STATE OF MINNESOTA	**IN DISTRICT COURT**
COUNTY OF AITKIN	**NINTH JUDICIAL DISTRICT**

Brian K. Pippitt,

Petitioner,

vs.

State of Minnesota,

Respondent.

MEMORANDUM OF LAW SUPPORTING PETITION FOR POST-CONVICTION RELIEF

D.C. File No. 01-K4-99-000325

INTRODUCTION

Though decades have now passed since Brain Pippitt's wrongful conviction, it is never too late to correct an injustice. Material never before presented to any court establishes Mr. Pippitt's complete innocence in the 1998 murder of Evelyn Malin. As described below, Mr. Pippitt's conviction was secured through perjured testimony describing events that simply could not have happened, in light of what we now know.

The defense is not alone in professing Mr. Pippitt's innocence. The Minnesota Attorney General's Office, through the Minnesota Conviction Review Unit (CRU), has conducted an exhaustive two-year investigation of Mr. Pippitt's conviction culminating in a comprehensive 115-page Report and Recommendation [CRU Report attached as Exhibit A to the Petition]. The CRU recommends that Mr. Pippitt's conviction be vacated, and that he be fully exonerated for the crime of Evelyn Malin's murder, as he had no part in it.

RELEVANT FACTS

A. The murder and the police investigation.

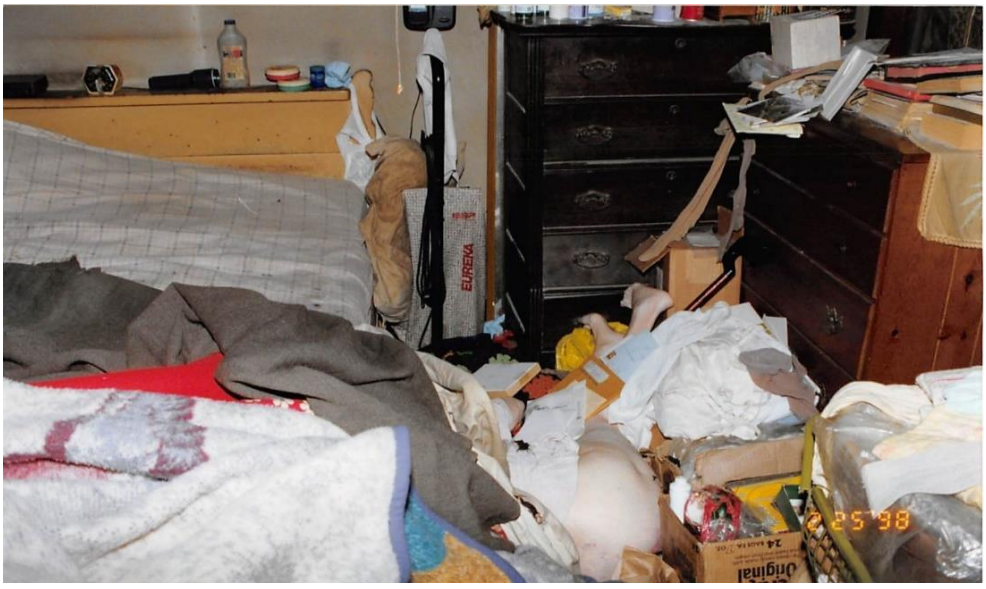
1. The murder.

On the night of February 24, 1998, 84-year-old Evelyn Malin was beaten and strangled to death in her home/store in Shamrock Township, McGregor, Minnesota. Her home, pictured below, was part "Dollar Lake Store" and part residence where she lived alone.

Mrs. Malin's daughter, Norma Horner, and her boyfriend, Gerald Horsman, arrived at the store the next morning at 8:30 am (as was their custom). Mrs. Malin, however, failed to answer when they knocked on the doors and windows. Mr. Horsman knew that the front door would be securely locked so he and Ms. Horner went to the back door. However, that back door had a skeleton key inserted in the keyhole on the inside preventing its operation. Also, the back screen door was held shut by a hook and eyelet on the inside of that door. Getting no response from Mrs. Malin, Ms. Horner

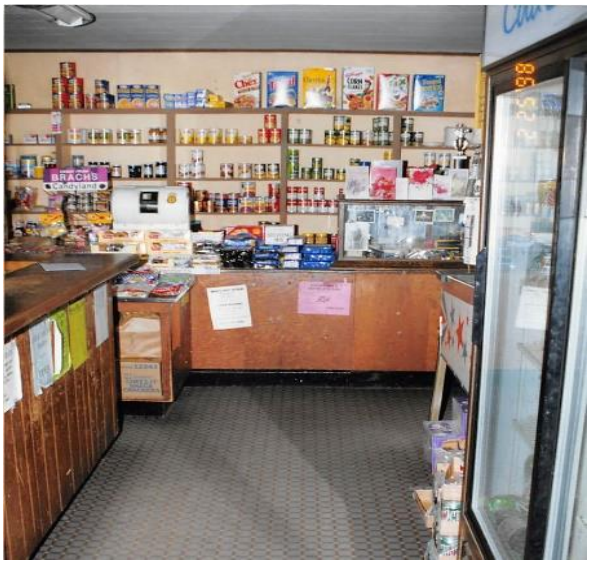
stayed by the store while Mr. Horsman drove back to their cabin to call 911. [Deputy John Drahota report 2/25/98-03/07/98; Norma Horner interview 02/25/98, Gerald Horsman interview 02/25/98]

The police arrived and kicked in the back door. As they made their way through the building, they found Mrs. Malin's body in her bedroom. Initially, they did not discover her as she was next to her bed covered by her overturned mattress and partially hidden among clothes, blankets, bedcovers and papers. Mrs. Malin had been murdered in her bed. Her glasses were on the dresser and she had removed her hearing aids for the night. Her bedroom, pictured below, was in disarray and it appeared the assailant had searched the room as numerous items were scattered, overturned and disrupted.[1] [Deputy Mark Fredin report 02/25/98; Sgt. Scott Turner report 02/25/98]



