Werner).

[¶ 128] If, as Bednardz reports, Fassett was at Mel's and then at a party on August 6, 1986, then Werner Kunkel is innocent of the murder of Gilbert Fassett.

[¶ 129] The defense was again deprived of the opportunity to explore this information, or even to use the information in Bednardz's cross-examination, because the state suppressed this evidence.

[¶ 130] But wait, there's still more. There is another previously undisclosed account of a witness who saw Fassett alive after August 1, 1986. And this witness provides the most compelling new evidence of all.

[¶ 131] Included among the material made available to the defense for the first time in 2023 were multiple documents related to Byron Anderson, a member of the North Dakota National Guard.

[¶ 132] In September 1986, Anderson provided an extremely detailed statement to investigators about time he spent with Fassett and Fassett's girlfriend, Betty Lou "Doll" Whitehead, at the very moment that Werner, having supposedly already killed Fassett, was out on Highway 80, three miles south of Devils Lake, being pulled over by Officer Klefstad:

Byron L. Anderson
#2 Gulseth Trailer Court
[redacted]
5:20 p.m. 9-15-86

Transcribed: September 16, 1986

On August 2nd, early morning hours a little after 1:00 a.m. while driving around town, I saw Gilbert and a girl that had Doll written on her belt. I gave them a ride to Lori Crist's hourse on 6th Street. Gilbert was carrying a bottle. The bottle was in a sack. They came from the direction of the Corner Bar. I picked them up near Glickson's on 4th Street. They were going east. Gilbert mentioned something about being in jail. Gilbert told his girlfriend to give me (Byron) a kiss for giving a ride over there. They got off in the front of the house on 7th Avenue. There was a light one.

I had earlier given Gilbert a ride there. I think it was on the 29th of July.

I had to pack alot of clothes because we were leaving for Alabama. Forty-three National Guardsmen went from here. I was late. We were to be at Camp Grafton by bus at 4:00 a.m. to catch a plane in Grand Forks. We were in Alabama for 15 days.

DeKrey Decl., Ex. J.

[¶ 133] According to Anderson's September 16, 1986 statement, he picked up Fassett and Whitehead in Devil's Lake, "near Glickson on 4th Street," sometime after 1:00 a.m. on August 2, 1986, before dropping them off at Lori Crist's house. Anderson recalls that on the night in question he needed to pack because he was running late; he had to report to Camp Grafton by 4:00 a.m. to catch a plane for National Guard training in Alabama.

[¶ 134] Upon hearing this from Anderson, Officer Belgarde tried to "fix" the timing problem. Another document suppressed by the state until 2023 is a

report by Belgarde dated November 7, 1986, purporting to reflect backtracking by Anderson as to whether he was certain about the date of the encounter:

Mr. Byron L. Anderson

Date of Interview: 11-6-86 8:50 a.m.
Date Transcribed: 11-7-86

Mr. Anderson states that he is not so sure of the time he gave Gilbert Fassett a ride. He states that during the week of July 27th, to August 2nd, 1986, he gave Gilbert a ride several times. Mr. Anderson states that he now does not believe he gave Gilbert Fassett and Betty Whitehead a ride during the early morning hours of August 2nd (approximately 1:05 a.m.) Refer to the September 15, 1986 report.

Peter Belgarde
Devils Lake Police Department

DeKrey Decl., Ex. K.

[¶ 135] Belgarde begins by saying that in retrospect, Anderson is "not so sure" about the date on which he gave Fassett and Whitehead a ride. Belgarde reports that the confusion arose from Anderson having given Fassett rides several times in the days leading up to August 2nd. Belgarde concludes by taking things a step further, concluding that Anderson "now does not believe he gave Gilbert Fassett and Betty Whitehead a ride during the early morning hours of August 2nd (approximately 1:05 a.m.)." (emphasis in original).

[¶ 136] Anderson's initial statement has an aura of veracity and authenticity, in contrast to the alleged revised statement, which is highly dubious. In the first statement, the National Guardsman exhibits the firm grasp of details one would expect from someone in the military: Anderson did not know Whitehead, but he identifies her as " a girl that had Doll written on her belt." He specifies the exact location where he picked the two up and dropped them off. He notes that Fassett was carrying a bottle in a sack and, wishing to provide a complete account, he includes the rather sweet detail of Fassett asking Doll to give Anderson a kiss. Anderson notes that he had given Gilbert a ride to the same location on an earlier date—July 29, 1986, so clearly Anderson recognizes them as distinct events.

[¶ 137] The first statement also provides details that situate the encounter at a particular point in time—Anderson reports that when he picked them up, "Gilbert said something about being in jail." Indeed, Fassett was released from jail that very morning.

[¶ 138] In contrast to Anderson's initial statement, which was written in the first person, the subsequent "correction" is written in Officer Belgarde's voice. It's also suspiciously vague. The reference to giving Fassett a ride "several times" in the days leading up to August 2nd is questionable, given that Fassett was in jail for much of that period. Indeed, Fassett's reference to "being in jail" would make no

sense if the events described by Anderson occurred ***before*** Fassett went to jail. Was Fassett planning to get arrested for DWI?

