

Fassett “on or about the 1st day of August, 1986.”⁴ See Case No. 04935, Doc. No. 43. A jury trial was held in the original matter from August 15, 1995, through August 22, 1995. Attorney Todd BuriANEK (“Attorney BuriANEK”) represented Kunkel during the trial.

[¶3] At the 1995 trial, the State called as witnesses Solomon Peltier, James Yankton, Betty Jaeger, Tim Rolland, Karen Azure, Kelly Bednardz, Charles Nelson, Barry Johansson, Barbara Brandt, Betty Lou Whitehead, Kenneth Larson, Clarence Greene, Francis LaForte, William Cavanaugh, Gertrude Cavanaugh, Stuart Klefstad, Peter Belgarde, Jr., Chris Anderson, Mark Demarce, Bradley Jarvey, Lori Crist, Sandra Austin, Rodney Maier, Shelly Rutten, Nicholas Elston, Fred Nakken, Albert Rose, Christopher Funkhouser, Dr. Roel Gallo, Dr. Omer Larson, and Aaron Nash. Doc. No. 123. The Defense called Robert Ricard and Tammy DeJong. Doc. No. 123.

[¶4] On August 22, 1995, the jury found Kunkel guilty of the sole count of murder. See Case No. 04935, Doc. No. 197. On September 26, 1995, Kunkel was sentenced by the Court to life in prison. See Case No. 04935, Doc. No. 206.

Case No. 36-95-K-04935, it will be cited as “Case No. 04935, Doc. No. _”). All other references to documents will be reflective of those filed in the present post-conviction matter. Additionally, “P.C. Tr. at _” indicates references to the post-conviction trial testimony. “Tr. at _” indicates references to the 1995 trial testimony.

⁴ Prior to trial in the original proceeding, the State was ordered to respond to Kunkel’s Motion for Bill of Particulars to state the exact date, time, and place to which the State alleged Kunkel murdered Fassett. The State responded to the Bill of Particulars as follows:

- A. The exact date said murder took place would have been in the late evening hours of August 1, 1986, or the very early morning hours of August 2, 1986.
- B. The precise time of day the murder was committed was between 10:30 p.m. on August 1, 1986 and 1:10 a.m. on August 2, 1986.
- C. The specific place in Ramsey County where the crime occurred would have been either in Lori Crist’s house which the State understands to be 623 6th St. in Devils Lake, or in rural Ramsey County near Lakewood, which is an unincorporated area of section of subdivisions. The exact place in rural Ramsey County is not determined, however several witnesses will testify that it took place near “his mother’s home” which the State understands to be Werner Kunkel’s mother’s home which is near Acorn Ridge, South of Devils Lake along Highway 20.
- D. The cause of death of Gilbert Fassett will be alleged to [be] by stabbing.

Doc. No. 125.

[¶5] On October 5, 1995, Kunkel appealed his conviction to the North Dakota Supreme Court. See Case No. 04935, Doc. No. 208. Kunkel argued on appeal the State presented insufficient evidence to sustain the guilty verdict, including a lack of physical evidence and a lack of eyewitness testimony. State v. Kunkel, 548 N.W.2d 773, 774 (N.D. 1996). Kunkel also argued the evidence did not support a finding by the jury that Fassett’s murder took place in Ramsey County. Kunkel, 548 N.W.2d at 774. The Supreme Court rejected Kunkel’s arguments and affirmed the conviction on both grounds. Id. As to the lack of physical evidence and eyewitness testimony claim, the Supreme Court found:

After reviewing the evidence in the record in the light most favorable to the verdict, we conclude the jury could reasonably have found the following facts: Kunkel and Fassett were together for a significant amount of time on August 1, 1986, the last day Fassett was seen alive; Fassett was carrying a great deal of money that day; when last seen alive around 10:30 p.m. on August 1, Fassett was with Kunkel; Kunkel was nervous and behaving strangely at the time; Fassett probably died sometime in the late evening of August 1 or early morning of August 2.

The record also shows that Kunkel made several admissions implicating himself in Fassett’s killing. Christopher Anderson testified Kunkel showed him a ring that had belonged to Fassett, and said “You see this? You’re going to get the same thing that Gilbert got.” Mark Demarce testified that Kunkel admitted he killed and mutilated Fassett and dumped Fassett’s body on the Fort Totten reservation. Sandra Austin testified that Kunkel admitted “stabbing [Fassett] over and over and over and over.” Rodney Maier and Shelley Rutten testified that Kunkel admitted fighting with Fassett and said “the better man won.” Nicholas Elston testified that Kunkel admitted stabbing Fassett with the help of a third person. Fred Nakken testified that Kunkel admitted holding Fassett while a third person stabbed Fassett.

Id. at 773-74.

[¶6] The Supreme Court also found there was substantial evidence to support the jury’s finding that the murder took place in Ramsey County. Id. at 774. The Supreme Court noted:

Under our law, “[p]rosecution of a crime is authorized in any county where part of the offense occurred.” State v. Martinsons, 462 N.W.2d 458, 459 (N.D.1990); see N.D.C.C. § 29-03-04. Fassett’s body was found in Benson County. There is evidence in the record, however, indicating that Fassett was killed in Ramsey County. Demarce testified that Kunkel admitted killing Fassett in front of a bar in Devil’s Lake and dumping the body at the reservation. Austin testified that

Kunkel admitted killing Fassett in the Lakewood Park area near Devil's Lake and transporting the body to dump it. Elston testified that Kunkel admitting killing Fassett in front of a bar in Devil's Lake. Nakken testified that Kunkel admitted killing Fassett and driving "out to Fort Totten to get rid of his body."

Id.

ii. 2004 Post-Conviction Relief Petition and Appeal

[¶7] Kunkel filed his first post-conviction relief petition on November 24, 1997. See Case No. 04935, Doc. No. 213. Kunkel's first petition asserted four grounds for relief, including (1) prosecutorial misconduct, (2) ineffective assistance of counsel, (3) newly discovered evidence, and (4) jury misconduct. Id. The Court determined Kunkel's request was inadequate as a petition and instead, treated it as a motion for appointment of counsel. Case No. 04935, Doc. No. 214. On November 24, 1997, the Court assigned Attorney Douglas Broden ("Attorney Broden") as post-conviction counsel for Kunkel. Id.

[¶8] A letter dated May 25, 1999, from Attorney Broden to the Court indicates Attorney Broden was having difficulty in working through the case with Kunkel due to the fact that Kunkel was then imprisoned in Wyoming. Case No. 04935, Doc. No. 215. The Court authorized a complete copy of the Clerk's file to be copied and mailed to Attorney Broden. Id. On March 14, 2000, the Court wrote to Attorney Broden to request that he give a status update on the case. Case No. 04935, Doc. No. 216. On March 15, 2000, the Court directed the Clerk to administratively close out the file because no formal petition for post-conviction relief by Kunkel through Attorney Broden had been filed at that point. Case No. 04935, Doc. No. 217.

[¶9] On April 29, 2004, Kunkel filed a formal petition through Attorney Broden asserting three grounds for post-conviction relief, including (1) ineffective assistance of counsel, (2) State's failure to disclose exculpatory evidence as required by Brady v. Maryland, and (3) violation of Kunkel's rights as a foreign national under the Vienna Convention. Case No. 04935, Doc. No. 218.

Specifically, Kunkel argued his trial counsel, Attorney Burianek, was ineffective because he “failed to obtain the services of a forensic entomologist to review the findings of Omer Larson, Ph.D., a zoologist who evaluated the age and condition of various insects, specifically blowfly maggots, found on and within the body of the victim, and who offered expert testimony at trial regarding his opinion as to the likely time of death.” Id. at p. 2. He further argued he was denied effective assistance of counsel when Attorney Burianek failed to object to the opinion testimony of Aaron Rash, as he argued Mr. Nash was not qualified to give expert opinion testimony on the fire of Kunkel’s automobile. Id. at p. 7. He also asserted Attorney Burianek was ineffective by failing to obtain an expert in automobile fires for his case. Id. As an additional basis for ineffective assistance of counsel, Kunkel asserted Attorney Burianek was ineffective by failing to object to the testimony of Peter James Belgarde, Jr. “as an expert in the fields of crime scene investigation and of tracking, when Mr. Belgarde was neither qualified as an expert in these areas, and in fact admitted that he was not an expert.” Id.

[¶10] Kunkel next asserted he was denied due process because “the prosecuting attorneys failed to disclose potentially exculpatory evidence within their possession and knowledge as is required by Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.” Id. at p. 7. In this specific claim, Kunkel maintained it related to an “oral statement taken under oath of Clifford Monteith, which was taken in an unrelated case on January 31, 1992, prior to his trial.” Id. at p. 8. He contended:

In that sworn statement, Mr. Monteith related information regarding the murder of Gilbert Fassett by someone other than the petitioner. *See* Sworn Statement of Clifford Monteith dated January 31, 1992, pp. 9 - 15, a copy of which is attached as Exhibit Q. This sworn statement was taken in the case of United States vs. Grey Bear, et al. *See* Cover Sheet for United States District Court Docket #CR 85-69-10, a copy of which is attached as Exhibit R. Lynn Crooks, an Assistant United States Attorney, is one of the attorneys for the United States who was directly involved in that case. Mr. Crooks also acted as Assistant States Attorney for Ramsey County during the trial of the petitioner's case. Because this information was potentially exculpatory, the assistant state’s attorney had an obligation to turn it over to the

defense to allow the defense to make proper investigation, even if it is rejected by the government as being unreliable or inadmissible, as it could lead to potentially admissible and exculpatory evidence. The government failed to disclose this evidence to the petitioner's trial counsel. *See* Affidavit of Todd Burianek, a copy of which is attached hereto as Exhibit S.

Id. at p. 8.

[¶11] Kunkel lastly argued his rights as a foreign national, a citizen of the Republic of Germany, were violated when the “government failed to notify the German Consulate General of his arrest or to advise the petitioner of his right to access to the German Consulate General in order to obtain the assistance which would have been available to him from the German Consulate General.” Id. at p. 9.

[¶12] The Court held an evidentiary hearing March 2-3, 2005. Kunkel presented the testimony of Dr. Neil Haskell, a forensic entomologist. He also presented testimony of witnesses who testified Kunkel had an alibi.

[¶13] On September 22, 2005, the Court ultimately denied Kunkel’s petition on all grounds. Case No. 04935, Doc. No. 274. The Court determined Attorney Burinaek did not provide ineffective assistance of counsel by failing to call an expert to refute the testimony of Dr. Larson, noting, among other reasons, it was a permissible trial strategy. Id. at p. 3. The Court rejected Kunkel’s remaining ineffective assistance claims, finding the testimony of Peter Belgarde Jr. and Aaron Nash was admissible and went to weight rather than admissibility. Id. at p. 10. The Court ultimately found that even if it were to find the actions or inactions of Attorney Burianek were deficient, Kunkel failed to show he was prejudiced by the same. Id.

[¶14] In rejecting Kunkel’s Brady claim regarding the Clifford Monteith statement, the Court found it was public record, as it was filed in a federal court proceeding, and thus, there was not a Brady violation. Id. at p. 12. The Court further found that “[t]he information contained in the Clifford Monteith sworn statement is hearsay, is speculative and not credible, and it was

appropriate and reasonable for the state to make that determination and not provide it as Brady material.” Id. at p. 12. Furthermore, the Court concluded that the claim by Monteith that another person killed Fassett, including the identity of that person, was a rumor that was well known to Kunkel and his counsel before trial. Id. at p. 13.

[¶15] As for his foreign citizen claim, the Court concluded that Kunkel failed to present evidence that the State had sufficient notice to conclude he was a citizen of the Republic of Germany, and it had an obligation therefore to inform him of his rights under the Vienna Convention. Id. at p. 14. The Court further found that even if Kunkel was required to be informed of these rights, he failed to show he was prejudiced by the failure. Id. The Court ultimately denied all of Kunkel’s claims. Id. at pp. 16-18.

[¶16] Kunkel appealed to the North Dakota Supreme Court. Rummer v. State, 2006 ND 216, 722 N.W.2d 528. Specifically, Kunkel argued his trial counsel:

was ineffective in failing to adequately investigate various scientific evidence . . . inadequately investigated forensic entomological evidence offered by the State to establish the time of Fassett’s death . . . was inadequately prepared to meet that evidence at trial . . . inadequately investigated scientific evidence offered by the State to show that a fire in the defendant’s car occurring several years after the crime was intentionally set and . . . was inadequately prepared to meet that evidence at trial.

Id.