[1] Deputy Mark Fredin had moved the mattress off her body and back onto the bed when the crime scene photograph was taken of her body. [Fredin report 02/25/98]

Unlike Mrs. Malin's clearly ransacked bedroom, the area of the building that housed the convenience store was untouched, even though that is where the cash register (where she kept cash) and a jar of change were located. (pictured below) [Drahota report 02/25/98-03/07/98; Turner report 02/25/98]



And it was the State's theory that the defendants entered the store, while it was closed, specifically to steal beer. [County Attorney Rhodes opening remarks, Grand Jury pp. 8-13]

Crime scene photographs taken from inside the store show that the front door was locked with a deadbolt lock. (Photograph below is Brian Pippitt trial Ex. 55–an enlargement of the crime scene photograph)

As pictured below, two small windowpanes leading to the basement had been removed.

Ultimately, the State's theory was that one of the assailants gained access to the building by squeezing through the small basement window and entering the store through a trap door in the floor. Then, so the theory goes, he opened the front door to let the other four participants into the store where they murdered Mrs. Malin, stole beer and cigarettes then fled through the front door.

As described in more detail later in this memorandum, a forensic trace evidence crime scene expert, Linda Netzel, the former Director of the Kansas City Police Lab, determined, in a comprehensive analysis, that no entry was made through the basement window and that it was staged to appear as a point of entry. [Netzel Report, attached as Exhibit C to the Petition]

Similarly, criminalist and crime-scene reconstruction expert, Dr. Brent Turvey, after reviewing records in the case and conducting an on-site inspection of

the scene in September 2000, independently[2] determined that no one entered the premises through the basement window, and that the scene was staged to appear as though the attack was the result of a burglary gone wrong. [Dr. Brent Turvey Declaration, attached as Exhibit B to the Petition, ¶¶ 27 A-E, 28, 34 A-E]

The State's theory that 4 or 5 drunken men were all in the store to steal beer and cigarettes and then murdered Mrs. Malin is utterly implausible, given that there is absolutely no forensic trace to support such a theory. Moreover, the front and back doors were locked with deadbolt locks operable only with keys–a fact that police tried desperately to obscure because it was wholly inconsistent with their crime theory that the assailants had exited through the front door. Finally, Mr. Horsman, who was responsible for the inventory in the store, confirmed that no beer or cigarettes were stolen from the store at all.

2. The investigation.

Aitkin County Sheriff's Office Investigator Bruce Beck led the investigation assisted by Deputy John Drahota, Sgt. Scott Turner, Deputy Mark Fredin and Sgt. Roy Bruggman. The state Bureau of Criminal Apprehension ("BCA") Special Agents Dave Bjerga, Gary Pederson, and Brad Barker also participated in the investigation.

A customer, Bradley Haussner, informed police that he had been at the store around 9:40 pm and Mrs. Malin was preparing to close (Mrs. Malin generally closed the store at 10:00 pm). She told Mr. Haussner that "trouble was back in the neighborhood," referring to a man named Terry Peet who had recently been released from prison. Evidently, Mr. Peet had caused Mrs. Malin trouble in the past. That very

[2] Ms. Netzel was not made aware of Dr. Turvey's report and Turvey was not made aware of Netzel's report when each conducted their independent analyses.

day and evening, he had argued with her when she refused to sell him bottled gas on credit.

Mr. Peet became an early suspect. [Bradley Haussner interview 02/25/98] One witness, George Boyd, told investigators that he saw a man with a flashlight walking outside of the Dollar Lake Store at about 11:00 pm. He thought the man looked like Terry Peet. [George Boyd interview 02/26/98] Within a few months of the murder, Terry Peet died when his trailer burned. For reasons not ever explained, police then abandoned the theory that he was the assailant. [Beck report 02/25/98-03/17/98]

Other early leads pointed toward a family dispute. Norma Horner immediately directed investigators toward her nephew—the victim's grandson, Mark Malin. Mark had argued with Mrs. Malin earlier that month when she refused to give him $450. Mrs. Malin was generally prone to giving him money when he asked, but this time she refused. The relatives said that Mark Malin had a "terrible temper," was "bad news," was prone to violence particularly when "on something," and had a drug problem. [Norma Horner interview 02/25/98; Norma Horner interview 02/26/98; Beck report 03/17/98] Malin family members told lead Investigator Bruce Beck, "around the first of February, Evelyn had Mark Malin go to three different locations in the store and get money for her." [Beck report 03/24/98] "It had been told to Special Agent Bjerga by local officers that Mark Malin was frequently seen at the Dollar Lake Store." [Special Agent Dave Bjerga report 2/25/98, A 204] Mark Malin was absent from work for eight days after his grandmother's death.

When interviewed, Mark gave names of possible suspects to police. [Bjerga report 03/18/98; Special Agent Gary Pederson report 02/25/98] They were false leads. Joel Torgerson, a former friend of Mark Malin, told police that he had heard that Mark

Malin had "been rough with his grandma" and that he knew Mark Malin had stolen from her. [Joel Torgerson interview 12/08/98] Despite the relatives' concerns over Mark Malin's behavior and the statements of Joel Torgerson, the police did not pursue him as a suspect nor did they ever interview him again.