[¶ 139] One thing that could resolve the timing discrepancy between the two statements would be military records. In the first statement, Anderson recalls that he was up in the early morning hours of August 2nd when he saw Fassett because he had to pack and report to Camp Grafton at 4:00 a.m. to travel to Alabama for training. A request for the military records from around that time could show whether Anderson was confused about the date or not.

[¶ 140] In a demonstration of solid policework, the investigators did just that, only to have the records confirm the accuracy of Anderson's initial statement:

OFFICE OF THE ADJUTANT GENERAL
State of North Dakota
P.O. Box 5511
Bismarck, ND 58502-5511

tol

ORDERS 108-45 10 July 198

KORFHAGE, DONALD D
CONLIN, PETER W 501
KIENAST, JAMES J 46
ANDERSON, BYRON L 5
ASLESON, MELVIN D 5
ASLESON, WESLEY A 5
BEARMAN, WALTER W 5
BROOKS, TIMOTHY P 4
BURDICK, WILLIAM P
BURKHARD, ANTON H 5
DAVIS, STEVEN P 501
JEMTRUD, OLE J 501-
JOHNSON, LYLE R 501
JOHNSON, MARK A 504
JOHNSON, ROY D 501-
JONES, THEODORE W 5
KRUMWIEDE, JOSEPH A
MAGNUSON, ALBERT G

You are ordered to annual training at Anniston Army Depot, Alabama for the period indicated. Upon completion of period of duty you will return to home station and are relieved from such duty.

Assigned to: 3662d Maint Co (HE) (GS) NDARNG, Devils Lake, ND 58301-9235
Reporting time/date: 2 Aug 86

DeKrey Decl., Ex. L.

[¶ 141] This order from the Office of the Adjutant General confirmed for law enforcement that Anderson had been ordered to attend annual training at Anniston Army Depot, Alabama on August 2, 1986. As plainly stated in Anderson's initial statement, when he gave a ride to Fassett and Whitehead in the early morning hours of August 2, 1986, he needed to finish packing so that he could get to Camp Grafton (by 4:00 a.m.), then Grand Forks, then Alabama for training.

[¶ 142] Byron Anderson's initial statement, the "revised" statement, and the military records confirming the accuracy of the initial statement, were ***all*** suppressed by the state. The defense was again deprived of the opportunity to call Anderson as a witness and to further investigate this issue.

[¶ 143] If Byron Anderson was telling the truth in his September 1986 statement, then Werner Kunkel is innocent of the murder of Gilbert Fassett.

[¶ 144] The State may argue that Anderson's initial account conflicts with testimony from Betty Lou "Doll" Whitehead at trial, in which she claimed that she saw Fassett for the last time on August 1, 1986, when she said goodbye to him at the bus station before leaving for Fargo. But this conflict is all the more reason why the Byron Anderson evidence should have been turned over—it conflicted with the state's case and was therefore exculpatory under *Brady*.

[¶ 145] In fact, still another suppressed document speaks to doubt that investigators held about Whitehead's veracity (in light of Anderson's statement), particularly as it related to the timing of her trip to Fargo:

A North Dakota National Guardsman has been interviewed and said he gave a ride to victim and WHITEHEAD from MEL'S CORNER BAR to residence of LORI CRIST after time WHITEHEAD claims she was on bus to Fargo. WHITEHEAD claims she took taxi from Fargo bus depot to 2525 South 14th, Fargo, and taxi company in Fargo has no record of fare.

DeKrey Decl., Ex. M.

[¶ 146] This October 3, 1986 memorandum from FBI Agent Spencer Hellickson shows that investigators entertained doubts about Whitehead's account, and that taxi records—or rather the absence of taxi records—undermined her story.

[¶ 147] There is more in this memorandum, which discussed Whitehead, Curtis Posey, and trial witness Lori Crist:

> All three of these individuals have been confronted with lies and none can or will explain discrepancies. All are very afraid of KUNKEL, a well-known violent drug dealer who recently got out of jail for shooting out the windows of a house he thought belonged to a North Dakota Highway Patrolman.

DeKrey Decl., Ex. M.

[¶ 148] While the memorandum does not speak well of Agent Hellickson's views of Kunkel, it nevertheless shows that two of the state's witnesses, Whitehead and Crist, "have been confronted with lies and none can or will explain discrepancies." This is particularly important regarding Whitehead, given the conflict between her testimony and Anderson's statement.

[¶ 149] By suppressing this evidence, as well as the documented statement of Mel Brodell, the documented statement of Kelly Bednardz, the documented statements of Byron Anderson, and the National Guard records confirming the accuracy of Anderson's initial account, the state significantly

hampered the defense's ability to challenge the very foundation of the state's case—that Fassett was last seen alive on August 1, 1986, in the company of Werner Kunkel.

Other New Evidence

[¶ 150] The defense has uncovered additional new evidence in the past year, evidence that undermines the foundation of the state's case—that Fassett died on August 1, 1986.