[¶17] The Supreme Court affirmed the district court’s denial of his first post-conviction petition, agreeing with the district court’s analysis and finding Kunkel’s trial representation did not fall below an objective standard of reasonableness. Id. The Supreme Court also agreed there was no Brady violation, noting “Rummer has failed to establish the initial element of a Brady violation in that the sworn statement would have been favorable to Rummer considering what had already been provided and was known at the time of trial” Rummer, ¶ 23. The Supreme Court affirmed the

denial of his last claim on the grounds he “did not raise his claims under Article 36 of the Vienna Convention in his prior criminal trial, or in his previous direct appeal,” as required by law. Rummer, ¶ 28.

iii. 2009 Post-Conviction Relief Petition

[¶18] On October 7, 2009, Kunkel filed a second petition for post-conviction relief (“second petition”). Case No. 95-K-04935, Doc. No. 298. Kunkel asserted as grounds for relief (1) ineffective assistance of counsel on Attorney Burianek for failing to allow his vehicle to be entered into evidence; (2) ineffective assistance of counsel on Attorney Burianek for failing to object to the process used in securing an expert for identification of a dental bone; (3) ineffective assistance of counsel on Attorney Burianek for allowing the victim’s clothing to be transferred improperly from Dr. Roel Gallo to police; and (4) asserting certain witnesses for the State perjured themselves. Id. Attorney Thomas Glass was appointed post-conviction counsel for Kunkel. Id., Doc. No. 303. However, on February 21, 2012, Kunkel moved to withdraw his petition. Id., Doc. No. 374. The Court granted the request and dismissed the petition on February 27, 2012. Id., Doc. No. 376.

iv. Current Post-Conviction Relief Petition

[¶19] Kunkel filed his third and current post-conviction petition on January 15, 2025. Kunkel’s current petition asserts four claims:

1. The State failed to disclose exculpatory evidence entitling him to relief under N.D.C.C. § 29-32.1-01(1)(a) in violation of Brady v. Maryland, 373 U.S. 83 (1963) and the Fourteenth Amendment to the United States Constitution. (“Brady claim”)
2. There is unheard evidence that would require vacation of his conviction under N.D.C.C. § 29-32.1-01(1)(e). (“New Evidence Claim”)
3. His counsel was ineffective, and he was not given a fair trial entitling him to relief under N.D.C.C. § 29-32.1-01(1)(a). (“Ineffective Assistance Claim”)
4. His due process rights were violated when the shirt recovered from Gilbert Fassett’s body, critical evidence, was lost or destroyed in bad faith, entitling him to relief under N.D.C.C. § 29-32.1-01(1)(a). (“Destruction of Evidence Claim”)

Doc. No. 1.

1. BRADY CLAIM

a. Alleged Brady Material

[¶20] Kunkel maintains, and the State denies, that he did not receive four documentary items from the State until January of 2023. These include (1) a statement by Melvin Brodell dated 8/15/1986 (“Melvin Brodell Statement”); (2) an Order from the Office of the Adjutant General dated 7/10/1986 (“OAG Order”); (3) a memorandum from Special Agent Spencer Hellekson dated 10/3/1986 (“Spencer Hellekson Memo”); and (4) a “while you were out” note to Merle Henke regarding Kelly Bednardz dated 8/14/1986 (“WYWO Note”). Doc. Nos. 104, 107, 108, and 115. When discussing all four items collectively, they will be referred to as “alleged Brady material”.

[¶21] The Melvin Brodell Statement was dated 8-15-85⁵ 2:27 p.m. and stated:

I, MEL BRODELL, talked with GILBERT FASSETT on August 6, 1986, at my tavern. GILBERT said he wanted to pay 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

Doc. No. 104.

[¶22] The OAG Order was dated 7/10/1986. Doc. No. 107. The Order stated certain individuals, including Byron Anderson, were to report to annual training in Alabama for fifteen days, with a reporting date of August 2, 1986. Doc. No. 107. Kunkel contends the significance of the OAG Order must be considered with two other documents received in the record, Doc. Nos. 105 and

⁵ At trial, the Trial Prosecutor testified “85” was likely a typographical error, as 1985 would not have made logical sense, given Fasset was murdered in 1986. Doc. No. 127, P.C. Tr. at 147.

106, statements by Byron Anderson. Byron Anderson gave a statement to the Devils Lake Police Department on 9/16/1986 wherein he stated:

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 house [sic] 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 a lot 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.

On August 1, 1986, I gave Doll and Tracy (Anderson) a ride to Tracy's sister's house. Tracy's sister lives at Southview West. Time was about late afternoon. I met them in the Corner Bar. They went to the door of that house and came back. I think the bartender was Squid. I went to the guard camp for duty from 6:00 p.m. to 10:00 p.m. I don't remember what Gilbert was wearing. He was wearing blue jeans because he always wears blue jeans.

For about (2) two weeks prior to this, I would see Gilbert sitting with Patty Mense quite often.

Doc. No. 105.

[¶23] Byron Anderson gave an additional statement to the Devils Lake Police Department on 11/6/1986 at 8:50 a.m., wherein he stated:

Mr. Anderson states 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.

Doc. No. 106.

[¶24] The Spencer Hellekson Memo, dated 10/3/86, discusses interviews taken by Agent Spencer Hellekson with Lori Christ, Curtis Posey, and Betty Lou Whitehead. Doc. No. 108. When discussing Betty Lou Whitehead's statements, the memo indicates

Betty Lou Whitehead lived with the victim from March, 1986, to August 1, 1986, when she last saw victim at bus depot in Devils Lake when she was catching a bus to Fargo, Whitehead. WHITEHEAD's ex-common-law husband, HANK CAVANAUGH, has threatened to kill both victim and WHITEHEAD, and admitted in interview.

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.

Id. at p. 1.

[¶25] The memo also explains Lori Christ's statements. Doc No. 108, p. 1. The memo states in relevant part:

Victim [] was last seen with WERNER WOLFGANG KUNKEL around 11:00 p.m., 8/1/86. KUNKEL claims to have dropped victim at residence of LORI CRIST []. CRIST acknowledges seeing victim (who occasionally stayed with her) the morning of 8/1/86 and she cannot recall anything she did thereafter. CRIST left Devils Lake 8/1/86⁶, the day after FASSETT's body was found, and she did not come back for over two weeks. She has not lived in residence since 8/11/86.

CRIST was very upset during interview and obviously afraid of Kunkel.

Id.

[¶26] The memo further explains Curtis Posey's interview. Doc. No. 108, p. 2. The memo indicates "CURTIS POSEY, an Indian male from Fort Totten, was the first person interviewed in this case. He was extremely nervous even though writer did not know time of death at time of interview. In subsequent interviews, POSEY has furnished three alibis which were not proven not to be true." Id.

⁶ This appears to be a typographical error and should read 8/10/1986, when Fasset's body was found.

[¶27] The memo also indicates “[a]ll 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.” Doc. No. 108, p. 2. The memo indicated all three, Crist, Posey, and Whitehead, agreed to undergo polygraph examinations, but ultimately, the memo indicates polygraphs would be considered after a federal grand jury. Id.

[¶28] The WYWO Note was written to Merle Henke on 8/14/1986 at 10:30 p.m. Doc. No. 115. The note does not indicate who it was written by. Id. The note indicated Kelly “Bednarz [sic], Sportsmans Den, above wanted 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 at 2:00P.” Id. The note also has a handwritten notation in the bottom corner that states “Who wrote this? Kelly B’s statements don’t say this at all.” Id.

b. Handling and Discovery of Alleged Brady Material

1. Attorney Carlson

[¶29] Attorney Carlson testified that in 2022 and 2023, she filed a request with the Ramsey County State’s Attorney’s Office for discovery on Kunkel’s behalf, which included a request for the status of the physical evidence in this case. Doc. No. 126, P.C. Tr. at p. 8; see also Case No. 04935, Doc. No. 384 (“Notice of Appearance” by Attorney Carlson dated 9/30/2022) and Doc. No. 385 (“Defendant’s Discovery Request” dated 9/30/2022). Attorney Carlson testified that in January 2023, she received a Dropbox link from the Ramsey County State’s Attorney’s Office for some of the documents. Doc. No. 126, P.C. Tr. at p. 9; see also Case No. 04935, Doc. Nos. 387 (Notice of Discovery Provided to Defendant’s Attorney). She also testified that there were additional documents that were not able to be uploaded properly. Doc. No. 126, Tr. at p. 9; see

also Doc. No. 103 (Letter from Ramsey County State’s Attorney to Attorney Carlson). Because some documents were unable to be uploaded, the Ramsey County State’s Attorney indicated to Attorney Carlson she could make an appointment to inspect the documents. Doc. No. 103; see also Case No. 04935, Doc. No. 387.

[¶30] Attorney Carlson testified at some point after receiving the electronic documentation, she reviewed the files. Doc. No. 126, P.C. Tr. at p. 10. She testified in this documentation she located the Melvin Brodell wherein he states he talked to Mr. Fassett on August 6, 1986. Doc. No. 126, P.C. Tr. at p. 10; see also Doc. No. 104. She testified this document struck her as having significance to the case because she was aware the Ramsey County State’s Attorney’s theory was that Fassett was killed on or around August 1, 1986. Doc. No. 126, P.C. Tr. at p. 11. Attorney Carlson testified she did not locate any additional documentation to her recollection that indicated there were any follow-up interviews with Melvin Brodell. Doc. No. 126, P.C. Tr. at p. 11. Attorney Carlson testified in the documents produced to her in 2023, she also located the OAG Order and the Spencer Hellekson Memo. Doc. No. 126, P.C. Tr. at pp. 13, 14; Doc. Nos. 107, 108.

[¶31] Attorney Carlson also observed the following documents: a 9/16/1986 police report about a statement from Byron Anderson (“Byron Anderson September Statement”), an 11/7/1986 report by Officer Peter Belgarde regarding Byron Anderson (“Byron Anderson November Statement”), and handwritten notes, Doc. No. 126, P.C. Tr. at pp. 11-13, 15; Doc. Nos. 105, 106, 109, 110. Attorney Carlson indicated the Byron Anderson September Statement caught her attention because his statement mentioned seeing Fassett alive after the State alleged Fassett had been killed. Doc. No. 126, P.C. Tr. at p. 12.

2. Scout Holding Eagle-Bushaw

[¶32] Scout Holding Eagle-Bushaw also testified at the trial that in the summer of 2023, she was working as a legal intern. Doc. No. 126, P.C. Tr. at p. 27. She testified in late July of 2023, she travelled to the Ramsey County State’s Attorney’s Office to review discovery on behalf of Kunkel. Doc. No. 126, P.C. Tr. at p. 27. She testified that in the physical files she was reviewing, she located the WYWO Note to Merle Henke regarding Kelly Bednardz dated 8/14/1986. Doc. No. 126, P.C. Tr. at p. 28. Ms. Holding Eagle-Bushaw testified she took a photo of the note because she was specifically looking for things that were not in Kunkel’s file with her firm and things that related to anyone seeing Fassett alive after the State alleged he had been killed. Doc. No. 126, P.C. Tr. at p. 29. Ms. Holding Eagle-Bushaw testified she then compared it to the firm’s digitized files to see if it was present there. Doc. No. 126, P.C. Tr. at p. 29. She testified that, as she reviewed the files that day, she did not see any follow-up of the statement of Bednardz. Doc. No. 126, P.C. Tr. at p. 31.

3. Attorney Burianek

[¶33] Attorney Burianek testified he has been an attorney for thirty-five years. Doc. No. 126, P.C. Tr. at p. 33. Attorney Burianek was assigned Kunkel’s attorney for his trial in 1995. Doc. No. 126, P.C. Tr. at p. 33. Attorney Burianek testified he had a discovery dispute with the State in the Kunkel matter early on. Doc. No. 126, P.C. Tr. at p. 35. At the time, the State indicated to Attorney Burianek that it had an “open records policy.” Doc. No. 116. The State indicated to Attorney Burianek:

You can come and review my file at any time during working hours. I would suggest you do this on a regular basis, as there is a considerable amount of documentation in this case, and I want to ensure you have had full access to this information in case some would accidentally not be forwarded to you on the assumption that it has already been forwarded to you.

Doc. No. 116.

[¶34] Attorney Burianek testified that because it was an hour and a half drive to Devils Lake, he felt the Prosecutor should provide discovery to him rather than require him to come to the Ramsey County State's Attorney's Office to review the discovery. Doc. No. 126, P.C. Tr. at pp. 35-36. The Judge presiding over the matter at the time agreed with Attorney Burianek. Doc. No. 117. By letter to the parties dated March 14, 1995, the Judge stated:

The State indicates it has an open file policy. I do have a concern about being able to document that disclosure was made to the defense, particularly with the description of the vast number of documents and information. The burden of disclosure will be on the State. Therefore I suggest that if an open policy is intended and that Mr. Burianek is going to be required to review the State's file, that either a log be established that describes each item with a location that would allow defense counsel to acknowledge whether or not they have either inspected or received a copy of the item.

I'm sure all of you appreciate that the request for discovery describes items that may be located not only in the State's Attorney's file, but in other law enforcement files, and if so they too would be subject to disclosure.

Finally, this is a very serious case and defense counsel is 90 miles away from the State's Attorney's office. Therefore I think it is really an unfair burden to require him to show up at the Ramsey County State's Attorneys office to occasionally inspect the file. Rather, I think that the State's Attorney's office should be making better accommodation of the records it is prepared to disclose. If the State is not willing to do that, then I am prepared to issue an order directing the State to do so.

Doc. No. 117.

[¶35] The State responded to both the Judge and Attorney Burianek with the following:

I am in receipt of your letter dated March 14, 1995. Please be advised that anything that I have been getting in my file I send immediately copies to Mr. Burianek. I am in no way "requiring" him to come all the way to my office to look at the file. Please be advised that due to Mr. Burianek's indigent defense contract, I see him in Devils Lake on the average of every other week. Again I reiterate that I am not "requiring" Mr. Burianek to show up at my office to occasionally inspect the file. but I am attempting to make sure that he has the opportunity to inspect my file in addition to all the copies that have been forwarded to him.

I will continue sending copies of whatever I get in my file to Mr. Burianek and will not "require" him to come and look at my files. The files shall remain open, and he can inspect them at any time he wants when he is in Devils Lake for this or other business to ensure that he has copies of everything that I have.