3. Rumors begin to swirl.

Among the multitude of rumors that came to the attention of the police was one suggesting that the "Misquadace boys" were involved in the Malin murder. In his report dated March 2, 1998, Investigator Beck notes, "there was a meeting with all of the BCA Special Agents and myself as we discussed the investigation to date. During the meeting it came up that one of the officers was told that the Misquadace boys might possibly have done this at the Dollar Lake Store."[3] The so-called Misquadace boys were Brian Pippitt's nephews–Keith, Michael, Brandon and Wesley Misquadace. [Beck report 03/02/98] They are the sons of Anita Misquadace, Mr. Pippitt's sister. Keith, Michael, and Brandon lived on the Sandy Lake Reservation about 15 miles north of the Dollar Lake Store with their grandmother, Agnes Chief. Agnes was Anita Misquadace and Brian Pippitt's mother. Wesley Misquadace lived about 60 miles away in Onamia.[4]

On March 2, 1998, five days after the murder, 16-year-old Melissa Nelson told Deputy John Drahota she had heard that her relative Aaron Nelson was involved in the murder. She also said she heard that Keith, Michael, and Wesley Misquadace were

[3] Neither the officer nor the source of this rumor is identified in the report.

[4] Brian Pippitt's biological mother is Agnes Chief. His surname of Pippitt comes from his adoptive parents with whom he lived in Indiana until he was a teenager. Brian was given to the Pippitts as a baby because of strife in Agnes Chief's marriage.

involved, but she couldn't remember where she heard it. She also thought it was more likely that Aaron Nelson had been the attacker, rather than the Misquadaces. [Melissa Nelson interview 03/02/98]

On March 5, 1998, Investigator Bruce Beck interviewed Keith, Michael, and Brandon Misquadace. All three disclaimed any direct knowledge of the crime. Both Michael and Brandon recalled that, on the day and evening of the murder, they were at the Mille Lacs Grand Casino, where Michael Misquadace had two job interviews. They said that their uncle Brian Pippitt was with them. Throughout the history of this case, they never wavered on this point.[5] Keith Misquadace said he came home after school that afternoon, watched television that night, and went to bed. Investigator Beck also noted that Keith did not have any scrapes or cuts on him and that none of the brothers' shoes matched the footwear impressions left on the sandy basement floor of the Dollar Lake Store. [Keith Misquadace interview 03/05/98; Michael Misquadace interview 03/05/98; Brandon Misquadace interview 03/05/98; Beck report 03/05/98]

The number of rumors and reports of supposedly incriminating statements multiplied after the announcement on March 22, 1998 of a $10,000 reward effective

[5] Brandon and Michael Misquadace were ultimately cleared based on this alibi. The evidence and logic should also have cleared Brian Pippitt, who had the identical alibi. Not only did Brandon and Michael consistently corroborate his alibi, other witnesses did as well. In fact, Michael testified to Brian's alibi at trial. Nevertheless, the County Attorney Brad Rhodes used the gambit of arguing that since Brian had not used his Grand Advantage Club card at the casino, he had not been there. A Grand Advantage Club Card is a rewards card through which a player can earn points for future incentives. Brian, however, did not always use his card. Also, despite County Attorney Rhodes' knowledge of Brandon and Michael's statements made within days of the murder confirming Brian's alibi, he falsely argued that Brian fabricated the alibi while awaiting trial and enlisted "his family…to help him with the "fabrication." [County Attorney Rhodes summation, Brian Pippitt trial pp. 665–666]

until April 24, 1998. [Aitkin County Sheriff's Award Announcement]

Although there was never any consistency to the rumors surrounding the identity of the assailants or the circumstances of the crime, the investigators, solely through hearsay, rumor, and false innuendo, narrowed the suspect group to five people who they claimed were driving around together on the afternoon and night of the murder. This group—Raymond Misquadace, Keith Misquadace, Donald Hill, Neil King and Brian Pippitt—would have had no reason to be together. Raymond was 21, Keith was a 17-year-old high school student, Donald was 23, and Neil was 18. Brian Pippitt, however, was 34. Moreover, they haled from diverse parts of the family. Raymond Misquadace is a cousin of the Misquadace brothers but from a different family branch and from a town 2 ½ hours away. Keith Misquadace and Brian Pippitt did not get along with Raymond. [*see*, *e.g.*, Keith Misquadace Decl., attached as Exhibit G to the Petition, ¶ 14] Neil King was from another side of the family and did not associate with Keith Misquadace or Brian Pippitt. In fact, Neil told police that the Misquadaces and the Hill families did not get along. [Neil King interview 11/13/98] These five never hung out together, and especially not as a group. In fact, Raymond Misquadace admits that he and Brian Pippitt did not like each other. Raymond further admits that he (Raymond) did not get along with Donald Hill either. [Raymond Misquadace testimony, Grand Jury pp. 522–523]

Curiously, the investigators were initially led to Raymond Misquadace by Keith Misquadace. In an interview with Keith Misquadace on February 17, 1999, Keith told Beck and Bjerga that he heard secondhand that Raymond Misquadace may have been involved. Again, if the police theory was correct about the identities of the participants, Keith Misquadace obviously would not lead law enforcement to Raymond Misquadace

who could in turn implicate him. [Keith Misquadace interview 02/17/99] [6]

In a dubious effort to get incriminating statements, the investigators used a tactic of falsely representing to a person in this group that another in the group had incriminated him. They first used this tactic on 15-year-old Brandon Misquadace. But, despite the exceedingly coercive and dishonest nature of Brandon's interrogation (who had no parent, guardian, or lawyer present), he withstood the aggressive device and stood firmly by his alibi that he was at the Grand Casino in Onamia. [Bjerga report 04/08/98; Brandon Misquadace interview 04/08/98] He has never wavered from this alibi, which investigators ultimately had to concede was valid. [Donald Hill interview 05/06/99]

In another example of this ploy, investigators lied to Neil King, claiming that Brian Pippitt told them Neil had been driving. [Neil King interview 11/13/98] Brian had said no such thing and had steadfastly denied any involvement or knowledge of the crime. Similarly, the police told Brian Pippitt that Neil King had said that Brian was present at the homicide. [Brian Pippitt interview 01/26/99] Neil King had not made