[¶ 151] To provide context for the significance of the new evidence, witness after witness for the state described Fassett's level of extreme intoxication on August 1, 1986. Fassett had reportedly spent the day and evening drinking at two bars, and was described by various state witnesses that evening as "drunk" (Tr. at 550:24–25), "obviously intoxicated" (Tr. at 563:1–3); "wild" (Tr. at 496:11–12) ("when [Fassett] gets drunk, he just gets wild, I guess"); and "staggering" (Tr. at 571:7–11).

[¶ 152] Despite all this, the medical examiner, Dr. Roel Gallo, testified that Fassett's liver specimen was negative for alcohol. But that begs the question: if Werner killed the highly intoxicated Fassett the night of August 1st, how was this possible? With carefully crafted questions to Dr. Gallo, the state sought to assuage any concerns the jury may have had on this subject:

> Q: The issue of the liver sample being negative for alcohol, how much of a liver was left to get a sample of?
> A: All that remained of the liver, as well as any other internal organs, were simply these amorphous masses that coalesced together. As I've stated, not only was there severe decomposition of soft tissue surrounding the body comprising skin and underlying fat and muscle, but that some decomposition was also evident within the body cavities and involving all internal organs.
> Q: Could you tell what part of the liver this was at all?
> A: No.

(Tr. at 1076:13–24.) Having "cleared" that up, there was no further discussion from the state or the defense of the issue.

[¶ 153] The jury was thus left with the impression that the liver toxicity evaluation was invalid and meaningless, because decomposition affected Dr. Gallo's ability to determine which tissue was liver tissue, and because Dr. Gallo could not tell which part of the liver he had taken the sample from.

[¶ 154] While the issue of liver toxicity was not specifically raised and pleaded as a formal post-conviction claim, the matter ended up being discussed sometime during the proceeding. The Court referenced the issue in its order, noting as follows:

> For example, although the defendant correctly points out that that the pathologist failed to find the presence of alcohol in what was left of Gilbert Fassett's liver, the petitioner fails to bring forward evidence that considering the putrefied state of the soft tissues surrounding the liver, that evidence of alcohol at that stage of decomposition could have been determined. Simply raising the question at this post conviction state is insufficient to meet any burden required of the petitioner.

Index No. 272 at 8, Finding of Fact 19.

[¶ 155] The new evidence presented with this petition shows that, even considering the purified state of the soft tissues surrounding the liver, evidence of alcohol at that stage of decomposition ***could*** have been determined.

[¶ 156] Dr. Gallo was a resident when he performed Fassett's autopsy, and he recently retired after a long career in anatomic and clinical pathology. Declaration of Roel Gallo, MD, ¶ 1.

[¶ 157] Dr. Gallo recalls the autopsy he performed on Fassett, and the questions posed to him by the state at Werner's trial. As for his trial testimony, and the questions it left unanswered, Dr. Gallo states as follows:

> Had I been asked, however, I would also have testified that even though there was decomposition within the body cavities, I could determine based on gross inspection which tissue was liver tissue. I am confident that the tissue subjected to toxicological evaluation in this case was indeed liver tissue.
>
> Moreover, had ai been asked, I would have explained that for purposes of a toxicologic evaluation, it does not matter which part of the liver was used. Any part of the liver should yield the same results with regard to the presence or absence of alcohol.

Id. at ¶¶ 7–8.

Dr. Gallo further states as follows:

> Putting aside how general decomposition might impact the presence or absence of alcohol in the liver over time, I believe that the liver toxicology evaluation in this case was valid.

Id. at ¶ 9.

[¶ 158] It is reasonable, however, for Dr. Gallo to put aside the issue of if and how general decomposition might impact the presence of alcohol in the liver over time, as his 30+ year career was in anatomic and clinic pathology, not forensic pathology. In other words, he did not make a career out of examining dead bodies.

[¶ 159] But Dr. Lindsey Thomas did. Dr. Thomas has 36 years of experience as a forensic pathologist, and has performed more than 5,000 autopsies. Declaration of Lindsey Thomas, MD, ¶ 1. After reviewing Dr. Gallo's September 14, 2024 Declaration, Dr. Gallo's trial testimony, and the autopsy report, Dr. Thomas states as follows:

> Based on my experience as a forensic pathologist, I am not surprised that Dr. Gallo was able to identify liver tissue in the autopsy in this case, despite the state of decomposition of Mr. Fassett's body. Even where there is advanced decomposition within the body cavity, a pathologist can often identify on gross inspection which tissue is liver tissue.
>
> I agree with Dr. Gallo's conclusion that it does not matter which part of the liver is used for purposes of a liver toxicity evaluation. If there was alcohol present in the system at the time of death, even if the body has been decomposing for several days or weeks, the liver toxicology evaluation would still reflect the presence of alcohol.

> Based on this, assuming the accuracy of the assertions in Dr. Gallo's Declaration, ***it is my opinion that Gilbert Fassett did not have any detectable amount of alcohol in his system at the time of his death.***

Id. at ¶¶ 3-6 (emphasis).

[¶ 160] This new evidence further undermines the foundation for the State's case—that Werner killed an intoxicated Fassett on the night of August 1, 2024. If Drs. Gallo and Thomas are correct, then Werner Kunkel is innocent of the murder of Gilbert Fassett.