...

To conclude, I again reiterate that I am not “requiring” Mr. Burianek to come to Devils Lake to review the file, only that I am telling him that I have an open file that he can view whenever he comes to Devils Lake, which as I understand has been averaging every other week. I will continue sending copies of everything I have to him, except of course work product. Thank you very much.

Doc. No. 118.

[¶36] Attorney Burianek testified that despite the Judge’s recommendation that the State create an evidence log, he did not. Doc. No. 126, P.C. Tr. at p. 41. Based upon these communications, Attorney Burianek testified he believed the State was providing him with all of the discovery he had by mailing him copies of the same. Doc. No. 126, P.C. Tr. at p. 41.

[¶37] Attorney Burianek admitted the Kunkel matter included a substantial amount of documentation. Doc. No. 126, P.C. Tr. at p. 74. Attorney Burianek testified that while he had an assistant in 1995, he always opened his own mail. Doc. No. 126, P.C. Tr. at p. 71. He also testified that he stored his files in a filing cabinet, with the items on his desk being things he was currently working on. Doc. No. 126, P.C. Tr. at p. 71. Attorney Burianek testified that he went “piece by piece, page by page” through each document in discovery, reviewing all of it carefully and thoroughly. Doc. No. 126, P.C. Tr. at pp. 42-43.

[¶38] After he reviewed all of the discovery, he testified he came up with a trial strategy. Doc. No. 126, P.C. Tr. at p. 43. He testified he first looked at all of the individuals that told law enforcement that Kunkel admitted to killing Fassett to see what their motivation was and to poke holes in their stories. Doc. No. 126, P.C. Tr. at p. 43. He testified he next focused on the timeline of events because he was aware that Kunkel went to jail shortly after the murder, and he believed if the murder occurred while he was in jail, Kunkel could not have killed Fassett. Doc. No. 126,

P.C. Tr. at p. 43. He testified that he was focusing on evidence that would establish Fassett was alive after August 1, 1986. Doc. No. 126, P.C. Tr. at p. 43.

[¶39] During the trial, Attorney Burianek testified he cross-examined two of the State's witnesses who originally told law enforcement they had seen Fassett after August 1st, but then recanted and said it was August 1st. Doc. No. 126, P.C. Tr. at p. 47. Attorney Burianek also testified he cross-examined the medical doctor who testified as to when Fassett was likely killed based upon the presence and maturation of insects, getting him to admit he did not know the exact date of death. Doc. No. 126, P.C. Tr. at p. 47. He remembered the State's expert testifying Fassett had no alcohol in his body when he was killed, concluding after the testimony that something was wrong, either the expert was wrong, or Fassett was not intoxicated at all at the time of death. Doc. No. 126, P.C. Tr. at p. 47. When asked if he retained a forensic pathology expert for the 1995 trial, Attorney Burianek stated he did not because he was not sure, based on all of the evidence that was going into the case, if that would be important to the jury or not. Doc. No. 126, P.C. Tr. at p. 47. Attorney Burinaek also testified he cross-examined the highway patrolman who had pulled Kunkel over at 1:13 a.m. on August 2, 1986, questioning him if he had observed Kunkel acting strangely or noticed anything unusual. Doc. No. 126, P.C. Tr. at p. 44; see also Doc. No. 123, Tr. at 646.

[¶40] As for the OAG Order, Attorney Burianek testified that while he reviewed and seen the Byron Anderson September Statement and the Byron Anderson November Statement, he did not receive the OAG Order until it was shown to him recently by Kunkel's attorneys. Doc. No. 126, P.C. Tr. at p. 50. Attorney Burianek testified had he known with this OAG Order that Byron Anderson flew out the day that he gave Mr. Fassett a ride, he would have tried to find Anderson to testify. Doc. No. 126, P.C. Tr. at p. 50. He testified this would have been important because Anderson was one of the most credible witnesses. Doc. No. 126, P.C. Tr. at p. 50.

[¶41] Attorney Burianek testified he had not seen Melvin Brodell's statement until he was shown them recently by Kunkel's counsel. Doc. No. 126, P.C. Tr. at p. 52. Attorney Burianek testified had seen this statement, he would have subpoenaed Mel Brodell because "seriously, if – if this is in my hands . . . I don't even know if we have a trial." Doc. No. 126, P.C. Tr. at p. 52. Attorney Burianek stated this was a "huge" document in the case. Doc. No. 126, P.C. Tr. at p. 53. He further testified that he was sure he had never received this document from the State because he attempted to poke holes in all the State's witnesses' statements, and this would have been a "sleeping, smoking gun." Doc. No. 126, P.C. Tr. at p. 53.

[¶42] Attorney Burianek testified he had not seen the WYWO Note regarding Kelly Bednardz until he was shown it recently by Kunkel's counsel. Doc. No. 126, P.C. Tr. at p. 55. Attorney Burianek acknowledged that Kelly Bednardz testified at trial that he saw Kunkel and Fassett drinking together on August 1, 1986, at the Sportsman's Den and hadn't seen Fassett after. Doc. No. 126, P.C. Tr. at p. 54. Attorney Burianek testified that had he seen this document, he questions again whether there would have been a trial. Doc. No. 126, P.C. Tr. p. 55. He testified it would have been "easy" to cross-examine Bednardz about his trial statement that he last saw Fassett on August 1st. Doc. No. 126, P.C. Tr. at p. 55. Furthermore, he stated because the WYWO document indicates Bednardz saw him on August 6th, Kunkel could not have been the one who killed him. Doc. No. 126, P.C. Tr. at p. 55. Attorney Burianek testified he is sure he never received this document because he had never seen another "while you were out" type of statement. Doc. No. 126, P.C. Tr. at p. 56. It was "jarring" for him to see the document, so much so that he compared it to coming home to see a washing machine in his living room. Doc. No. 126, P.C. Tr. at p. 56. He testified he did not know if this case would have moved past the preliminary hearing stage if he had seen this document. Doc. No. 126, P.C. Tr. at p. 57.

[¶43] Attorney Burianek testified he had not seen the Spencer Hellekson memo until he was shown it recently by Kunkel’s counsel. Doc. No. 126, P.C. Tr. at p. 58. Attorney Burianek testified this document would have gone to Mr. Fassett’s girlfriend Betty Lou Whitehead’s credibility, and he would have used it to cross-examine her. Doc. No. 126, P.C. Tr. at p. 59. He testified that the jurors were left with the impression that the State believed her and thought she was a credible witness, when in reality, this document could have shown the State, through its investigators, questioned her credibility. Doc. No. 126, P.C. Tr. at p. 59. Attorney Burianek testified he would have cross-examined Ms. Whitehead about the lack of proof for her taxi cab in Fargo. Doc. No. 126, P.C. Tr. at p. 125.

[¶44] Attorney Burianek testified that he had not seen any of the alleged Brady materials until he was shown them recently by Kunkel’s counsel. Doc. No. 126, P.C. Tr. at p. 48. Attorney Burianek testified that if the State had turned over any of the alleged Brady materials and he did not use them in Kunkel’s case, he would not have provided Kunkel with competent representation. Doc. No. 126, P.C. Tr. at p. 60. Attorney Burianek testified that the alleged Brady material would have made a difference in Kunkel’s case because “he can’t be convicted of murder if the person that he murdered is walking around while he’s in jail.” Doc. No. 126, P.C. Tr. at p. 62.

4. Attorney Broden

[¶45] Attorney Broden testified he has been an attorney for 41 years. Doc. No. 126, P.C. Tr. at p. 138. Attorney Broden testified he represented Kunkel in 2004-2006 for his post-conviction relief matter. Doc. No. 126, P.C. Tr. at p. 138. Attorney Broden testified that at the beginning of his representation, he received two banker boxes full of discovery, including transcripts, files, reports. Doc. No. 126, P.C. Tr. at p. 139. He testified he believed Tom Trenbeath, an attorney from Cavalier, dropped the box off at his office. Doc. No. 126, P.C. Tr. at p. 139. Tom Trenbeath was

the attorney for Kunkel between Attorneys Burianek and Broden. Doc. No. 126, P.C. Tr. at pp. 155-156. Attorney Broden was told the boxes were from Todd Burianek. Doc. No. 126, P.C. Tr. at p. 139.

[¶46] Attorney Broden testified he spent a lot of time going through the discovery, which included starting with reading the trial transcripts. Doc. No. 126, P.C. Tr. at p. 140. He testified he then went through the rest of the files. Doc. No. 126, P.C. Tr. at p. 140. He reviewed it more than once, two or three times he stated. Doc. No. 126, P.C. Tr. at pp. 140-41. Attorney Broden testified he went through it more than once because he could not believe there was a conviction after reading the trial transcript. Doc. No. 126, P.C. Tr. at p. 141.

[¶47] Attorney Broden testified that he did go to the Ramsey County Attorney's Office, but not to look at files, only photographs. Doc. No. 126, P.C. Tr. at p. 141. He testified he did not look at the files because he assumed he had everything and no reason to believe anything was left out or removed, and he had already reviewed the file two or three times. Doc. No. 126, P.C. Tr. at p. 141. After reviewing the file, Attorney Broden testified he met with Kunkel on separate occasions, and ultimately, he landed on the strategy of presenting an ineffective assistance of counsel case. Doc. No. 126, P.C. Tr. at p. 142. He testified he chose that strategy because he believes the timeline was important, given the fact that Kunkel had an "airtight alibi beginning the day after he was last seen with the decedent." Doc. No. 126, P.C. Tr. at p. 142.

[¶48] Attorney Broden testified he wanted to secure the services of an entomologist, which he believed to be ineffective assistance of counsel on the part of Attorney Burianek in not securing his own experts for the 1995 trial. Doc. No. 126, P.C. Tr. at p.143. Attorney Broden testified he was able to secure a forensic entomologist to look at the case. Doc. No. 126, P.C. Tr. at p. 143. Attorney Broden testified that after review, this expert indicated the State's expert's calculation of

death was wrong, meaning Mr. Fassett could not have died as early as what was indicated. Doc. No. 126, P.C. Tr. at p. 145. This expert testified Mr. Fassett was actually killed two or three days after the original date by the State's expert. Doc. No. 126, P.C. Tr. at p. 146. According to Attorney Broden, Kunkel's post-conviction appeal was dismissed on what he recalled being sufficient other evidence to support the conviction, and the Court deeming the expert testimony contradiction to be a dispute between experts. Doc. No. 126, P.C. Tr. at p. 147.

[¶49] Attorney Broden testified he did not remember ever seeing the alleged Brady material until it was recently shown to him by Kunkel's counsel. Doc. No. 126, P.C. Tr. at p. 148. He believed he would have remembered seeing a witness state Mr. Fassett was alive after August 1, 1986, and had not recanted because that would have been important to establish an ineffective assistance of counsel claim. Doc. No. 126, P.C. Tr. at p. 148. He testified he would have remembered the OAG Order because it would have been a government document supporting Byron Anderson's statement of giving Mr. Fassett a ride on a certain date. Doc. No. 126, P.C. Tr. at p. 149.

[¶50] Attorney Broden did testify, "yeah, maybe I probably should have requested the file anew. I didn't do that. Probably unfortunate that I didn't. Maybe I would have discovered those. But I didn't request the file anew. I had no reason to believe that it was necessary." Doc. No. 126, P.C. Tr. at p. 150. He further testified, "I do not recall seeing them. Had I seen them, I think I would have remembered them because of the importance to the time frame, to the alibi defense. So that's why I can say that I'm fairly confident they were not in the materials that I received." Doc. No. 126, P.C. Tr. at p. 152. Attorney Broden testified on cross-examination that Brady violations, including discovery violations, are a common ground in post-conviction appeals, and as a result, it would have been "best practice" for him to have obtained "discovery to compare and contrast what was in the State's file versus" what he received from Attorney Burianek. Doc. No. 126, P.C.

Tr. at p. 159. He testified he “assumed” he would have located the alleged Brady materials if he would have requested the file anew. Doc. No. 126, P.C. Tr. at p. 159.

[¶51] After Kunkel’s appeal, Attorney Broden testified that the file sat in his office for a while when it was picked up by another counsel for Kunkel, but it was ultimately returned back to him. Doc. No. 126, P.C. Tr. at p. 160. Kunkel asked him to digitize files at one point, and eventually Attorney Broden testified he took the file to a local printing shop and had them digitize the entire file. Doc. No. 126, P.C. Tr. at p. 161. Eventually, Attorney Broden testified the file was transferred to Kunkel’s sister one to two years ago. Doc. No. 126, P.C. Tr. at p. 161.

5. State’s Paralegal

[¶52] The State’s Paralegal at the time of Kunkel’s 1995 trial testified she worked as a paralegal for the Ramsey County State’s Attorney’s Office (“the Office”) up until 2019 when she retired. Doc. No. 127, P.C. Tr. at p. 44. She testified she had worked for the Office since 1990. Doc. No. 127, P.C. Tr. at p. 45. She stated the Trial Prosecutor was voted in as the Ramsey County State’s Attorney six months into her working at the Office. Doc. No. 127, P.C. Tr. at p. 45. She testified she has a two-year degree for legal assistance, but learned on the job. Doc. No. 127, P.C. Tr. at p. 46.