[6] Investigators apparently also believed that Raymond's involvement was corroborated by a statement made by Larry Chadwick. On April 21, 1999, Chadwick told an officer who was driving him from jail to court that he had overheard Michael and Wesley Misquadace at a party discussing their roles in the murder. [Deputy Steve Cook report 04/21/99] Chadwick claimed that they said one of the participants fled back to Bagley, Minnesota. Although investigators knew that Raymond Misquadace lived in Bagley, they had already determined that neither Michael nor Wesley Misquadace had any involvement in the crime. Chadwick also told investigators that the Misquadaces said they cut off the victim's fingers. Accordingly, police knew at the time Chadwick told his story—which relied on the premise that Michael and Wesley were involved and had knowledge of the murder—that the story was false. [Larry Chadwick interview 04/22/99] Clearly, Chadwick's story was meritless and should have been treated as such.

any such statement and had, like Brian, denied any involvement. [Neil King interview 11/13/98]

The whole framework of the investigation, built solely on unsupported, inconsistent innuendo and varying rumors, was concocted from nothing and remains baseless. As described in more detail below, the State's entire theory of the attack on Mrs. Malin—that it was a burglary gone bad committed by Raymond Misquadace, Keith Misquadace, Donald Hill, Neil King and Brian Pippitt, five Native Americans looking for beer—is completely contradicted by the known facts.

B. Zeroing in on the 5 defendants; making a case, and securing convictions.

Ultimately, the official version of events coalesced around a story involving 5 defendants and a robbery gone wrong.

1. The Raymond Misquadace interrogations and the continued evolution of his "confession."

On February 18, 1999, one day after Keith Misquadace first mentioned Raymond's name and almost exactly a year after the murder, Special Agents Bob Barker and Dave Bjerga interviewed Raymond Misquadace. Raymond was in custody in Bagley for a probation violation (failing to pay a fine). During the interrogation, the BCA agents accused Raymond of being involved in the murder. They asked him if there was a good reason as to why his fingerprints and palm print would be at the scene of the crime. They told him that his name keeps coming up and they falsely claimed that the County Attorney was about to bring charges and that Raymond had to confess and identify accomplices to get the best deal. They threatened him with being an accessory after the fact to murder with a 20-year sentence if he stuck to his denial of involvement or knowledge of the crime. [Raymond Misquadace interview 02/18/99]

Raymond said he heard from his aunt Kathy Hill that Keith Misquadace and Brian Pippitt and maybe others were involved but he did not directly know of any evidence, just rumors. Raymond agreed to provide his fingerprints and palm prints. He steadfastly denied any involvement. [Raymond Misquadace interview 02/18/99]

On April 28, 1999, seven days after Larry Chadwick falsely claimed to have overheard Michael Misquadace and Wesley Misquadace discussing the crime and mentioning a person from Bagley being involved, Bjerga and Beck returned to Bagley. They picked up Raymond Misquadace and drove him to Bemidji, ostensibly for a polygraph examination that Raymond agreed to. Once in Bemidji, the investigators began an intense and coercive interrogation, lying to Raymond that other assailants placed him at the store with them.

The interrogation progressed with many leading questions and threats, just as it had with 15-year-old Brandon Misquadace. Bjerga told Raymond that Mrs. Malin had been killed during a burglary gone wrong, and he repeatedly lied to Raymond, telling him that an accomplice named him as a primary participant in the crime. [Raymond Misquadace interview 04/28/99] No one had said any such thing. It is also evident that the investigators had spoken to Raymond during the 40-minute ride from Bagley, as they refer to things Raymond did not mention in the recorded part of his interview. Bjerga even admitted in the interview that he had conversations with Raymond during their car ride from Bagley to Bemidji. [Raymond Misquadace interview 4/28/99]

After relentless pressure and prompting from the interrogators, Raymond gave the first version of his story. He claimed that Keith Misquadace, Neil King and Brian Pippitt came to his aunt Kathy Hill's house in McGregor at around 3:00 or 4:00 pm and picked up him and Donald Hill. He said Neil King was driving. According to this

story, they drove to the Village Pump in Tamarack where they bought some beer, and then they drove to Sawyer. When they ran out of beer and were low on gas, they drove back to the Dollar Lake Store—about 30 miles from Sawyer—to get some beer.[7]

He said the store was closed and that, after Brian kicked in the front door, the others went in and came out through that door. He said no one had a screwdriver. He said no one had a weapon. He did not see anyone go around to the side where the basement windows were located. He did not know anything about anyone going through the basement windows—an alleged event the police were obviously planting in his mind. [Raymond Misquadace interview 04/28/98]

Raymond then told investigators that, when they left the store, Keith Misquadace was driving and took Route 65 up to Raymond's father's old house. [Raymond Misquadace interview 04/28/98]

Raymond told the interrogators that, while the group was driving to his father's old house, no one said anything about what happened inside the store. In response to leading questions, Raymond said, once they got back to the house, Keith said he pushed her down when she "came in there." Of course, Mrs. Malin was killed in her bed and never "came in" anywhere. Raymond denied that anyone had said anything about Brian Pippitt holding the victim down, though this, like other aspects of Raymond's story, would later evolve. [Raymond Misquadace interview 04/28/99]

After this purported confession on April 28, 1999, Raymond Misquadace gave

[7] Among many reasons, this story is nonsensical. Brian Pippitt was 34 and had charge accounts in numerous bars and off-sale liquor stores in the immediate area where he often charged alcohol purchases. He could have readily purchased real beer or alcohol on credit at any of those businesses, rather than travel 30 miles to break into a closed general store where only 3.2 beer was available.

six more evolving versions: (1) on April 30, 1999; (2) on June 3, 1999 (the day before the Grand Jury proceeding); (3) on June 4, 1999 at the Grand Jury hearing; (4) on October 27, 1999 during Neil King's murder trial (which resulted in an acquittal by the trial judge); (5) on April 12, 2000; and (6) on January 23 and 24, 2001 at Brian Pippitt's murder trial. This series of subsequent statements is remarkable for the progression and evolution from the original story to one that more readily conforms to the State's theory.