[¶ 161] As discussed below, this constitutes significant new evidence, never before presented or heard, requiring vacation of the conviction or sentence in the interest of justice under N.D. Cent. Code § 29-32-1.01(c). Alternatively, if the state had discussed these questions with Dr. Gallo before trial (which would explain why the state did not ask these questions), then Dr. Gallo's responses were exculpatory evidence under *Brady* that should have been disclosed to the defense. Moreover, to the extent the information was available to defense counsel and could/should have been discovered with a proper investigation, the failure to pursue and present these issues to the jury, or to the previous post-conviction court, was ineffective assistance of counsel. Under any scenario, the fact that this crucial information was kept from the jury deprived Werner of his right to a fair trial.

[¶ 162] In addition to the new pathology evidence, Kunkel has also obtained new information from state's witness Karen Azure. First, Azure confirms that Mel Brodell owned Mel's Corner Bar in 1986, that he spent a lot of time in the bar, and that he was familiar with many of the regular customers, including Gilbert Fassett. Declaration of Karen Azure, ¶ 3.

[¶ 163] While Azure no longer remembers when she last saw Fassett at Mel's Corner Bar, she does recall one significant detail, one that does not appear in her previous disclosed pretrial statements or in her trial testimony:

> I do remember that the last time I saw Gilbert Fassett at Mel's Corner Bar before he was killed, Gilbert told me as he was leaving that he was going to go and visit his girlfriend, who was living in another city, either Fargo or Grand Forks.

Id. at ¶ 5.

[¶ 164] While there is now some question about when Betty Lou Whitehead moved to Fargo, there is no question that as of the afternoon of August 1st, she had not yet left Devils Lake and was not in fact "living in another city." Like the suppressed evidence from Mel Brodell, Kelly Bednardz, and Byron Anderson, and like the new pathology evidence that Fassett was not intoxicated at the time of his death, the new evidence from Azure further vitiates the state's timeline.

[¶ 165] If Azure's statement—or if any of the evidence presented above—is accurate, then Werner is innocent of the murder of Gilbert Fassett.

POST-CONVICTION CLAIMS

[¶ 166] Werner Kunkel requests post-conviction relief under N.D. Cent. Code. § 29-32.1-01(1)(a) because his conviction was obtained in violation of the laws or the Constitution of the United States and/or the laws or Constitution of the State of North Dakota. Specifically, the conviction was obtained in violation of his right to disclosure of exculpatory evidence under the Fourteenth Amendment of the United States Constitution and Article I, Section 12 of the North Dakota Constitution. *See Brady v. Maryland*, 373 U.S. 83 (1963).

[¶ 167] Werner also requests post-conviction relief under N.D. Cent. Code § 29-32-1.01(e) because evidence, neither previously presented nor heard, exists that requires vacation of the conviction or sentence in the interest of justice.

[¶ 168] In the alternative, Werner is entitled to relief under N.D. Cent. Code § 29-32.1-01(1)(a) because of violations of the right to effective trial and/or post-conviction counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, Section 12 of the North Dakota Constitution. *See Bahtiraj v. State*, 2013 ND 240, ¶ 8.

[¶ 169] Werner further requests post-conviction relief under N.D. Cent. Code § 29-32.1-01(a) because by losing or intentionally destroying critical evidence in bad faith, the state violated his due process rights under *Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988).

I. Werner's conviction is tainted by the state's suppression of material exculpatory evidence.

[¶ 170] As set forth in great detail above, the state suppressed critical evidence that would have rendered impossible the story on which it persuaded the jury to convict Werner.

[¶ 171] The suppression by the prosecution of evidence favorable to an accused violates due process "where the evidence is material to either guilt or punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *City of Grand Forks v. Ramstad*, 2003 ND 41, ¶ 9.

[¶ 172] Moreover, the prosecution's disclosure obligation under *Brady* extends even to "evidence known only to police investigators and not to the prosecutor," and "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case …" *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995).

[¶ 173] Suppression of material exculpatory evidence violates due process "irrespective of the good faith or bad faith of the prosecution." *State v. Kolstad*, 2020 ND 97, ¶ 19.

[¶ 174] To obtain relief for a *Brady* violation under North Dakota precedent, Werner must show that (1) the government possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the evidence; and (4) a reasonable probability exists that the outcome of the proceedings would have been different if the evidence had been disclosed. *Kolstad*, 202 ND 97 at ¶ 10.

[¶ 175] To obtain relief under *Brady* as applied by the U.S. Supreme Court, the test is simpler:

> The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution … Evidence qualifies as material when there is "any reasonable likelihood it could have "affected the judgment of the jury." To prevail on his *Brady* claim, Wearry need not show that he "more likely than not" would have been acquitted had the new evidence been admitted. He must show only that the new evidence is sufficient to "undermine confidence" in the verdict.