[¶53] As for discovery, she testified she was taught to “get everything to the defense attorney. Give them everything.” Doc. No. 127, P.C. Tr. at p. 46. She testified that once the Office received something, such as a police report, she would copy it and get it to the defense counsel as soon as she could. Doc. No. 127, P.C. Tr. at p. 47. She testified that some defense counsel would have a box in the clerk’s office, and she would place discovery in that box. Doc. No. 127, P.C. Tr. at p. 47. Others, she said, she would copy it and hand it to them. Doc. No. 127, P.C. Tr. at p. 47. From

her recollection, attorneys would call and ask for discovery or they would file it. Doc. No. 127, P.C. Tr. at p. 48.

[¶54] She testified there were only two individuals physically working in the Office in 1995, her and the Trial Prosecutor. Doc. No. 127, P.C. Tr. at p. 49. She testified there was another employee of the Office, but she worked from home. Doc. No. 127, P.C. Tr. at p. 70. She did testify this woman had access to the office and had a key. Doc. No. 127, P.C. Tr. p. 70. She also testified that a federal prosecutor helped on the case, but she was unable to remember how he got a copy of the file. Doc. No. 127, P.C. Tr. at p. 71.

[¶55] She testified that she was working in the Office for about five years when the instant case was going on. Doc. No. 127, P.C. Tr. at p. 48. She remembered reports and discovery coming into the Office, and she testified she would copy them and, at first, she would place them in a file folder, but when that got to be too many, she put the documents in a box. Doc. No. 127, P.C. Tr. at p. 48. She testified at first the box was located in a small, long closet. Doc. No. 127, P.C. Tr. at p. 50. She did recall handing Attorney Burianek physical pictures on one occasion. Doc. No. 127, P.C. Tr. at p. 51. She testified there was never any documentation she did not give to Attorney Burianek. Doc. No. 127, P.C. Tr. at p. 52. She testified that by 2019, she started doing affidavits of service. Doc. No. 127, P.C. Tr. at p. 54. She testified she would describe everything that was going out on the affidavit. Doc. No. 127, P.C. Tr. at p. 54.

[¶56] On cross, the State's Paralegal testified she would do discovery, type complaints, file everything, answer the phone, and interact with law enforcement. Doc. No. 127, P.C. Tr. at p. 56. She testified she would receive mail for the Office. Doc. No. 127, P.C. Tr. at p. 57. She testified she always made the copy if one was made, never the defense counsel. Doc. No. 127, P.C. Tr. at p. 60. She testified that when she was out and discovery came in, the Trial Prosecutor would leave

the discovery for her when she returned, and he did not typically handle the discovery. Doc. No. 127, P.C. Tr. at p. 61. She testified that she did not know if there was an investigatory file about Mr. Fassett in the office prior to 1994. Doc. No. 127, P.C. Tr. at p. 63. She testified that the Office burned old files, primarily from the previous State's Attorney, but if something was in those files about Mr. Fassett, it would not have been burned. Doc. No. 127, P.C. Tr. at p. 63. She testified she never saw the Trial Prosecutor take files home. Doc. No. 127, P.C. Tr. at p. 69.

6. Trial Prosecutor

[¶57] The Trial Prosecutor testified he was employed as the Ramsey County State's Attorney from 1991 to 2016. Doc. No. 127, P.C. Tr. at p. 79. He testified in 1994 and 1995, he, the State's Paralegal, and his part-time employee had access to the office. Doc. No. 127, P.C. Tr. at p. 81.

[¶58] He testified the first documentation he received from law enforcement in regard to this case was in January of 1995. Doc. No. 127, P.C. Tr. at p. 82. He testified that documentation started coming to the office in boxes, which may have turned into more toward the end of the case. Doc. No. 127, P.C. Tr. at p. 83. He testified the documents were not organized, and it was a long process of reading and trying to organize them. Doc. No. 127, P.C. Tr. at p. 83. Once he had them organized, he testified he placed the documents, not all, in two three-ring binders. Doc. No. 127, P.C. Tr. at p. 84. Things that were duplicative, not probative, or otherwise went into the box. Doc. No. 127, P.C. Tr. at p. 84. Everything he testified that did not go in the binder went into the box. Doc. No. 127, P.C. Tr. at p. 84. He stored the boxes and binders in his office in January of 1995 when things were getting started. Doc. No. 127, P.C. Tr. at p. 85.

[¶59] The Trial Prosecutor testified the Ramsey County State's Attorney's Office had an open file policy for discovery in 1995. Doc. No. 127, P.C. Tr. at p. 86. He testified that once his office was notified that someone had retained counsel, the State's Paralegal would make a copy of everything

in the file for the counsel. Doc. No. 127, P.C. Tr. at p. 86. He testified that at that time, attorneys rarely filed Rule 16 discovery requests like they do today. Doc. No. 127, P.C. Tr. at p. 86. He further testified the standard practice was that there was not an itemized list or affidavit of service in 1995. Doc. No. 127, P.C. Tr. at p. 87.

[¶60] The Trial Prosecutor testified that in the interactions with the Judge and Attorney Burianek referenced above, he took the stance that everything he had in his file, Attorney Burianek would have in his. Doc. No. 127, P.C. Tr. at p. 90. He testified that as discovery would come in, the State's Paralegal would provide copies to Attorney Burianek. Doc. No. 127, P.C. Tr. at p. 90. He testified he never instructed her to withhold documents. Doc. No. 127, P.C. Tr. at p. 91.

[¶61] The Trial Prosecutor testified on cross-examination that he was unaware if the Ramsey County State's Attorney's Office had an investigatory file on the death of Mr. Fassett. Doc. No. 127, P.C. Tr. at p. 92. He stated that because it started as a federal investigation, he did not believe there was. Doc. No. 127, P.C. Tr. at p. 92. He was aware that Merle Henke from the local office was involved with search warrants because he was at the law enforcement center for other reasons, and officers were getting ready to execute the warrants. Doc. No. 127, P.C. Tr. at p. 93. He testified the initial bulk of discovery came from the United States Attorney's Office. Doc. No. 127, P.C. Tr. at p. 93. He clarified that the discovery came in from different sources, and it came sometimes in big chunks and smaller chunks. Doc. No. 127, P.C. Tr. at p. 94. The Trial Prosecutor contended he did not complete the organization of the binders before the charging decision, or he filed the information. Doc. No. 127, P.C. Tr. at p. 99.

[¶62] The Trial Prosecutor testified the open records policy was an additional safeguard he believed because everything would be sent to the defense, and they could also come and look at the file. Doc. No. 127, P.C. Tr. at p. 103. The Trial Prosecutor testified in 1995, Kunkel's file was

the only one physically kept in his office, all others, he testified, were kept in the storage office or filing cabinets out front. Doc. No. 127, P.C. Tr. at p. 105.

[¶63] The Trial Prosecutor testified the time and day of death of Mr. Fassett was significant to the prosecution. Doc. No. 127, P.C. Tr. at p. 108. The Trial Prosecutor testified the handwritten notes found in Doc. No. 109 were his. Doc. No. 127, P.C. Tr. at p. 113. Some of his notes read:

- G.F. seen alive again?
- Tim Roland 8-6
- Karen Azure 8-6
- M.L. Simonson – 8-5
- Roland change?
- Karen Azure change?
- M.L.Simonson who was at the bar with her?
- date mix up?

Doc. No. 109, p. 2.

[¶64] The Trial Prosecutor could not verify if Attorney Burianek received copies of his handwritten notes or not, but stated he thought he might have because he probably kept them in the file. Doc. No. 127, P.C. Tr. at p. 115.

[¶65] The Trial Prosecutor agreed that impeachment evidence could be considered Brady material. Doc. No. 127, P.C. Tr. at p. 127. The Trial Prosecutor agreed that Special Agent Spencer Hellekson's memorandum indicated he knew about some lies from the three individuals in the report and confronted them, but the exact situations were unknown. Doc. No. 127, P.C. Tr. at p. 130. He agreed it would be important to test the credibility of any proposed witness. Doc. No. 127, P.C. Tr. at p. 130.

[¶66] The Trial Prosecutor also was asked to read partially into the record an interview of Kelly Bednardz by Merle Henke on August 13, 1986, a day before the WYWO note. Doc. No. 127, P.C. Tr. at p. 132, Doc. No. 124. Bednardz told Officer Henke he removed Mr. Fassett and Kunkel from the Sportmens Den on the night of August 1, 1986. Doc. No. 124. Specifically, the statement reads:

Mr. Bednardz stated the night of August 1st, 1986 around dark he removed Gilbert Fassett from the premises. It appears that Fassett and Werner Wolfgang Kunkel were in the bar drinking a pitcher of beer and gambling. They became disorderly and were asked to leave. Fassett was knocking items off the shelves in the service station portion and Bednardz removed Fassett. While putting Fassett into the car, Bednardz noticed what he thought was a rifle in the back seat covered with a levi-jacket. Fassett was kicking him at this time so he did not get a better look. Fassett also had “a lot” of money on him according to Bednardz. They left going south on highway 57. Several local people were present during this incident.

Doc. No. 124.

[¶67] The Trial Prosecutor admitted the handwritten note on the bottom of the WYWO note, dated August 14, 1986, that stated “who wrote this? Kelly B’s statements don’t say this at all” looked like his handwriting. Doc. No. 127, P.C. Tr. at p. 137. The Trial Prosecutor acknowledged that a follow-up interview may have been justified given the inconsistent statement but he did not know if one was done. Doc. No. 127, P.C. Tr. at p. 137.

[¶68] The Trial Prosecutor could not recall why Melvin Brodell was not called as a witness. Doc. No. 127, P.C. Tr. at p. 148. The Trial Prosecutor admitted that if Attorney Burianek had this statement he could have used it to either establish his theory that Kunkel was factually innocent or attack Melvin Brodell’s testimony had he testified and to a different date. Doc. No. 127, P.C. Tr. at p. 150. The Trial Prosecutor agreed this statement could have been used to put a reasonable doubt into mind of jurors. Doc. No. 127, P.C. Tr. at 150. He testified he had no doubt the State’s Paralegal got Attorney Burianek “copies of everything, and he could come and look through everything we had to verify and ask for additional copies or anything like that” Doc. No. 127, P.C. Tr. at p. 165.

2. New Evidence Claim

a. Liver Toxicology

[¶69] Kunkel contends new forensic evidence never presented to the jury exists that establishes Fassett was not killed the night of August 1, 1986. Specifically, Kunkel maintains it was undisputed that Fassett was intoxicated on the night of August 1, 1986, as stated by multiple witnesses for the State. Now, he states, the testimony of Drs. Roel Gallo and Lindsey Thomas show that not only was Fassett “was not intoxicated when he died, but that he also lacked a detectable trace of alcohol in his system.” Doc. No. 1, p. 73. Kunkel contends the “[j]ury was led to a false belief that because the body was decomposed, and because Dr. Gallo did not know what part of the liver he extracted, the liver toxicity evaluation was not valid.” Doc. No. 131, p. 57.

[¶70] Dr. Roel Gallo performed the autopsy of Fassett in 1986. He testified at the 1995 trial, as well. A number of exchanges during the cross examination and re-direct occurred in the 1995 trial occurred amongst Dr. Gallo, Attorney Burianek, and the Trial Prosecutor which are relevant to Kunkel’s claims in this proceeding:

Attorney Burianek: Q. Okay. With respect to the preliminary diagnosis, there’s an indication that the liver specimen was sent for a toxicological evaluation.

Dr. Gallo: A. Correct.

Attorney Burianek: Q. And that would be an evaluation to see if the liver had drugs or alcohol in it.

Dr. Gallo: A. Correct.

Attorney Burianek: Q. Okay. And in the final diagnosis, that came back as negative.

Dr. Gallo: A. Correct.

Doc. No. 123, Tr. p. 1074.

Trial Prosecutor: Q. The issue of the liver sample being negative for alcohol, how much of a liver was left to get a sample of?

Dr. Gallo: 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 same decomposition was also evident within the body cavities and involving all internal organs.

Trial Prosecutor: Q. Could you tell what part of the liver this was at all?
Dr. Gallo: A. No.

Doc. No. 123, Tr. p. 1077.

[¶71] In the present proceeding, Dr. Gallo testified he remembers performing the autopsy because it was “such a dramatic case.” Doc. No. 126, P.C. Tr. p. 172. Dr. Gallo also testified that he remembered the autopsy report and associated documents, which were discussed in this case. Doc. No. 126, P.C. Tr. p. 172; Doc. No. 119.

[¶72] Dr. Gallo testified he ordered a toxicology examination as part of his work on the autopsy, which he testified is a standard part of an autopsies. Doc. No. 126, Tr. p. 178. Dr. Gallo testified that he requested a routine toxicology, which he believed to be an analysis to include any and all foreign substances. Doc. No. 126, P.C. Tr. p. 179. Dr. Gallo testified he believed a routine toxicology would test for ethanol in the system. Doc. No. 126, P.C. Tr. p. 179. Dr. Gallo testified he agreed it was “his desire and understanding” and intent that ethanol would be screened for. Doc. No. 126, P.C. Tr. p. 179. He testified he did not recall ever ordering a toxicological evaluation that did not include ethanol and had never heard of a pathologist getting a toxicological evaluation without having ethanol be screened. Doc. No. 126, P.C. Tr. p. 180. He testified that if the lab did detect ethanol, he would have expected to see it listed. Doc. No. 126, P.C. Tr. p. 185.