Raymond Misquadace was offered a plea deal of 58 months for manslaughter in exchange for his testimony against the others. [Raymond Misquadace testimony, Neil King trial pp. 157-158; Raymond Misquadace testimony, Brian Pippitt trial pp. 313-314] The 58 months could be served in as few as 38 months with good time credits. In addition, Raymond would receive credit for 669 days of pretrial detention and his sentences for the unrelated crimes of felony theft and domestic assault would be considered fully executed. [Raymond Misquadace sentencing hearing 02/26/01 pp. 9-11] Thus, for the murder of an 84-year-old woman, Raymond Misquadace could be released in as little as 18 months. Given that his sentences for his other convictions would be rolled into that term, he was serving almost no time for the murder itself. But according to Investigator Beck, in order to get that deal, Raymond had to provide more and more incriminating information.

After Raymond provided his confessional statements on April 28, 1999 and April 30, 1999, he met with Investigator Beck and Special Agent Bjerga on May 27, 1999 at the Itasca County Jail to give a further interview. His counsel was present. After conducting the interview, Beck reports:

> The purpose of the meeting was a scheduled interview with Raymond Lee

> Misquadace in cooperation with his counsel, Donovan Dearstyne, Asst. Public Defender, Walker, Minnesota. Dearstyne had made an agreement with County Attorney Bradley Rhodes in regards to Raymond giving a statement. At approximately 9:30 a.m. SA Bjerga, Raymond, Dearstyne, and myself began the interview at Itasca County. SA Bjerga read Raymond the Miranda warning off the card and began the interview. Bjerga let Raymond tell what he knew, it was basically nothing different than what Raymond had previously told us. ***We pointed out that part of the agreement the County Attorney had made was for new and more detailed information.*** [emphasis added]

Beck and Bjerga stopped the interview when Raymond failed to invent more details that might help to falsely convict the others. After the aborted interview, Special Agent Bjerga spoke by phone with the prosecutor, Bradley Rhodes, and they rescheduled the interview. Investigator Beck's report states: "See enclosed statement for details." [Beck report 05/27/99] If a statement of the details of the agent's call with Rhodes ever existed, it has disappeared. Seven days later, Raymond gave his June 3rd interview with the new more incriminating details that Beck, Rhodes, and Bjerga demanded.

Thereafter, Raymond's story kept changing to more closely meet the State's theory of the crime. One of the most glaring examples was Raymond's complete reversal of his description of how they entered the store. He initially said that Brian Pippitt kicked in the front door. But the police knew from the onset that no one had kicked in that door. Thus, when Raymond gave this false story, police knew he had to alter it because there was no evidence the deadbolted locked door had been kicked open. So, Raymond's story then magically transformed to one where Keith had gone to the side of the building where the basement window was, somehow gained entrance to the building and opened the front door for Brian from the inside. Unfortunately for all involved, Raymond's own lawyer was an actor in this charade who continued to

prompt Raymond with additional details, presumably as a way to ensure acceptance of his plea deal. The chart below lays out a sampling of critical details that changed as Raymond repeated the various versions of his story:

[The following abbreviations are used in the table below: BP trial: Brian Pippitt criminal trial; GJ: Grand Jury; stand-alone dates: the dates of Raymond Misquadace's interviews]

TOPIC	**INITIAL STORY**	**FINAL STORY AFTER EMBELLISHMENTS**	**REASON FOR FINAL VERSION**
Mode of entry and exit	Through the front door; Brian kicked in the front door. 04/28/99, 04/30/99	Brian waited by the front door until Keith opened the door from the inside. BP trial p. 340	Police knew that the door had not been kicked in or forced open, so Raymond had to change his story to meet the police theory that someone went through the basement window and opened the door from the inside.
Where everyone went	In and out of the front door. Did not see anyone go around to the sides of the building. Did not see anyone go to basement windows. 04/28/99 04/30/99	Keith and Donald went around to either side of the building. Keith broke in and opened the front door while Brian waited by the door. 06/03/99 GJ p. 470 BP trial p. 342	The police theory was that the assailant went around to the side of the building and entered through the basement on that side. Raymond's initial story as to where they went did not support that theory.
Car they were in	Gold, two door Toronado, owned by his grandmother who sold it to his aunt Anita. 04/28/99 04/30/99 06/03/99	Doesn't know what kind of car; doesn't know the color; doesn't know who owned it. BP trial pp. 418, 426, 464-465, 468, 470	There was no Toronado (gold or otherwise) so Raymond had to change that recollection. It also does not fit with the police theory that they were driving around in Agnes Chief's van.

Weapon	No one had a weapon. 04/28/99 04/30/99	Brian had a gun or stick that he came out of the store with. 06/03/99 GJ p. 479 BP trial pp. 344, 445	Merle Malin claimed that a gun was missing from the premises. Although this claim was never substantiated, Raymond's embellishment accounts for a gun being stolen.
Discussions	While they drove back from the store to Raymond's father's old house, no one talked in the car about what happened at the store. Raymond did not know anything had happened to Mrs. Malin until they got to his father's old house. No one said anything about Brian "holding her down." 04/28/99 04/30/99	Keith said in the car that she came out and discovered them and he "had to put her down" (a phrase that Bjerga had used in prior interviews with other suspects). Keith said Brian helped hold her down. 06/03/99 GJ p. 481 BP trial p. 353	Raymond's initial story was not sufficiently incriminating as to how Mrs. Malin was killed. It was also not plausible to police that the assailants would not have discussed what happened in the store while driving away from the crime scene.
What they came out of the store with	Didn't really see them come out of the store but, when they got to the car, they had some beer and cigarettes. No one came out with a gun or guns. 04/28/99 04/30/99	Brian came out carrying a bag with a "long object", 3 or 4 feet long, possibly a club or gun and a shopping bag. 06/03/99 GJ p. 476 BP trial p. 342	See above.
Injuries to accomplices	No mention	Keith had cut his hand and was bleeding badly. He wrapped the wound in his shirt. The blood oozed through the shirt. 06/03/99 GJ p. 496-497	If the window to the basement was broken and someone squeezed through, it would be likely that he cut himself doing so.