Wearry v. Cain, 577 U.S. 385, 392 (2016). Moreover, the U.S. Supreme Court has made clear that the prosecution's affirmative duty of disclosure arises regardless of whether defense counsel has requested the material. Thus, "regardless of request,

favorable evidence is material, and constitutional error results from its suppression by the government if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Whitely*, 514 U.S. at 432.

[¶ 176] Under either formulation, Werner is entitled to relief.

A. The evidence was favorable to Werner.

[¶ 177] The suppressed evidence involves multiple documented witness accounts of sightings of Gilbert Fassett after the state said he had already been killed by Werner Kunkel. Mel Brodell claimed to have interacted with Fassett on August 6, 1986, at a time when Werner was incarcerated. Kelly Bedardz claimed to have also seen Fassett on August 6, 1986. Byron Anderson claimed to have been with Gilbert Fassett and Betty Lou Whitehead at the very moment when Werner and Trina Poppenhagen were being pulled over by Officer Klefstad, at which time the state insisted to the jury Kunkel must have already killed Fassett. The Spencer Hellickson memo shows that, to the extent Whitehead's statements conflicted with Anderson's, there were reasons to doubt Whitehead.

[¶ 178] The North Dakota Supreme Court has explained: "Evidence is favorable to the defense if it is exculpatory or it is impeaching. Exculpatory evidence

is evidence tending to establish criminal defendant's innocence." *Kolstad*, 2020 ND 97, at ¶ 20.

[¶ 179] The suppressed evidence here is both independently exculpatory and impeaching. It tends to establish Werner's innocence, because if Gilbert Fassett was alive after August 1, 1986, then Werner is innocent. But the suppressed evidence could also have been used to impeach the trial testimony of various state's witnesses, including Kelly Bednardz, Betty Lou Whitehead, Tim Rolland, and Karen Azure, and others.

B. Kunkel did not possess the evidence and could not have obtained it with reasonable diligence.

[¶ 180] As discussed above, the evidence was not contained anywhere in the defense files, not having been obtained through pretrial discovery disclosure by the prosecution or any other means. The defense did not see this material until after the state provided access beginning in 2023.

[¶ 181] Nor could this material have been obtained through the exercise of reasonable diligence. As explained above, the state repeated ad nauseam that no one had reported seeing Fassett after August 1st, to the point of calling the very idea "frivolous." Neither Kunkel nor his counsel had any reason to know that Mel Brodell had told investigators about seeing Fassett on August 6th. Likewise, neither Kunkel nor his counsel had any reason to know that a National Guardsman who

otherwise had no relationship to the cast of characters in this case happened to give Fassett a ride on the morning of August 2nd, much less that his account was supported by the suppressed records from the Office of the Adjutant General. Again, neither Kunkel nor his counsel had any reason to know that Kelly Bednardz had, contrary to what he testified to at trial, reported to the BCI about seeing Fassett on August 6th. Finally, without the suppressed evidence of Bryon Anderson, neither Kunkel nor his counsel had any reason to know that Whitehead's claim to having said goodbye to Fassett and leaving for Fargo on August 1st was questionable and could have been fodder for cross-examination.

C. The prosecution suppressed the evidence.

[¶ 182] Under this prong, the state suppresses evidence when it "collects and preserves evidence, but withholds that evidence from the defendant requests it, or when it otherwise becomes material to the defense." *State v. Steffes*, 500 N.W.2d 608, 612 (N.D. 1993). Here, the state collected the contested evidence well before the trial in this case, and preserved the evidence through 2023, when it was finally shared with the defense (per the defense's request). And, as discussed below, the evidence was, from the very outset, material to the defense.

D. A reasonable probability exists that the outcome of the case would have been different had the evidence been disclosed.

[¶ 183] Werner has already laid out in excruciating detail why this particular evidence is ***more than sufficient*** to undermine confidence in the jury's guilty verdict. In short, the centerpiece of the state's case was the notion that no one, ***absolutely no one***, saw Gilbert Fassett alive after he was with Werner on the evening of August 1, 1986.

[¶ 184] This evidence and argument were so crucial to the state's case because no physical evidence connected Werner to the crime scene, and because the "confessions" were inconsistent with each other and with known facts.

[¶ 185] Any doubt about the centrality of this issue to the state's case is belied by the sheer number of references made to it at trial, and especially in the state's summation. In a trial that lasted only one week, the state made or elicited no fewer than ***20 direct references*** to Fassett not being seen alive after being with Werner the evening of August 1st.

[¶ 186] Moreover, testimony from these suppressed witnesses would likely have been credible and persuasive. Mel Brodell's account is detailed and was provided within two weeks of the events he describes. Byron Anderson's account was even more detailed and, as set forth above, has rock solid indicia of reliability,

both as to what he observed and, most importantly, when he observed it. These are independent witnesses with no reason to lie for anyone.

[¶ 187] Moreover, recall that even the state's forensic witnesses, Drs. Gallo and Larson, each provided a time-of-death window that—while being earlier than that provided by Dr. Haskell in post-conviction—did not exclude the possibility of Fassett dying later than August 1, 1986. This is why the state, and the post-conviction Court, noted that the fact witness testimony (Fassett not seen alive after August 1st) was more damning than the forensic testimony (opining based on decomposition and maggots that Fassett died no later than August 3rd or 4th).