[¶73] Dr. Gallo testified he supplied a portion of Fassett’s liver for the toxicology sample, for which he had “no doubt” was liver tissue. Doc. No. 126, P.C. Tr. p. 180. Dr. Gallo’s final report on the autopsy indicated “[t]oxicological evaluation of liver specimen is negative.” Doc. No. 119, p. 2. Dr. Gallo testified at the time he signed this, he believed the lab had tested for ethanol. Doc. No. 126, P.C. Tr. p. 188.

[¶74] Kunkel also called in this proceeding Dr. Lindsey Thomas, a forensic pathologist who has performed over 5,000 autopsies. Doc. No. 127, P.C. Tr. p. 12. Dr. Thomas testified that in her

experience toxicology evaluations are done in every autopsy, unless the body is skeletonized. Doc. No. 127, P.C. Tr. p. 19. Dr. Thomas testified that in her experience the liver is the most common organ used for toxicology evaluations, and she testified that there is no specific part of the liver that is needed to get a valid toxicology result. Doc. No. 127, P.C. Tr. p. 21.

[¶75] She testified alcohol is the most common substance tested in toxicological evaluations. Doc. No. 127, P.C. Tr. p. 21. She testified she has been performing autopsies since 1980, and in 1986, she would have expected to see alcohol be tested in a routine toxicology report. Doc. No. 127, P.C. Tr. p. 22. She testified that she had reviewed older cases, from the 1950s and younger, and alcohol was included in the panel. Doc. No. 127, P.C. Tr. p. 23. When asked if there was any lab she could imagine that would not test for ethanol, she stated no. Doc. No. 127, P.C. Tr. p. 22-23. However, Dr. Thomas testified she has not worked with the State Toxicologist in the State of North Dakota, so she is not familiar with their protocols. Doc. No. 127, P.C. Tr. p. 37. She admitted she could not personally state what the Office would have tested for in 1986. Doc. No. 127, P.C. Tr. p. 37.

[¶76] Dr. Thomas testified she reviewed the autopsy report and toxicology report of Mr. Fassett. Doc. No. 127, P.C. Tr. p. 29. Dr. Thomas testified the toxicology report did not list ethanol, but she did not believe that meant the evaluation is positive for ethanol, as she stated she would have expected it to be listed and listed as positive. Doc. No. 127, P.C. Tr. p. 29. When asked “based on your education, training and experience, does the absence of ethanol on this document mean to you that its likely the lab did not test for ethanol,” she answered “I just cant imagine that a lab wouldn’t test for ethanol. So no.” Doc. No. 127, P.C. Tr. p. 29. She testified in her experience, if a lab did not test for something or couldn’t, it would be explained. Doc. No. 127, P.C. Tr. p. 30.

She ultimately testified she believed Fassett's liver was tested for ethanol and that he did not have ethanol in his system at the time of his death. Doc. No. 127, P.C. Tr. p. 34.

[¶77] A review of the August 26, 1986 Analytical Report from the Office of the State Toxicologist reads “[a]nalysis of the liver sample submitted in the above styled case failed to disclose the presence of Librium, valium, meprobamate, meperidine, morphine, codeine, amphetamine, methamphetamine, chlorpromazine, imipramine, methaqualone, methyprylon, phenacetin, chlorpheniramine, doxepin, amitriptyline, or barbituric acid derivatives in a detectable amount.” Doc. No. 119, p. 8. There was no additional information such as lab data to accompany the document. Dr. Thomas furthermore testified that the analytical report did not include any raw data or what protocols were used. Doc. No. 127, P.C. Tr. p. 38.

b. Karen Azure Declaration

[¶78] Kunkel asserts he has obtained new evidence from the State's witness, Karen Azure. Azure testified as a state witness in the 1995 trial. Doc. No. 123, Tr. pp. 482-490. She specifically testified that the last time she saw Gilbert Fassett was on August 1st. Doc. No. 123, Tr. p. 484. During the trial, she admitted that she had originally given a different date of seeing Fassett, but later corrected it. Doc. No. 123, Tr. p. 484. She stated she did so “because we went back and we looked at the schedule – when Peter and Yankton come 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.” Doc. No. 123, Tr. p. 484.

[¶79] Recently, in 2024, Azure signed a declaration (“Azure Declaration”) stating the following:

1. I remember talking to police about the 1986 murder of Gilbert Fassett.
2. At the time, I was working at Mel's Corner Bar in Devil's Lake, North Dakota. Gilbert Fassett used to come into the bar.
3. Mel's Corner Bar was owned by Mel Brodell, who has since died. Back in 1986, Mel was still working. He spent a lot of time in the bar and was familiar with many of the regular customers, including Gilbert Fassett.

4. I do not remember the exact date of when I last saw Gilbert Fassett at Mel's Corner Bar.
5. I do remember that the last time I saw Gilbert Fassett at Mel's Corner Bar before he was killed, Gilbert told me he was leaving that he was going to go and visit his girlfriend, who was living in another city, either Fargo or Grand Forks.

Doc. No. 102.

[¶80] Karen Azure died on December 23, 2025, weeks before the present trial. As a result, Kunkel has moved to admit the Azure Declaration pursuant to North Dakota Rule of Evidence 807, otherwise known as the residual exception. The State asserts the Azure Declaration does not meet the requirements of Rule 807 and should not be considered. The Court will conduct the relevant analysis further in this opinion.

3. Destruction of Evidence Claim

[¶81] Kunkel maintains the State violated his due process rights by losing or destroying important physical evidence, including Fassett's clothing. Doc. No. 1, ¶ 215.

[¶82] Attorney Carlson testified she spoke to the Ramsey County State's Attorney over telephone and exchanged emails with him regarding the status of physical evidence in the case. Doc. No. 126, P.C. Tr. at p. 19; Doc. Nos. 111-113. On May 8, 2023, Attorney Carlson emailed the Ramsey County States Attorney "I am wondering if you could please tell me where the physical evidence in Werner Kunkel's case is currently being stored at?" Doc. No. 111. The Ramsey County State's Attorney responded "I have checked with the Devil's Lake Police Department, Bureau of Indian Affairs police, clerk's office, and in our States Attorney vault and no one has any information as to where the physical evidence is stored." Doc. No. 112. He then indicated he would check with the previous State's Attorney who prosecuted the case. Doc. No. 112. On June 12, 2023, the Ramsey County State's Attorney emailed Attorney Carlson the following:

Since your last email Ive been trying to run down any lead I could find regarding the location of physical evidence related to the Werner Kunkel case. I spoke with

Special Agent Dan Genck from the FBI satellite office in Grand Forks, and he provided me with the attached Case Evidence Report. It appears that the FBI Minneapolis field office was in possession of:

1) an autopsy report with slides, 2) clothing from Gilbert Fassett's body, and 3) miscellaneous beer cans and a pop bottle collected near the body. SA Genck noted that all three evidentiary items have a disposition by data migration date of 1/9/1995 which means it is very likely that these items have been destroyed due to the age of the case.

SA Genck has requested the physical FBI case file from the Minneapolis field office and my office will forward it once it comes into our possession.

Doc. No. 113.

[¶83] Attorney Carlson testified she also spoke to the Ramsey County State's Attorney on the telephone two or three times. Doc. No. 126, P.C. Tr. at p. 23. She testified that the Ramsey County State's Attorney told her over the telephone that the FBI had destroyed the physical evidence. Doc. No. 126, P.C. Tr. at p. 23. Attorney Carlson stated she believed at the time the evidence was destroyed on January 9, 1995 due to the "disposition by data migration on 1/9/1995" notation in the Case Evidence Report. Doc. No. 126, P.C. Tr. at p. 22. On cross-examination, the State questioned Attorney Carlson as to whether she was aware that someone from the State Crime Lab had testified on August 21, 1995 that he had the physical evidence in the trunk of his car at that time. Doc. No. 126, P.C. Tr. at p. 24. Attorney Carlson indicated that because she did not review all of the trial testimony, it did not change her opinion at the time that the evidence was destroyed in January of 1995. Doc. No. 126, P.C. Tr. at p. 25.

[¶84] The Court in this matter granted the parties the opportunity to conduct discovery regarding the location of physical evidence. Doc. No. 50. Evidence was provided by the State to the defense. Specifically, the Ramsey County Sheriff's Office provided a statement by a Deputy Investigator describing the Sheriff's Office's efforts to locate the physical evidence. Doc. No. 121. The Deputy Investigator spoke to numerous individuals, including a previous deputy who worked on the case,

the Sheriff's Office's previous manager at the time, BCI, and a detective who was with the Devils Lake Police Department during the time in question. Doc. No. 121. The report indicates the Ramsey County Sheriff's Office did not have "any documents, reports, or evidence that is linked to Werner Kunkel's case." Doc. No. 121, p. 2. The report further indicates the Sheriff's Office reached out to BCI, and BCI indicated it did not locate any of the items in its evidence lockers. Doc. No. 121, p. 1.

II. CONCLUSIONS OF LAW

[¶85] Post-Conviction Relief Proceedings are governed by N.D.C.C. ch. 29-32.1. "The purpose of the Act is to furnish a method to develop a complete record to challenge a criminal conviction." Woolsey v. State, 2024 ND 184, ¶ 4, 11 N.W.3d 872, 873. Specifically, a person who has been convicted of and sentenced to a crime may apply for relief by instituting a proceeding on the ground that:

- a. The conviction was obtained or the sentence was imposed in violation of the laws or the Constitution of the United States or of the laws or Constitution of North Dakota;
- b. The conviction was obtained under a statute that is in violation of the Constitution of the United States or the Constitution of North Dakota, or that the conduct for which the applicant was prosecuted is constitutionally protected;
- c. The court that rendered the judgment of conviction and sentence was without jurisdiction over the person of the applicant or the subject matter;
- d. The sentence is not authorized by law;
- e. Evidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice;
- f. A significant change in substantive or procedural law has occurred which, in the interest of justice, should be applied retrospectively;
- g. The sentence has expired, probation or parole or conditional release was unlawfully revoked, or the applicant is otherwise unlawfully in custody or restrained; or
- h. The conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error available before July 1, 1985, under any common law, statutory or other writ, motion, proceeding, or remedy.

N.D.C.C. § 29-32.1-01(1)(a)-(h).

[¶86] “In postconviction proceedings, the applicant has the burden to establish the grounds for relief.” Rademacher v. State, 2025 ND 137, ¶ 5, 23 N.W.3d 915, 918. The Court will consider the Brady claim, New Evidence Claim, Ineffective Assistance of Counsel Claim, and Destruction of Evidence Claim separately.

A. BRADY CLAIM

i. Factors

[¶87] “In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)], the United States Supreme Court held that suppression by the prosecution of evidence favorable to an accused violates due process if the evidence is material to guilt or punishment.” Rummer v. State, 2006 ND 216, ¶ 21, 722 N.W.2d 528, 534. To establish a Brady violation, a defendant must prove: “(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.” Rummer, ¶ 21. The Court considers each factor separately.

1. The government possessed evidence favorable to the defendant.

[¶88] Kunkel must show the government possessed evidence that was favorable to him. “The undisclosed material must be plainly exculpatory; Brady does not apply to evidence that might have been exculpatory.” State v. Pederson, 2024 ND 79, ¶ 12, 6 N.W.3d 619, 622, reh’g denied (July 3, 2024); see also State v. Kardor, 2015 ND 196, ¶ 9, 867 N.W.2d 686, 688 (“Brady evidence must be plainly exculpatory and require no inference.”). “Evidence is favorable to the defendant if it is exculpatory or because it is impeaching.” State v. Kolstad, 2020 ND 97, ¶ 20, 942 N.W.2d

865, 872. “Exculpatory evidence is evidence tending to establish a criminal defendant's innocence.” Id. (citation omitted). “There is no Brady violation if the defendant fails to demonstrate the evidence was favorable to him.” Pederson, ¶ 12. “The duty to produce exculpatory materials under the Brady rule is not limited to materials in the hands of the prosecutor, but includes material known to the police.” State v. Eugene, 340 N.W.2d 18, 25 (N.D. 1983).

a. Melvin Brodell Statement

[¶89] Both parties in 1995 and both parties today assert the timing of events regarding when Gilbert Fassett was last seen alive was crucial to their cases. The State asserted consistently in 1995 that no one had seen Gilbert Fassett alive after August 1, 1986. In fact, the Bill of Particulars stated “[t]he precise time of day the murder was committed was between 10:30 p.m. on August 1, 1986, and 1:10 a.m. on August 2, 1986.” Doc. No. 125. This time period came from witnesses the State called at the 1995 trial, who all testified they had not seen Gilbert Fassett after August 1, 1995. These witnesses include Betty Jaeger, Tim Rolland, Karen Azure, Kelly Bednardz, Charles Nelson, Betty Lou Whitehead, William Cavanaugh, Gertrude Cavanaugh, and Lori Christ. See generally Doc. No. 123, Trial Transcript August 10, 1995 through August 22, 1995. The State focused on the time period in its opening and closing statements. The Trial Prosecutor at this trial testified the State did not focus on any other time period to his recollection. Doc. No. 127, P.C. Tr. p. 111.

[¶90] Attorney Burianek focused on the timeline of events because he was aware that Kunkel went to jail shortly after the murder, and he believed if the murder occurred while he was in jail, Kunkel could not have killed Fassett. Doc. No. 126, P.C. Tr. p. 43. He testified that he was focusing on evidence that would establish Fassett was alive after August 1, 1986. Doc. No. 126, P.C. Tr. p. 43. Attorney Broden also testified he focused on the timeline of events for Kunkel’s post-

conviction case, given the fact that Kunkel had an “airtight alibi beginning the day after he was last seen with the decedent.” Doc. No. 126, P.C. Tr. p. 142. As a result, part of his case strategy was to focus on obtaining a forensic entomologist who could show Fassett could not have died at the time the State originally asserted. Doc. No. 126, P.C. Tr. p. 145.