		BP trial pp. 360, 446	
Shoe prints	No mention	Keith was worried about having left shoe prints at the scene. He said he had to get rid of his shoes. 06/03/99 GJ p. 495 BP trial pp. 359	If the assailant had entered through the basement window, as theorized by police, then he would have left footprints in the sandy floor of the basement.
How Mrs. Malin was killed	Did not know anything about how she was killed. No one told him any details or specifics about it. 4/28/99 4/30/99	Keith said he was choking her and couldn't put her out, so Brian was holding her down hitting her. 06/03/99 GJ p. 481 BP trial p. 357	This embellishment was necessary to conform to the autopsy report which stated that the victim was beaten about the head and strangled.
Time of day when they arrived at Dollar Lake Store	Stopped at Village Pump in Tamarack while still light out around dusk. Then drove to Sawyer. Turned around at Sawyer and drove directly to the Dollar Lake Store. That would have placed them at the store at about 7:00 pm. 04/30/99	Arrived around 10:00 pm GJ p. 469 BP trial p. 336	Raymond's timeline would have placed them at the Dollar Lake Store at about 7:00 pm, but Mrs. Malin was not killed until sometime after 10:00 pm. Thus, the need for the change in time.
What Raymond heard at the store	Did not hear any commotion. He had the car radio on. 04/28/99	Heard a bang or a crash. 06/03/99	This version accounts for th window being broken.

The majority of the embellishments, obviously made to conform to the investigators' narrative of surmised events, only formed as Raymond was being alternately threatened and then coaxed by the promise of an exceedingly light sentence. Raymond's excuse for the ever-changing story was that he was initially scared to describe the true details. [Raymond Misquadace interview 06/03/99; Grand Jury p. 498] But this excuse lacks any credibility. It is not scarier to say that someone opened the front door for Brian instead of saying, as he did in his original story, that Brian kicked in the front door. It is not scarier to say that Keith Misquadace and Donald Hill went around the sides of the building and opened the door for Brian instead of saying, as he did in his original story, that he did not see anyone go around to the sides of the building.

Aside from the embellishments themselves, there were numerous inconsistencies in Raymond's various statements. For example, in his initial statements he had the car parked with the driver-side nearest the store door. [Raymond Misquadace interviews 04/28/99; 04/30/99] In his testimony, he had the car parked in the opposite direction. [Grand Jury p. 474; Neil King trial p. 195] In one statement Raymond said that, after arriving at his father's old house, he and Donald Hill left the others there and drove back to Kathy Hill's house. [Raymond Misquadace interview 04/28/99] Later, he changed his story and claimed that Keith, Neil and Brian gave him and Donald a ride to Kathy Hill's house. [Brian Pippitt trial p. 459] As discussed below, Raymond's recent recantation resolves all of these anomalies—because the recantation is truthful.

2. Keith Misquadace accepts a plea deal but refuses to allocute and attempts to withdraw his plea.

Keith Misquadace, who was 17, accepted an arrangement where he would plead guilty to participating in the Malin murder in exchange for the dismissal of a first-degree sexual assault charge that was pending against him. Keith reluctantly agreed to the plea agreement believing he would fare better in a correctional facility if he pled to manslaughter as opposed to a sex crime. He refused, however, to allocate, insisting he was not involved in the murder. He therefore entered an Alford plea on September 27, 2000. But, being innocent of the murder, he almost immediately regretted the decision and attempted to withdraw his plea on October 16, 2000. The court would not allow it. [Keith Misquadace hearing to withdraw plea 10/16/00 pp. 3–22]

Keith Misquadace has consistently and steadfastly denied any involvement in the crime. As discussed further below, he now declares, under oath, that he was never in a car with Raymond Misquadace, Donald Hill, Neil King, or Brian Pippitt; that Raymond's story, insofar as it involves him, is utterly false; that Brian Pippitt was at the Grand Casino in Mille Lacs that night, and; that despite Raymond's claim that they were driving around in a gold Toronado, no one he knew even owned a gold Toronado or any similar vehicle. [Keith Misquadace Declaration attached as Exhibit G to the Petition] Keith confirmed those same statements in a recent interview with the Minnesota Attorney General's office. [See CRU Report p. 78 n. 555] The CRU also located and interviewed Teresa Colton-Schalz, a witness who had not been previously interviewed, and who confirmed an alibi for Keith for the night of the murder [CRU Report pp. 82–83]

3. The Neil King trial and acquittal.

Neil King was tried first, in October 1999. Raymond Misquadace testified to his enhanced version of events but stumbled on whether Neil King had exited the car or whether he was drunk and stayed in the car. The prosecution also failed to present corroboration of the accomplice's testimony as required under Minnesota law. Since the State presented no corroboration and since Raymond's story itself faltered, the judge, at the close of the State's case, acquitted Neil King. [Neil King trial pp. 307–319]

As further discussed below, Mr. King has recently come forward and declared under oath that he was not present at the crime; that he has never been in a car with Raymond Misquadace, Keith Misquadace, Donald Hill and Brian Pippitt; and that he and his family determined he was in Virginia, Minnesota the day and night of the murder. [Neil King Declaration, attached as Exhibit H to the Petition]