[¶ 188] Indeed, the fact that the suppressed evidence might have made a difference is confirmed by the state's response to Kunkel's previous petition for postconviction relief. The state successfully opposed a new trial for Kunkel by arguing the issue at the heart of the suppressed evidence:

> What is significantly absent [from Werner's claims] is the fact that consistently by everyone at trial, ***the last person seen with Gilbert Fassett was the Defendant***." Ms. Betty Jaeger, who worked at Mel's Corner Bar in Devil's Lake, saw Gilbert Fassett in the bar on Friday, August 1, 1986, ***and after he left, never saw Gilbert again*** … He was also seen in the bar by Tim Rolland and Karen Azure, at the same time. ***After Gilbert left the bar, he was never seen again by them***. Mr. Kelly Bednarz [sic] was interviewed, and indicated that on August 1, 1986, he was working at the Sportsmen's Den … About 9:00 p.m. that night, ***he saw the victim in the Sportsmen's Den Bar and thereafter never saw him alive again*** … Mr. Nelson took particular note that the Defendant was trying to get the victim out of the bar. After the victim was removed

> from the bar, ***Mr. Nelson never saw the victim alive again*** … After [Werner and Fassett] left [the Cavanaugh residence on August 1st] ***no one saw the victim alive again***.

Index No. 225 at 9–10 (emphasis); *see also* Index No. 266 at 3 ("What is significant is the last time Gilbert Fassett was alive, he was in with [sic] the Defendant. He was with the Defendant in [his] car. The opportunity for the Defendant to murder Gilbert Fassett was quite present, as he was the last one seen with the victim alive.").

[¶ 189] The Court took the state at its word, denying relief in part because: "testimony by numerous witnesses who stated that they saw Gilbert Fassett on August 1, 1986, but did not see him after that date," and "that neither at trial nor at the post-conviction hearing, witnesses were offered to show that Gilbert Fassett was seen after August 1, 1986." Index No. 274 at 8, Finding of Fact 18.

[¶ 190] If the absence of witness reports seeing Fassett alive after August 1st was a key factor in putting Werner behind bars and in keeping him there for the past 30 years, the presence of such reports is more than sufficient to undermine confidence in the verdict.

II. New evidence requires vacating the conviction in the interest of justice.

[¶ 191] Post-conviction relief is appropriate where "[e]vidence, not previously presented and heard, exists requiring vacation of the conviction or

sentence in the interest of justice." N.D. Cent. Code § 29-32.1-01(1)(e). A petitioner seeking such relief must show that (1) the evidence was discovered after trial, (2) the failure to learn about the evidence before the plea was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal. *Syvertson v. State*, 2005 ND 128, ¶ 9.

[¶ 192] Because this claim is being raised more than two years after conviction, however, the North Dakota Supreme Court has held that prong #4 instead requires Kunkel to "establish that the petitioner did not engage in the conduct for which the petitioner was convicted." *Bridges v. State*, 2022 ND 147, ¶ 11, (citing N.D. Cent. Code § 29-32.1-01(3)(a)(1)).

[¶ 193] Here, the forensic evidence from Drs. Roel Gallo and Lindsey Thomas, as well as Karen Azure's Declaration, constitute evidence neither previously presented nor heard that establishes that Fassett did not die the night of August 1st, and thus that Werner did not engage in the conduct for which he was convicted.

A. The evidence was discovered after the trial.

[¶ 194] The information disclosed in the declarations was not discovered until late in 2024, when post-conviction counsel was able to track down

and meet with Dr. Gallo, then use the information obtained from him to secure an additional expert opinion from forensic pathologist Lindsey Thomas, MD. This did not come to fruition until September 2024.

[¶ 195] Similarly, the new evidence from Karen Azure was not discovered until post-conviction counsel was able to find and speak with her, which led to the recollections stated in her signed Declaration on August 2, 2024.

B. Failure to learn about the evidence was not the result of lack of diligence.

[¶ 196] Werner Kunkel has been behind bars for nearly 30 years and lacks investigation resources, not to mention forensic pathology training. Absent a non-profit entity being willing to investigate his case *pro bono*, Kunkel would never have been able to contact or get expert review by pathologists, nor track down and interview witnesses.

[¶ 197] Even the state was apparently unaware until now that expert opinion evidence—including from the medical examiner who testified at the original trial—could establish Fassett's sobriety at the time of his death. Had the state been in possession of such evidence, failing to disclose it to the defense was a violation of the state's *Brady* obligations, also justifying relief. The same is true of Karen Azure's statement. It appears that even law enforcement and the state did not realize (despite multiple interviews with Azure) that Fassett told her when he left Mel's that he was

going to travel to visit Doll in another city. If Azure had made this statement, failing to disclose that would also have violated *Brady*, justifying relief. In any event, if the state with its resources never uncovered this evidence, it cannot in good faith argue a lack of diligence on Werner's part.