[¶91] Melvin Brodell’s statement indicates he saw Gilbert Fassett alive on August 6, 1986. Both parties testified Melvin Brodell was not called a witness at the 1995 trial. There are no additional follow-up statements by Melvin Brodell the parties testified. For all intents and purposes, the Melvin Brodell statement was an uncontradicted statement that Gilbert Fassett may have been alive on August 6, 1986, a time in which Kunkel was imprisoned in the local jail.

[¶92] As a result, Attorney Burianek could have utilized this statement to prove that Kunkel was factually innocent of the crime. The Trial Prosecutor admitted as much when he admitted that if Attorney Burianek had this statement, he could have used it to either establish his theory that Kunkel was factually innocent or attack Melvin Brodell’s testimony had he testified and testified to a different date, either at the trial or through some additional statements. Doc. No. 127, P.C. Tr. p. 150. The Melvin Brodell Statement is clearly favorable to Kunkel.

b. OAG Order

[¶93] Byron Anderson made two statements to law enforcement, one in September of 1986 and one in November of 1986. Both statements were transcribed by law enforcement. Again, the Byron Anderson September Statement indicates “[o]n 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 house . . .” Doc. No. 105. Byron Anderson also discussed the fact that he was leaving for Alabama for military service, noting, “I had to pack a lot 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.” Doc. No. 105. Byron Anderson’s November Statement, however, indicated “Mr. Anderson states 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.” Doc. No. 106.

[¶94] Again, the OAG Order was dated 7/10/1986. Doc. No. 107. The Order stated certain individuals, including Byron Anderson, were to report to annual training in Alabama for fifteen days, with a reporting date of August 2, 1986. Doc. No. 107. Attorney Buriank testified that this was important because Byron Anderson was one of the most credible witnesses, and he had no reason to recant. Doc. No. 126, P.C. Tr. p. 50. He testified that had he had this document, knowing Anderson flew out for military service on the day he said he gave Fassett a ride, he would have tried to find him then to testify at that time. Doc. No. 126, P.C. Tr. p. 50. He felt this would have helped Anderson, who appeared confused as to what date he gave the ride. Doc. No. 126, P.C. Tr. p. 133. Attorney Burianeck testified he called the local military service to see if there was any other information he could get from what Anderson knew, but they were unsure where he was at that time. Doc. No. 126, P.C. Tr. p. 49. He stated the reason he did not call him to testify otherwise was because he knew he had recanted. Doc. No. 126, P.C. Tr. p. 50.

[¶95] Attorney Burianeck did admit that the OAG Order does not necessarily negate Byron Anderson’s November Statement, in that Anderson was not sure what day he gave Fassett a ride but felt it was not August 2, 1986. However, he testified this OAG Order was important because,

unlike the other two recanting witnesses, this would have provided credible independent corroboration. Doc. No. 126, p. 115.

[¶96] Attorney Broden also testified he would have utilized the OAG Order in his case. Doc. No. 126, P.C. Tr. p. 149. Attorney Broden testified this document struck him as important, “Because not only was there his recollection of when he saw Mr. Fassett, but his reason for why he saw – remembered the date on which he saw him was supported by a government document that matched up with what his reasoning was for why he remembered it.” Doc. No. 126, P.C. Tr. p. 149. He asserted this document would have provided a lot more strength to his claims on post-conviction, and if he had this at that time, he would have raised a Brady violation. Doc. No. 126, P.C. Tr. p. 149.

[¶97] The OAG Order is a government document establishing Byron Anderson was to report for duty on August 2, 1986, for a period of fifteen days. Byron Anderson’s September Statement indicates he gave Fassett a ride on August 2, 1986, a little after 1:00 a.m., and he was “late” because he was to be at Camp Grafton by bus at 4:00 a.m. for this trip to Alabama for fifteen days. The Statement also indicates that Fassett mentioned something about being in jail. It is undisputed that Fassett was released from jail the morning of August 1, 1986. Clearly, the OAG Order would have provided Attorney Burianek with independent corroboration as to the facts within Byron Anderson’s September Statement that he gave Fassett a ride on the day he was leaving for military service. If true, this statement would tend to suggest Kunkel did not murder Fassett. The OAG Order would have been favorable to Kunkel.

c. Spencer Hellekson Memo

[¶98] In the Spencer Hellekson Memo, it discusses interviews with two witnesses the State called to testify, Betty Lou Whitehead and Lori Crist. As to Betty Lou Whitehead, it specifically discusses

that Betty Lou Whitehead last saw Fassett on August 1, 1986, when she caught a bus to Fargo. Doc. No. 108, p. 1. However, it also stated that a North Dakota National Guardsman stated he gave Betty Lou Whitehead a ride after the time she claimed she was on a bus to Fargo. Doc. No. 108, p. 1. It also states that while she took a taxi from the bus Depot, there was no record of the fare with the company. Doc. No. 108, p. 1. As to Lori Crist, it states she last saw Fassett the morning of 8/1/86, but couldn't recall anything she did after. Doc. No. 108, p. 1. It also stated she left Devils Lake the day after Fassett's body was found, returning two weeks later, but not living in the residence thereafter. Doc. No. 108, p. 1. SA Hellekson noted "[a]ll three of these individuals have been confronted with lies and none can or will explain discrepancies." Doc. No. 108, p. 2.

[¶99] Attorney Burianek testified this document would have gone to Mr. Fassett's girlfriend Betty Lou Whitehead's credibility, and he would have used it to cross-examine her. Doc. No. 126, P.C. Tr. p. 59. He testified that the jurors were left with the impression that the State believed her and thought she was a credible witness, when in reality, this document could have shown the State, through its investigators, questioned her credibility. Doc. No. 126, P.C. Tr. p. 60. Attorney Burianek testified he would have cross-examined Ms. Whitehead about the lack of proof for her taxi cab in Fargo. Doc. No. 126, P.C. Tr. p. 125. The Trial Prosecutor explained that the Spencer Hellekson memo wasn't a verbatim statement of what witnesses said, so it couldn't be used to impeach any statements of Betty Lou Whitehead or Lori Crist as prior inconsistent statements. Doc. No. 127, P.C. Tr. p. 154. He indicated that tactically, one could call Spencer Hellekson as a prior inconsistent witness. Doc. No. 127, P.C. Tr. p. 154. However, the Trial Prosecutor agreed that whatever information SA Hellekson knew about the purported lies or his confrontations "would be extremely important to test the credibility of any proposed witness." Doc. No. 127, P.C. Tr. p. 130.

[¶100] While the exact lies or confrontations witnessed by Special Agent Hellekson are not specifically outlined in the memorandum, it makes clear that a federal agent had called into question the credibility of two of the State’s witnesses. The Trial Prosecutor acknowledged that credibility of all witnesses is an issue in a trial, so much so that a jury instruction is given on the same. Doc. No. 127, P.C. Tr. at p. 129. There are aspects of this memorandum that Attorney Burianek would have been able to cross-examine both Whitehead and Crist on, including the missing cab fare in Fargo. Furthermore, there is no indication Attorney Burianek could not have called SA Hellekson to testify as to this memorandum had he known about its existence and SA Hellekson’s concerns about credibility. The Spencer Hellekson Memorandum was favorable to Kunkel.

d. WYWO Note

[¶101] It is undisputed that Kelly Bednardz gave an August 13, 1986, statement to Merle Henke wherein he stated he last saw Fassett on August 1, 1986. Doc. No. 124. Again, the WYWO Note indicates that on August 14, 1986, Kelly Bednardz wanted to speak to Merle Henke regarding “Gilbert Fassett. States he won money at Mels on 8-6-86 and was seen heading south with five others to a party.” Doc. No. 115. Kelly Bednardz testified at the 1995 trial that the last time he saw Fassett alive was August 1, 1986. Doc. No. 123, Tr. at p. 501.

[¶102] Attorney Burianek acknowledged that Kelly Bednardz testified at trial that he saw Kunkel and Mr. Fassett drinking together on August 1, 1986, at the Sportsman’s Den and hadn’t seen Mr. Fassett after. Doc. No. 126, P.C. Tr. p. 54. However, he testified it would have been “easy” to cross-examine Bednardz about his trial statement that he last saw Mr. Fassett on August 1, 1986. Doc. No. 126, P.C. Tr. p. 55. Again, a handwritten notation on the bottom that the Trial Prosecutor testified looked like his handwriting states, “who wrote this? Kelly B’s statements don’t say this

at all.” Doc. No. 115. The statement by Kelly Bednardz in the WYWO Note clearly contradicts the State’s theory as to August 1, 1986. The Trial Prosecutor agreed that impeachment evidence could be considered Brady material. Doc. No. 127, P.C. Tr. p. 127. When asked if a prosecutor has an obligation to go out and obtain Brady material, the Trial Prosecutor stated “we would go out of our way to ask officers to go interview witnesses if there’s inconsistencies, if they believe that there may be something out there to follow up on those potentials.” Doc. No. 127, Tr. p. 164. The WYWO note is favorable to Kunkel.

2.The defendant did not possess the evidence and could not have obtained it with reasonable diligence

[¶103] “The Brady rule does not apply to evidence the defendant could have obtained with reasonable diligence; a defendant's failure to discover evidence due to a lack of diligence defeats a Brady claim that the prosecution withheld such evidence.” State v. Horn, 2014 ND 230, ¶ 21, 857 N.W.2d 77, 82. “[C]ourts appear to universally hold that a Brady violation cannot be established if the defendant knew or should have known of the undisclosed evidence prior to or during trial, or if the defendant had the opportunity to use such evidence to his or her advantage during trial but failed to do so.” Kardor, ¶ 12 (citing State v. Bisner, 37 P.3d 1073, 1082 n. 1 (Utah 2001)).

[¶104] The Court finds the testimony of Attorneys Carlson, Burianek, and Broden, all officers of the Court, to be credible. The Court also finds Scout Holding Eagle-Bushaw, a legal intern at the time, to be credible. Attorney Carlson testified the Melvin Brodell Statement, OAG Order, and Spencer Hellekson Memo all caught her attention when going through the file because she knew the State’s entire case was that no one had seen Fassett alive after August 1, 1986, and these documents either discuss dates after August 1st or question the credibility of the State’s witnesses who testified they last saw the decedent alive on August 1, 1986. Scout Holding Eagle-Bushaw

testified the WYWO note struck her as significant because it again discussed a date after August 1st where someone saw Fassett alive.

[¶105] While Attorney Burianek admitted on cross-examination that he could not confidently say that he remembered every piece of documentation in all seven or eight murder trials he tried over his career, the Court finds his testimony to be credible that he did not see these four documents during the 1995 trial. Doc. No. 126, P.C. Tr. p. 77. He testified he went piece by piece through the Kunkel discovery, looking for anything that established Fassett was alive after August 1, 1986. The Melvin Brodell statement, which was never followed up on and was never contradicted through trial testimony or otherwise, was that he saw Fassett on August 6, 1986. The State asserts Attorney Burianek should have known to call Melvin Brodell or interview him at the time, given he was the owner of a Mel's Corner Bar, which was heavily discussed in the investigation. However, the State provided statements from two different employees of the bar who were working, who testified they last saw Fassett on August 1, 1986, Karen Azure and Tim Rolland, and Attorney Burianek did cross-examine each of them. The Trial Prosecutor also admitted Melvin Brodell was not called as a witness. As for the WYWO Note, Attorney Burianek testified he did cross-examine Kelly Bednardz, but because he had no knowledge that this Note existed, he had no reason to know that Kelly made a statement that he had seen Fassett alive on August 6, 1986. He could not have used impeachment evidence he did not know existed.

[¶106] Attorney Broden likewise testified he did not remember ever seeing the alleged Brady material until it was recently shown to him by Kunkel's counsel. He testified he would have remembered seeing a witness say they had seen Fassett alive after 1986 and had not recanted because he would have utilized this in an ineffective assistance of counsel claim. Furthermore, he testified he would have remembered the AOG Order because of its significance as a government

order that could have verified Byron Anderson’s September Statement. Attorney Broden did admit that he probably should have requested the file anew, especially given he was raising a Brady claim himself during his case, but he also testified he had no reason to believe all the discovery had not been provided.

[¶107] The Court finds Kunkel did not possess the alleged Brady material and could not have obtained it with reasonable diligence.

3. The prosecution suppressed the evidence

[¶108] “The State suppresses evidence when it ‘collects and preserves evidence, but withholds that evidence when the defendant requests it, or when it otherwise becomes material to the defense.’” Kolstad, ¶ 22 (citation omitted). “For the State to commit a Brady violation, the evidence suppressed must have been collected and preserved.” Id., ¶ 23. “Under Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), ‘suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material to guilt or punishment irrespective of the good faith or bad faith of the prosecution.’” State v. Williams, 2025 ND 46, ¶ 4, 17 N.W.3d 820, 823. The State does not dispute that these documents were found in its file; it disputes that Attorneys Burianek and/or Broden did not receive them.