4. Brian Pippitt's trial and conviction.

Brian Pippitt's first trial ended in a mistrial when the judge became ill. The lawyer who initially represented Mr. Pippitt then closed his practice and could no longer represent him. Tom Murtha[8] from the Brainerd public defender's office was then appointed. Murtha had graduated from law school only two years earlier and had never tried a murder case. The trial venue was moved from Aitkin County to International Falls, where the public defenders had no office or base of operations. Prior to trial, Mr. Pippitt was offered a plea deal which would carry a 7-year term and result in less than four years of actual incarceration with good time and pretrial

[8] Tom Murtha was later elected to the position of Aitkin County Attorney in 2002. He insists to this day that Brian Pippitt is innocent. [Murtha Decl. ¶ 22]

detention credits. Brian Pippitt refused, as he was not guilty of anything. [Thomas Murtha Declaration, attached as Exhibit K to the Petition ¶¶ 3–7]

The trial took place on January 23 and 24, 2001. It is undisputed that the State did not present any forensic evidence connecting Brian Pippitt to the crime.

The State relied solely on: (1) the testimony of Raymond Misquadace who testified to the embellished version of his false confession; and (2) the testimony of Peter Arnoldi, a lifelong felon, con artist, and jailhouse informant who testified that Brian confessed a role in the murder to him when they were housed for evaluations in St. Peter Hospital.[9] In reality, Brian had never confessed to Arnoldi; rather, he had shown Arnoldi a copy of the criminal complaint. In his testimony, Arnoldi merely rehashed what he thought he remembered from that document—including several obvious misinterpretations of its contents. For example, Arnoldi said that Brian told him they stuffed "Kleenex" in Mrs. Malin's mouth to silence her screams—but he was misinterpreting language in the complaint referring to "soft tissue" injuries. Peter Arnoldi's testimony was also inconsistent with that of Raymond Misquadace (e.g., Raymond said they were in a two-door Toronado, Arnoldi said they were in Brian's mother's van). Brian Pippitt could not have been convicted without Arnoldi's testimony, which provided the required corroboration for Raymond Misquadace's testimony. Below is a quote from a letter that Aitkin County Attorney Rhodes wrote to Federal Judge Richard Kyle, who was sentencing Arnoldi for bank robbery:

> Mr. Arnoldi's testimony was crucial to the State in obtaining two first degree murder convictions in the above-referenced matter. I spoke with nine of the twelve jurors after the trial. They indicated to me

[9] Peter Arnoldi's long history of dishonesty, lying, fraud, deception, forgery and other criminal conduct has been the featured subject of articles in the Star Tribune dated July 18, 1999 and August 25, 2016.

> that Mr. Arnoldi was one of two pivotal witnesses whose testimony was significant during their deliberations in convincing them of the guilt of the defendant.

[See Bradley Rhodes letter to U.S.D.J. Richard Kyle 09/05/01, attached as Exhibit E to the Petition]

Brian Pippitt was found guilty of murder and sentenced to two life terms. His conviction was upheld on appeal (except the Minnesota Supreme Court modified his sentence reducing, it from two life sentences to one). *State v. Pippitt*, 648 N.W.2d 87 (Minn. 2002). His post-conviction petition for relief was denied and his appeal therefrom was unsuccessful. *Pippitt v. State*, 737 N.W.2d 221 (Minn. 2007)

C. The CRU Investigation.

In 2021, the Office of the Minnesota Attorney General started a Conviction Review Unit (CRU) to investigate claims of actual innocence being made by inmates in Minnesota. Mr. Pippitt's case was submitted for CRU review. As part of that process, a tolling agreement was entered between the defense and the Aitkin County Attorney's Office, providing that the statute of limitations on any of Mr. Pippitt's post-conviction claims would be tolled effective January 7, 2022, through the completion of the CRU's final determination. [1/7/2022 Tolling Agreement, attached as Exhibit I to the Petition]

During its two-year investigation of Mr. Pippitt's conviction, the CRU reviewed thousands of pages of materials and conducted more than 26 interviews of fact and expert witnesses. On May 31, 2024, the CRU released its 118-page Report and Recommendation.

In the Report and Recommendation, the CRU made, among others, the following findings:

- It was implausible for Mr. Pippitt to commit the crime in accordance with the State's theory;
- The State's theory at trial was incongruous with the evidence;
- The State presented fabricated testimony from three witnesses, one of whom was a mentally ill, untrustworthy jailhouse informant;
- Investigators employed the Reid Technique, which produced a false confession from Raymond Misquadace;
- Raymond Misquadace has recanted his prior confession and testimony; and
- The State relied on unreliable jailhouse informant testimony to support Raymond Misquadace's fabricated testimony.

The CRU concluded that Brian Pippitt should be granted postconviction relief because he was denied due process of a fair trial based on the totality of their findings. The CRU further concluded that there is little confidence in Brian Pippitt's conviction, and that he should be exonerated in the death of Evelyn Malin.

D. New Evidence.

As set forth in detail below, newly discovered evidence never before presented in court now makes clear that Brian Pippitt is actually innocent. This includes forensics evidence from two well qualified experts establishing that the story used to secure Mr. Pippitt's conviction was fictional; credible recantations from Raymond Misquadace and Peter Arnoldi, the State's two key witnesses; new information about Arnoldi's severe mental illness at the time he was providing evidence against Mr. Pippitt; sworn statements from Neil King, Keith Misquadace, and Mari Blegen, all corroborating Raymond Misquadace's recantation, and; an interview with Teresa Colton-Schalz, who confirmed an alibi for Keith Misquadace.