[¶ 198] The facts here are very different from cases in which the North Dakota courts have found a lack of diligence in connection with this claim. *See, e.g.*, *Syvertson v. State*, 2005 ND 128, ¶ 10 (lack of diligence where "newly discovered evidence" was "publicly disseminated in 1992 and easily accessible"); *Kovalevich v. State*, 2019 ND 210, ¶ 19 (lack of diligence in finding new evidence where defendant was "aware of the receipts and had complete access to the receipts before trial"); *State v. Atkins*, 2019 ND 145, ¶ 20 (lack of diligence in obtaining text messages in possession of defendant's own mother); *compare with Wacht v. State*, 2015 ND 154, ¶ 13, (diligence requirement "arguably" established where new evidence was third party statements about admissions by co-defendant).

[¶ 199] To the extent the Court finds a lack of diligence on the part of defense counsel (both trial and post-conviction) and imputes such lack of diligence to Werner, then the lack of diligence constituted ineffective assistance of counsel, which also justifies post-conviction relief.

C. The new evidence is material to the issues at trial.

[¶ 200] As detailed above, the question of time of death is unquestionably material, as it goes to the heart of the state's case against Werner. Any evidence relating to whether or not Fassett died on August 1st is critical to a determination of Werner's guilt or innocence.

[¶ 201] There is no dispute whatsoever that on the night of August 1st, Fassett was intoxicated. The Declarations of Drs. Gallo and Thomas show not only that Fassett was not intoxicated when he died, but that he also lacked a detectable trace of alcohol in his system. This evidence therefore evidence bears directly on the state's case against Werner.

[¶ 202] Similarly, there is no dispute whatsoever that as of the afternoon of August 1, 1986, Betty Lou Whitehead was still in Devils Lake, and had not moved to Fargo. Karen Azure's Declaration—particularly the assertion that Fassett told her when he left Mel's that he planned to go out of town to visit his girlfriend, who had moved—bears directly on the state's claim that no witnesses saw Fassett alive after August 1st.

D. The weight and quality of the new evidence would likely result in an acquittal at trial, and it establishes that Werner is innocent.

[¶ 203] The new evidence also satisfies this requirement. In contrast to the imprecision of estimating time of death through entomology (all the forensic

experts could only provide a ranges spanning multiple days), liver toxicology is well understood. The issue raised by the declarations is not how much alcohol was in Fassett's system when he died—instead, the issue is that there was no measurable amount ***at all***. So unless Drs. Gallo and Thomas are wrong, or all the witnesses describing Fassett's August 1st drinking and intoxication level were lying, this new evidence (consistent with and supported by the new statement from Karen Azure, not to mention the *Brady* evidence identified above) establishes that Fassett died after August 1, 1986, and thus that Werner Kunkel is innocent of the crime for which he was convicted.

III. Defense counsel was ineffective.

[¶ 204] The Sixth and Fourteenth Amendments of the United States Constitution, and Article I, Section 12 of the North Dakota Constitution, guarantee criminal defendants effective assistance of counsel. *Bahtiraj*, 2013 ND 240 at ¶ 8.

[¶ 205] In order to prevail on a post-conviction claim for ineffective assistance of counsel, the petitioner must (1) "show that counsel's representation fell below an objective standard of reasonableness, and (2) show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at ¶ 9 (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

A. Counsel's representation fell below an objective standard of reasonableness.

[¶ 206] If the state suggests—or the Court finds—the documentation relating to Mel Brodell, Kelly Bednardz, and Byron Anderson were in fact disclosed to the defense, then the failure to investigate and/or use this evidence would be ineffective assistance of counsel requiring that the conviction be vacated.

[¶ 207] That's because defense trial counsel performed no investigation of Byron Anderson, Mel Brodell, or Kelly Bednardz's account of seeing Gilbert and five other people headed to a party on August 6, 1986, or of evidence following up on Hellickson's observation that Betty Lou Whitehead may not have gone to Fargo when she said she did. Defense trial counsel did not bring up any of these matters in the cross-examination of any witness, nor did defense trial counsel call Brodell or Anderson to testify at trial.

[¶ 208] If indeed these possibilities were made known to the defense through discovery disclosures, there is no conceivable strategy that would justify these failures. Attorneys are only able to make legitimate strategic decisions after "a thorough investigation of law and facts relevant to plausible options." *Strickland,* 466 U.S. at 690–91. Under *Strickland*, "counsel has a duty to make reasonable investigations …" *Id.*

[¶ 209] In addition, defense trial counsel and post-conviction counsel were ineffective for failing to properly investigate the forensic pathology evidence. Trial counsel had enough awareness to ask Dr. Gallo about the liver testing negative for alcohol, but not enough awareness—because he did not consult a pathologist—to elicit the testimony contained in Drs. Gallo's and Thomas's Declarations: that Dr. Gallo could tell from gross inspection that he had liver tissue, that it does not matter which part of the liver it was, that the liver toxicity evaluation was valid, that the body ceases metabolizing alcohol at death, and that Fassett therefore did not die on the night of August 1st. Again, there is no conceivable strategic justification for failing to explore and present this evidence.