[¶109] The Court has already acknowledged Kunkel did not have possession of the four documents prior to his 1995 and 2006 post-conviction hearings. It is also reasonably clear from the testimony in this hearing that the State had the four documents in its possession and suppressed the same.⁷ Clearest is the WYWO Note. It not only evidences a witness making a statement, factually true and/or inconsistent with a previous statement, that Gilbert Fassett was alive on

⁷ The Court in no way makes a finding the Trial Prosecutor in this case suppressed the four documents in question with bad faith. However, “suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material to guilt or punishment irrespective of the good faith or bad faith of the prosecution.” Williams, ¶ 4 (emphasis added).

August 6, 1986, a day in which Kunkel was in the local jail, but it also includes handwritten notes of the Trial Prosecutor acknowledging this inconsistency. This document was clearly in the hands of the State before the trial in 1995.

[¶110] Furthermore, Kunkel's 1995 case started with a discovery dispute, with the Judge presiding over the case recommending the Trial Prosecutor develop an evidence log to ensure all discovery items were disclosed to the defense. Despite this recommendation, and the reminder that this case was one of importance, the Trial Prosecutor did not accept that invitation from the Judge and no evidence log was created. The Trial Prosecutor and State Paralegal at that time did not use affidavits of service. The State Paralegal testified she would just send a copy of everything to the defense, and that was the procedure. Later, the State Paralegal did testify they started using affidavits of service to ensure documents were delivered.

[¶111] While the Trial Prosecutor and the State Paralegal testified they believed everything was given to Attorney Burianek in 1995, there is evidence to cast doubt on these assertions, again not because of a finding of bad faith. These documents were exculpatory to the defense, with one document containing the uncontradicted statement from a witness that he had seen Gilbert Fassett alive a day after Kunkel was in jail. Both Attorneys Burianek and Broden testified, and the Court would certainly expect, they would have used these documentary items in their cases. Furthermore, there were handwritten notes by the Trial Prosecutor on at least one document, indicating it was in the State's possession in 1995.

[¶112] The Court finds the State suppressed the documents.

4.A reasonable probability exists that the outcome of the proceedings would have been different if the evidence had been disclosed.

[¶113] It is undisputed that in the 1995 trial and post-conviction proceedings, the State's theory of the case has been and continues to be that Mr. Fassett was killed on August 1, 1986, or the early

morning hours of August 2, 1986. The State contended no one had seen Gilbert Fassett alive after August 1, 1986. This is evidenced by opening statement of the Prosecutor in 1995, the State's response to the Bill of Particulars, and even the Trial Prosecutor's testimony at this hearing this year. Doc. No. 107, P.C. Tr. p. 110, Doc. No. 125. The State's witnesses testified they last saw the victim on August 1, 1986. The Melvin Brodell statement, which was never challenged or otherwise contradicted, debunks that theory. If Kelly Bednardz's statement that he saw Fassett on August 6, 1986, was true, it debunks that theory. Or, at minimum, it could have cast doubt on the credibility of this witness. If Byron Anderson's September Statement that he gave Fassett a ride on August 2, 1986, in the early morning around 1:00 a.m. was true, as corroborated by the OAG Order, a government order with nearly identical details as his September statement, it debunks that theory. If Betty Lou Whitehead's statements about seeing Fassett alive on August 1, 1986, the facts related to that travel, and the lies alluded to by SA Hellekeson were challenged by the Spencer Hellekson memo, this could have either debunked or, at a minimum, cast doubt on this theory.

[¶114] The Court recognizes this case did not rest on these four documents alone. The State presented its case through witnesses who testified they personally saw Fassett on August 1, 1986 or through the testimony of witnesses who testified Kunkel made statements either explicitly admitting to killing Fassett or through innuendos. The State also presented testimony of experts who testified as to the likely date Fassett was killed based upon forensics. However, again, the state's entire theory, as presented by all of these witnesses, was that Fassett was killed on August 1, 1986, or the early morning of August 2, 1986.

[¶115] The jury was not presented with credible evidence that Fassett was seen alive after the time period the State claimed he was killed. Had they been presented with evidence to the contrary, including undeniably reliable evidence such as a government order or an uncontradicted statement

by an eyewitness who saw Fassett alive days after he was supposedly killed, a reasonable probability exists that the outcome of the proceedings would have been different if the evidence had been disclosed.

[¶116] In sum, Kunkel has proven “(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.” Rummer, ¶ 21. The Court finds the State failed to disclose exculpatory evidence entitling Kunkel to relief under N.D.C.C. § 29-32.1-01(1)(a) in violation of Brady v. Maryland, 373 U.S. 83 (1963) and the Fourteenth Amendment to the United States Constitution. However, the Brady analysis does not end here.

ii. Statute of Limitations

[¶117] The State maintains that, regardless of the merits of Kunkel’s Brady claim, it fails because it is time-barred. Typically, a petition for relief must be filed within two years of the date the conviction becomes final. N.D.C.C. § 29-32.1-01(2). However, a court may consider a petition after two years from final date of conviction if:

- (1) The petition alleges the existence of newly discovered evidence, including DNA evidence, which, if proved and reviewed in light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted;
- (2) The petitioner establishes that the petitioner suffered from a physical disability or mental disease that precluded timely assertion of the application for relief; or
- (3) The petitioner asserts a new interpretation of federal or state constitutional or statutory law by either the United States supreme court or a North Dakota appellate court and the petitioner establishes that the interpretation is retroactively applicable to the petitioner's case.

N.D.C.C. § 29-32.1-01(3)(a)(1)-(3).

[¶118] A petition under this section “must be filed within two years of the date the petitioner discovers or reasonably should have discovered the existence of the new evidence, the disability or disease ceases, or the effective date of the retroactive application of law.” N.D.C.C. § 29-32.1-01(3)(b). Additionally, a petitioner must meet four requirements to overcome the statute of limitations:

- (1) the evidence was discovered after trial;
- (2) the failure to learn about the evidence at the time of trial 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 newly discovered evidence would establish the petitioner did not engage in the conduct for which the petitioner was convicted.

Friesz v. State, 2022 ND 22, ¶ 9, 969 N.W.2d 465; Bridges v. State, 2022 ND 147, ¶ 13, 977 N.W.2d 718, 724.

[¶119] As a preliminary matter, the Court finds Kunkel met the two-year timeline as required in N.D.C.C. § 29-32.1-01(3)(b). Kunkel received the Brady material on January 11, 2023. Case No. 04935, Doc. No. 387. He filed this matter on January 10, 2025, in Case No. 04935. However, due to an administrative order and to no fault of his own, it was refiled on January 15, 2025, into the present case.

[¶120] As to the factors, of which factors one through three are largely similar to the Brady factors, the Court has already discussed above that Kunkel discovered these documents after trial, the failure to learn about the evidence at the time of trial was not the result of the defendant’s lack of diligence, and the newly discovered evidence is material to the issues at trial. The Court recognizes the fourth factor differs from Brady’s fourth factor. Nonetheless, the Court finds here the newly discovered evidence, which, if proved and reviewed in light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted.

[¶121] The State's entire theory was Kunkel murdered Fassett sometime between the hours of 10:30 p.m. on August 1, 1986, and 1:10 a.m. on August 2, 1986. The State explicitly put its anchor down on this period of time. A handful of the State's witnesses were called to discuss the last time they saw Gilbert Fassett alive, with all of them landing on August 1, 1986. These witnesses also testified they saw Fassett drinking and/or intoxicated on August 1, 1986. The State also called a handful of witnesses to testify that Kunkel confessed to killing Fassett; however, their versions were different from each other. The State also called experts, including one who performed the autopsy and one who specializes in zoology. The evidence was anchored to fitting the timeline of the State, that Kunkel killed Fassett between 10:30 a.m. August 1, 1986, or August 2, 1986, before 1:10 a.m. However, when looking at this evidence, in conjunction with the newly discovered evidence, the Brady material, Kunkel could not have killed Fassett during that timeline.

[¶122] Of the four Brady documents, the Court finds the OAG Order in particular to be the most important. Byron Anderson's September Statement, made just over a month after Fassett's body was found, indicated he had given Fassett and his girlfriend, Betty Lou Whitehead, a ride in the early morning hours, a little after 1:00 a.m. on August 2, 1986. His September Statement includes specific details about military service, such as reporting on August 2, 1986, leaving for Alabama, and leaving for a period of fifteen days. The OAG Order corroborates these exact details. Anderson's November Statement, taken months after the murder, is vague and indicates he didn't remember when he gave a ride, but didn't think it was that day anymore. However, given the specifics of his September Statement, the OAG Order is undeniably credible corroborative evidence that, if true, he did indeed give Gilbert Fassett a ride after 1:00 a.m. on August 2, 1986. And if he did, Kunkel, who had been pulled over by the highway patrol at 1:13 a.m. on August 2, 1986, could not have killed Fassett during that time period.

[¶123] With the OAG Order tying Byron Anderson to his statement that he gave this ride to Fassett on August 2, 1986, then, the remaining Brady materials further support the finding when viewing the evidence as a whole. They call into question the testimony of Betty Lou Whitehead, who testified she was on a bus to Fargo the night of August 1, 1986. They place Fassett alive on August 6, 1986, a day after Kunkel is in the local jail custody. They also now shine additional light on the issues with the State’s timeline in that the State’s witnesses testified Fassett was drinking alcohol and/or intoxicated on the night of August 1, 1986, but Dr. Gallo testified the toxicology evaluation was negative for alcohol. The evidence as a whole, including the newly discovered evidence, shows Kunkel cannot be the person committing the crime in the State’s timeline.

[¶124] The Court finds, the new evidence, which, if proved and reviewed in light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted. Because the Court has found the exception to the statute of limitations exists in this matter, Kunkel is entitled to post-conviction relief pursuant to his Brady claim.

B. NEW EVIDENCE

[¶125] Kunkel brings his second claim pursuant to N.D.C.C. § 29-32.1-01(1)(e), asserting “evidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice.” “An application for postconviction relief based on newly discovered evidence under N.D.C.C. § 29-32.1-01(1)(e) is reviewed as a motion for a new trial based on newly discovered evidence under N.D.R.Crim.P. 33.” Bazile v. State, 2025 ND 128, ¶ 9, 23 N.W.3d 770, 775. In order for a defendant prevail on such a motion, the defendant must show:

- (1) the evidence was discovered after trial,
- (2) the failure to learn about the evidence at the time of trial 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.

Id. (citing O’Neal v. State, 2023 ND 109, ¶ 4, 992 N.W.2d 14). However, if the petition is brought more than two years, the defendant must show the petitioner did not engage in the conduct for which the petitioner was convicted.” Bridges, ¶ 11. “If the newly discovered evidence is of such a nature that it is not likely to be believed by the jury or to change the results of the original trial, the court's denial of the new trial motion is not an abuse of discretion.” Bazile, ¶ 9. Specifically, Kunkel asserts that there exists new evidence regarding (1) the victim’s liver toxicology (“toxicology claim”) and (2) revised statements made by Karen Azure (“Azure Declaration”).

i. Toxicology Evaluation

[¶126] Kunkel contends new forensic evidence, never presented to the jury, exists that establishes Fassett was not killed the night of August 1, 1986. Specifically, Kunkel maintains it was undisputed that Fassett was intoxicated on the night of August 1, 1986, as stated by multiple witnesses for the State. Now, he states, the testimony of Drs. Gallo and Thomas show that not only was Fassett “was not intoxicated when he died, but that he also lacked a detectable trace of alcohol in his system.” Doc. No. 1, p. 73. Kunkel contends the “[j]ury was led to a false belief that because the body was decomposed, and because Dr. Gallo did not know what part of the liver he extracted, the liver toxicity evaluation was not valid.” Doc. No. 131, p. 57.

[¶127] The State asserts Kunkel has failed to provide newly discovered evidence regarding the toxicology evaluation. The Court agrees. The Court agrees the statements of Drs. Gallo and Thomas are but theories based upon already existing evidence. The Court agrees with the State that the lab report and analytical letter report were known to Attorney Burianek at the time of trial. As were the State’s witnesses’ accounts that Fassett was intoxicated on August 1, 1986. In fact, Attorney Burianek utilized these reports to cross-examine Dr. Gallo in 1995. Upon his questioning, Dr. Gallo testified, and Attorney Burianek was likely expecting and hoping, the toxicology

evaluation was negative for “drugs and alcohol.” While the State’s following line of questioning may have confused the jury that because Dr. Gallo didn’t know what portion of the liver he had sent for a sample, it was therefore invalid, Attorney Burianek knew that information at the time of trial and could have acted then to rectify the confusion, or perhaps chose not to as part of trial strategy. Regardless, “a defendant cannot seek a new trial for newly discovered evidence simply to employ a different trial strategy.” State v. Sievers, 543 N.W.2d 491, 497 (N.D. 1996).

[¶128] If not, then the Court agrees with the State that a claim for ineffective assistance of counsel for failing to explore this issue, likely by hiring a toxicological expert to examine this evidence, could have reasonably been brought in a prior post-conviction relief proceeding by Attorney Broden. Attorney Broden had the autopsy, report, trial testimony of all witnesses regarding Fassett’s alleged intoxication, including Dr. Gallo, and he testified he reviewed the transcript multiple times. Doc. No. 127, p. 140. Attorney Broden hired a separate expert to challenge other medical testimony. It was certainly reasonable to do the same here.