[¶ 210] To the extent the Court finds that the ineffective assistance claim related to liver toxicity was already raised in Werner's 2004-05 previous post-conviction case, post-conviction counsel was also ineffective for failing to properly investigate and present the claim.

[¶ 211] In North Dakota, "claims of ineffective assistance of post-conviction counsel may be raised in successive post-conviction proceedings any may be an excuse for an applicant's failure to raise an issue in a prior proceeding." *Coppage v. State*, 2011 ND 227, ¶ 11. Such claims are also governed by the *Strickland* standard. *Id.* at ¶ 15.

[¶ 212] To the extent the issue is considered to have been raised, the Court's 2005 Order denying post-conviction relief makes clear that post-conviction counsel committed the same error as trial counsel:

> For example, although the defendant correctly points out that that the pathologist failed to find the presence of alcohol in what was left of Gilbert Fassett's liver, ***the petitioner fails to bring forward evidence that considering the putrefied state of the soft tissues surrounding the liver, that evidence of alcohol at that stage of decomposition could have been determined***. Simply raising the question at this post-conviction state is insufficient to meet any burden required of the petitioner.

Index No. 272 at 8, Finding of Fact 19.

[¶ 213] Again, the Declarations of Drs. Thomas and Gallo answer the key unanswered question identified by the Court. Thus, to the extent the Court declines to consider the pathology opinions as "new evidence" based on lack of diligence, then the lack of diligence establishes ineffective assistance by Werner's previous attorneys.

B. Had counsel been effective, a different result was reasonably probable.

[¶ 214] As set forth repeatedly above, the timing of Fassett's death was the key to both the prosecution and defense's case. The evidence presented for the first time in this petition establishes that Werner could not and did not murder Gilbert Fassett as claimed by the state. This goes well beyond the *Strickland* standard

of a "reasonable probability of a different result." 446 U.S. at 694. In light of the evidence now presented, no fair-minded juror could fail to entertain reasonable doubt as to Werner Kunkel's guilt.

IV. The state violated Werner's due process rights by losing or destroying important physical evidence.

[¶ 215] By losing or intentionally destroying critical evidence in bad faith, the state violated Kunkel's due process rights under *Youngblood*, 488 U.S. at 57–58.

[¶ 216] Under North Dakota law, "once evidence has been collected, the State may violate a defendant's due process rights if it fails to preserve the evidence." *State v. Schweitzer*, 2021 ND 109, ¶ 3.

[¶ 217] Here, the state claims that Fassett was stabbed more than 100 times. The crime was extremely violent and was carried out with a high degree of physical intimacy. It is therefore highly plausible that traces of the perpetrator's DNA remain on Fassett's clothing or under his fingernails.

[¶ 218] The methods for extracting DNA and developing profiles from crime scene evidence have become increasingly sophisticated and discerning over the years, though even at the time of Werner's 1995 trial, nuclear DNA technology was being used forensically.

[¶ 219] On information and belief, physical evidence from the crime scene, including Gilbert Fassett's clothing, which was in the trunk of Aaron Rash's

car in August 1995, has since been intentionally destroyed by state or federal law enforcement actors in violation of local, state, and federal policies and practices.

[¶ 220] Werner requests an order permitting discovery into the disposal of or current location of any crime scene evidence from the case.

CONCLUSION

The evidence presented for the first time in this petition is more than sufficient to undermine confidence in the integrity of Werner Kunkel's conviction. In opposing relief for Kunkel in 2004, the state asserted, "as argued at trial, innocent people do not confess to seven different people that they killed someone." Index No. 266 at 16. While Kunkel denies confessing to anyone, the state's statement is simply not true. In the most recent exoneration obtained by the Great North Innocence Project, the organization now assisting Kunkel, two brothers—Robert and David Bintz—were convicted of a 1987 murder. There, as here, there was no physical evidence to connect them to the crime scene, and the case went cold for nearly a decade. There, as here, charges were eventually filed based on confessions later reportedly made to multiple parties, most of them prison inmates. Despite these "confessions," in September 2024 the Bintz brothers were released from prison after DNA testing of the crime scene evidence identified the real perpetrator.[11] The

[11] *See* story on Bintz brothers here.

Bintz brothers each spent 25 years in prison. Werner Kunkel has now been down for 30 years. Gilbert Fassett was a beloved young man who did not deserve to die. But neither does Werner Kunkel deserve to die in prison for a crime he didn't commit.

Accordingly, Werner Kunkel respectfully requests the following relief under N.D. Cent. Code §§ 29-32.1-11(3) and 29-32-1-08:

a. Vacate the Criminal Judgment;

b. Order a new trial or, alternatively, dismissal of the charges;

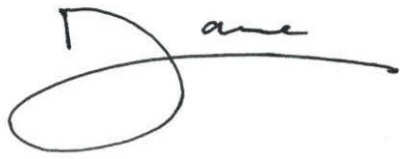
c. Order that discovery be had to the extent the State claims it disclosed the *Brady* evidence before trial; and

d. Grant any other relief deemed appropriate by the Court.

Dated: January 10, 2025

Respectfully submitted,

THE GREAT NORTH INNOCENCE PROJECT



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