[¶129] The Court finds the evidence was not new evidence discovered after trial. Kunkel’s claim that there exists new evidence, namely, new evidence related to the toxicology examination, that requires vacation of his conviction under N.D.C.C. § 29-32.1-01(1)(e) fails and is dismissed. While the Court continues to find the statements of Drs. Gallo and Thomas are not new evidence, they certainly strengthen the Brady argument above, that Kunkel could not have killed Fassett on the date in question because the last time witnesses saw Fassett and Kunkel together, Fassett was drinking and/or intoxicated, but Fassett’s toxicological evaluation was negative for alcohol.

ii. Karen Azure Declaration

[¶130] As noted above, Kunkel maintains Karen Azure’s Declaration constitutes new evidence under N.D.C.C. § 29-32.1-01(1)(e). However, Karen Azure died in December of 2025, and as a

result, Kunkel requests the Court to admit Azure's Declaration pursuant to North Dakota Rule of Evidence 807. The State resists this request. The Court must first determine if the Azure Statement is admissible under the North Dakota Rules of Evidence before it can ascertain if it constitutes newly discovered evidence.

1. Hearsay analysis

[¶131] Kunkel moves to admit Azure's statement pursuant to North Dakota Rules of Evidence 804(b)(5) and 807. N.D. R. Ev. 804(b)(5) has been moved to Rule 807, and now states:

(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness--after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement--including its substance and the declarant's name--so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing--or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

[¶132] The North Dakota Supreme Court has said of Rule 807:

In relying on federal authorities, we have stated courts should inquire into the reliability and necessity for the statement. The most important requirement for residual hearsay is that it possess guarantees of trustworthiness equivalent to those supporting the Rule 803 and 804 exceptions. No inclusive list of factors determining admissibility can be devised because admissibility hinges upon the peculiar factual context within which the statement was made.

Some common factors noted in the Federal Rules of Evidence Manual that may apply to the facts here include: (1) the relationship between the declarant and the person to whom the statement was made; (2) the capacity of the declarant at the time of the statement; (3) whether the statement, as well as the event described by

the statement, is clear and factual, or instead is vague and ambiguous; (4) whether the statement was made pursuant to formal duties, such that the declarant would have been likely to consider the accuracy of the statement when making it; (5) whether the statement appears to have been made in anticipation of litigation and therefore may be subject to a suspect motive; (6) whether the declarant was a disinterested bystander rather than an interested party; and (7) whether the statement is corroborated by independent evidence or similar statements from others.

Johnson v. Buskohl Const. Inc., 2015 ND 268, ¶ 25, 871 N.W.2d 459, 466.

[¶133] Kunkel maintains Azure's statements have sufficient guarantees of trustworthiness because they were made under oath, under no compulsion, and relate to matters within her first-hand knowledge. Doc. No. 101, p. 2. He also asserts her statements are corroborated by her initial statement to law enforcement and Tim Rolland's initial statement to law enforcement, wherein both reported seeing Gilbert Fassett at Mel's Corner Bar several days after August 1, although they both later said to law enforcement and the jury, it was on August 1. Doc. No. 101, pp. 2-3. He further maintains that Azure's statement that Gilbert was going to visit his girlfriend out of town was corroborated because the evidence was that Fassett's girlfriend, Betty Lou Whitehead, did plan to or did leave town. Doc. No. 101, p. 3.

[¶134] Kunkel further contends the Azure Declaration goes to a material fact because according to Azure's Declaration, Fassett's girlfriend Betty Lou Whitehead was already out of town when Azure last saw Fassett alive. This would support additional facts, including those in the alleged Brady material, that Fassett was alive after August 1, 1986. Kunkel also contends "[t]he statements are more probative on the point for which they are offered than he could have obtained through other reasonable efforts – Ms. Azure is the only witness who had information about this specific interaction with Mr. Fassett. She has since died." Doc. No. 101, p. 3.

[¶135] The State contends there is insufficient indicia of trustworthiness as to the Azure Declaration because while the new statement is that she does not remember the last time she saw

Fassett, her statements to both law enforcement and the jury in 1995 reference the specific date she last saw him. Doc. No. 129, p. 5. Furthermore, the State contends Azure's statements in 1995 did not mention anything about Fassett going to visit a girlfriend.

[¶136] An analysis of the Johnson factors leads the Court to agree with the State that there is insufficient indicia of trustworthiness as to the Azure Declaration:

1. The relationship between Azure and Fassett was that of patron and bartender. Azure testified Fassett was a regular, and she knew him pretty well. Doc. No. 123, Tr. p. 483.
2. The capacity of Azure at the time of the Declaration is wholly unknown. It was signed approximately one year before she died.
3. The event, "Fassett going to visit his girlfriend, who was living in another city, either Fargo or Grand Forks" is somewhat ambiguous. It does not identify specifically Betty Lou Whitehead nor does it indicate when he was planning to go and visit the girlfriend. There is no indication that it was that same day or days or months in the future. Furthermore, it does not indicate the date this conversation took place.
4. Azure did not make the statement pursuant to a formal duty. However, she did make the statement under oath.
5. It is clear Ms. Azure's statement was made as part of Kunkel's post-conviction relief application.
6. Azure cannot be characterized as either a disinterested bystander or an interested bystander. She was questioned by law enforcement and called to testify on behalf of the State. Her motivation for now providing these statements on behalf of Kunkel is unknown.
7. Betty Lou Whitehead testified she was already living in another city, Fargo, in August of 1986 and returned to visit Fassett in Devils Lake. Doc. No. 126, Tr. p. 553. Azure's Declaration indicates Fassett told her he was "going to go and visit his girlfriend, who was living in another city, either Fargo or Grand Forks." Doc. No. 102. Presuming Whitehead was the girlfriend Fassett was speaking of, Betty Lou Whitehead's testimony would corroborate this statement. However, again, this would require a presumption, and again, the Azure Declaration does not indicate when this conversation took place.

[¶137] The State further contends the most glaring problem presented in the Azure Declaration is that it is hearsay within hearsay. Namely, Fassett's statement to Azure about going to visit his girlfriend contains the inner level of hearsay, with Azure's statements in the declaration the second level. Both levels must meet a hearsay exception to be admissible. See Ziemann v. Grosz, 2024

ND 166, ¶ 34, 10 N.W.3d 801 (“when a statement within a statement is at issue in a hearsay challenge, each must be admissible on its own.”). The State also asserts Fassett’s statement likewise lacks indicia of trustworthiness, and the Court agrees.

1. The relationship between Azure and Fassett was that of patron and bartender. Azure testified Fassett was a regular, and she knew him pretty well. Doc. No. 123, Tr. p. 483.
2. The capacity of Fassett at the time is unknown. If this statement was on August 1, 1986, multiple witnesses testified Fassett was drinking and/or visibly drunk. If it was at any other time, his capacity is wholly unknown, and this Declaration does not provide any information to specify the same.
3. The event, “Fassett going to visit his girlfriend, who was living in another city, either Fargo or Grand Forks” is somewhat ambiguous. It does not identify specifically Betty Lou Whitehead nor does it indicate when he was planning to go and visit the girlfriend. There is no indication that it was that same day or days or months in the future.
4. Fassett had no formal duties in making this statement to Azure.
5. Fassett’s statements were not made in anticipation of litigation.
6. Fassett’s motivation in making the Statement to Azure is unknown.
7. Again, Betty Lou Whitehead had testified she was already living in Fargo, so this statement would corroborate that. But again, the timing of when he planned to visit her is wholly unknown. Betty Lou testified they had been dating since March of 1986.

[¶138] The Johnson factors disfavor admissibility of the Azure Declaration. As a result, the Azure Declaration will not be considered by the Court as newly discovered evidence for purposes of this proceeding, and no further analysis on the same is needed.

C. INEFFECTIVE ASSISTANCE CLAIM

[¶139] Kunkel brings his third claim pursuant to N.D.C.C. § 29-32.1-01(1)(a), which allows for relief if the “conviction was obtained or the sentence was imposed in violation of the laws or the Constitution of the United States or of the laws or Constitution of North Dakota. Specifically, Kunkel asserts the Sixth Amendment, Fourth Amendment, and Article 1, Section 12 of the North Dakota Constitution guarantee him the right to effective assistance of counsel. He maintains both his trial and post-conviction counsel were ineffective.

[¶140] The State and Kunkel both admit Kunkel’s third claim is closely intertwined with his first and second claims. Specifically, Kunkel asserts that if the Court finds that the alleged Brady material was provided to defense counsel, then his trial counsel was ineffective in failing to further investigate or use this evidence. As for the newly discovered evidence, namely the toxicology evidence, Kunkel asserts that if the Court were to find it was not discovered because of a lack of due diligence, then it would constitute a claim for ineffective assistance of counsel. Because the Court has already determined Kunkel’s counsel did not possess the alleged Brady material, the Court will only consider Kunkel’s claim that his trial and post-trial counsel were ineffective in relation to the toxicology evidence.

[¶141] As a preliminary matter, Kunkel acknowledges North Dakota law bars a petitioner from arguing ineffective assistance of post-conviction counsel. The State argues, and the Court agrees, Kunkel is explicitly barred from arguing ineffective assistance of post-conviction counsel Doug Broden. N.D.C.C. § 29-32.1-09(2) states “[a]n applicant may not claim constitutionally ineffective assistance of postconviction counsel in proceedings under this chapter.” The North Dakota Supreme Court has made the same clear. See Williamson v. State, 2025 ND 66, ¶ 19, 18 N.W.3d 921, 927, reh'g denied (Apr. 9, 2025) (“The plain language of the [] sentence prohibits such claims without exception.”). Therefore, the Court is limited to determining whether Attorney Burianek was ineffective as it relates to the toxicology evidence.

[¶142] “To succeed on a claim for ineffective assistance of counsel, the applicant must show: (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Black Elk v. State, 2023 ND 150, ¶ 16, 994 N.W.2d 394, 401. “To establish the first prong, the applicant must overcome the strong presumption that trial counsel's

representation fell within the wide range of reasonable professional assistance, and courts must consciously attempt to limit the distorting effect of hindsight.” Id. (citation omitted). “To establish the second prong, the defendant must specify how and where trial counsel was incompetent and the probable different result.” Id.

[¶143] Kunkel asserts Attorney Burinaek was ineffective in failing to elicit the information that Drs. Gallo and Thomas provided in this proceeding, namely “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 toxicology evaluation was valid, that the body ceases metabolizing alcohol at death, and that Fassett therefore did not die on the night of August 1st.” Doc. No. 1, ¶ 209.

[¶144] At the trial in 1995, Attorney Burianek got Dr. Gallo to state the toxicology evaluation was negative for alcohol. The Trial Prosecutor likewise stated his re-direct in a way that indicated the results were negative. See Doc. No. 123, Tr. p. 1077 (“Q. The issue of the liver sample being negative for alcohol, how much of a liver was left to get a sample of? “). While the Trial Prosecutor may have cast doubt by asking questions about the liver sample, Dr. Gallo still stated the sample was negative in both instances. The jury heard twice the liver sample was negative for alcohol. Kunkel has failed to show there is a reasonable probability that, but for Attorney Burinaek’s failure to adduce additional evidence to address the possible confusion by the State’s questioning, the result of the proceeding would have been different. There is no indication that the jury did not disregard the State’s line of questioning and rely solely on Dr. Gallo’s first statement that the exam was negative for alcohol.

[¶145] Furthermore, the Court agrees that an argument that Attorney Burianek should have hired an expert to review Dr. Gallo’s findings could have and should have been properly raised by Attorney Broden. Attorney Broden, who testified he reviewed the record multiple times, could

have made such a claim, especially considering Attorney Broden asserted an ineffective assistance of counsel claim for Attorney Burianek failing to consult with other medical experts to meet the State's expert testimony.

[¶146] The Court finds Kunkel's claim that his counsel was ineffective and he was not given a fair trial entitling him to relief under N.D.C.C. § 29-32.1-01(1)(a) fails and is dismissed.

D. DESTROYING OF EVIDENCE

[¶147] “[O]nce 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, 961 N.W.2d 310, 312. However, “unless a criminal defendant shows bad faith on the part of law enforcement, failure to preserve potentially useful evidence does not violate the defendant's due process rights.” Id.

[¶148] While the evidence shows the current disposition of the physical evidence is unknown, Kunkel's destruction of evidence claim must fail because he failed establish bad faith on the part of any actor in the handling of the evidence. “Whether a law enforcement officer's action could be termed reckless, intentional, negligent, or merely that of following or failing to follow regular police procedure, the evidentiary standard necessary to prove bad faith by the state with regard to the destruction or loss of evidence is quite high.” Schweitzer, ¶ 3. “Bad faith, as used in cases involving destroyed evidence or statements, means that the state deliberately destroyed the evidence with the intent to deprive the defense of information; that is, that the evidence was destroyed by, or at the direction of, a state agent who intended to thwart the defense.” Id. Kunkel has failed to meet his burden.

[¶149] Kunkel has failed to establish his due process rights were violated when the shirt recovered from Gilbert Fassett's body, critical evidence, was lost or destroyed in bad faith, entitling him to relief under N.D.C.C. § 29-32.1-01(1)(a). This claim fails and is dismissed.

III. ORDER

[¶150] The Court finds Kunkel is entitled to post-conviction relief pursuant to his Brady Claim as explained above. As a result, the Court hereby **VACATES** Kunkel's 1995 conviction for murder and **ORDERS A NEW TRIAL** on the matter.

[¶151] Dated this 27th day of February, 2026.

BY THE COURT:



Honorable Daniel Narum
District Court Judge
Southeast Judicial District