1. <u>The forensic evidence.</u>

a. *The Deadbolt Lock*

It is undisputed that the deadbolt lock to the front door of the Dollar Lake Store could only be locked or unlocked from inside or outside with a key. [Beck testimony, Grand Jury pp. 205-206] If that deadbolt lock was locked when Evelyn Malin's body was discovered, then the State's case (as presented through Raymond Misquadace's testimony) and the police's entire theory of the crime completely collapse. ***The deadbolt lock was in the locked position when police arrived at the Dollar Lake Store on the morning of February 25, 1998.*** Police photographs, taken upon arrival at the crime scene, show the bolt fully crossing the space between the door and the door jamb, meaning it is in the locked position. [Brian Pippitt trial Exs. 54, 55]

Obviously, the points of potential entry into the store/residence were important to the crime scene photographer who rightfully considered the position of that lock to be significant, as he photographed it from different distances inside the store, as shown below:

The police field reports prepared on the morning of the crime uniformly confirm that both the front and back doors were securely locked:

- Sgt. Scott Turner stated in his report, "Both the front (east) and back (west) doors were locked." [Turner report 02/25/98]
- Deputy Mark Fredin reported, "The front and rear entrance door were locked and secure." [Fredin report 02/25/98]
- Deputy John Drahota reported, "The front and rear door of the residence was locked and that we would need to gain entry to the building." [Drahota report 2/25/98]
- Deputy Seth Jacobs reported "the doors on the building were all locked." [Seth Jacobs report 02/25/98]
- A subsequent "Field Report" prepared by Crime Scene Coordinator Gary L. Kaldun and Forensic Scientist Nathaniel J. Pearlson stated, "The front doors of the store and the attached garage and all other windows were found to be locked with no signs of forced entry."[10] [BCA Lab and Field report 03/13/98]

The back door deadbolt was locked with a skeleton key still inserted in the lock from the inside. Gerald Horsman told police that he tried the back door when Mrs. Malin didn't answer because he knew the front door would be securely locked. [Horsman interview 02/25/98; Drahota testimony, Grand Jury p. 187]

An expert forensic locksmith has now examined the crime scene photographs and other photographs of the front door lock and determined that the deadbolt is in the locked position. [Stanley Paluski Declaration, attached as Exhibit J to the Petition, ¶¶ 7-8.]

[10] The police knew from the onset that no one had kicked in the front door, thus when Raymond Misquadace later gave his false story that Brian had kicked open that door, police had to make sure Raymond changed that tale because they knew the deadbolted locked door had not been forced open at all. *See* table of changes in Raymond's various stories, Mode of Entry and Exit, *supra* at 17-20.

In his statements and testimony, Raymond Misquadace claims that he saw Brian Pippitt and Keith Misquadace go in and out through the store's front door. The fact that the door is locked with a deadbolt operable only with a key utterly destroys Raymond's claim. Neither Brian Pippitt nor any of the alleged assailants had a key to unlock that deadbolt lock upon arriving, much less to lock it upon exiting. Nor could the assailants have left through the back door, as the key was still in the keyhole on the inside of that door. Additionally, the outside screen door was secured from the inside by a hook and eyelet—meaning no one had exited through that back door. [Horsman interview 02/25/98] Furthermore, the victim's key to the deadbolt lock was accounted for. [Beck report 05/28/99; Beck testimony, Grand Jury pp. 206-207]

The police obviously recognized the significance of the deadbolt lock. The day after Raymond Misquadace gave his confessional statement—some 15 months after the murder—the police suddenly retrieved the front door and the lock from the crime scene. [Deputy Seth Jacobs report 04/30/99; receipt for seizure of door and lock 04/30/99] The police first confirmed that the deadbolt was fully operable and could only be locked and unlocked with a key [Beck report 05/28/99] Next, the police photographed the disassembled lock parts ***except the most critical part, the bolt itself—the very piece that is visible in the crime scene photographs.***

An exemplar photograph of the disassembled deadbolt lock, taken after the door and lock were removed from the crime scene, appears below:[11]

Brian Pippitt's defense counsel, Tom Murtha, also recognized the significance of the lock and repeatedly sought to examine it prior to trial, but the State was unable (or unwilling) to produce it to him. [Murtha Decl. ¶¶ 14–17] Suspiciously, ***the lock has now disappeared from the evidence room***. [Drahota letter 04/10/15]

Despite the photograph showing the deadbolt in the locked position and all field reports describing both front and back doors as securely locked, the BCA Agents, the County Sheriff's Office, and the prosecutor all realized that their theory of the crime as told through Raymond Misquadace—that Keith Misquadace broke in through the basement window and opened the front door and let Brian Pippitt in—could not be reconciled with the reality that the front door was locked during and after the murder.

[11] There are actually four such photographs—all showing the same assortment of lock parts, but none showing the bolt.

Accordingly, they continually tried to obscure and deflect from this inconvenient reality.

For instance, when police seized the door and the lock, they failed to test it on site to determine whether it operated properly in the door jamb—as would have been the obvious first step taken by anyone seeking to confirm Raymond's story. Then, when police photographed the disassembled lock, they conspicuously omitted the bolt from the photographs. When questioned at trial, Investigator Beck testified that (notwithstanding the documented observations of colleagues Turner, Fredin, Drahota, Jacobs, Kaldun, and Pearlson) ***he did not know*** whether the door was deadbolted and admitted that he refused to tell the public defender investigator whether it was locked. And at the Grand Jury hearing, the prosecutor, Aitkin County Attorney Bradley Rhodes, deflected the grand jurors' questions on the point.[12]

During the Grand Jury proceeding, the testimony about the lock elicited from Beck was hardly a model of clarity:

> Q. Deputy Beck, you had an opportunity to inspect the doors and the locks at the Dollar Lake Store?
>
> A. Yes, sir.
>
> Q. With respect to the front door, what was the locking setup, relative to that door?
>
> A. It was a dead bolt, keyed lock. You needed a key to lock or unlock it from the inside and the outside. Underneath would be like a push button on the handle itself, on the same door.
>
> **********

A Grand Juror, perhaps noticing the apparent discrepancy in the prosecution's

[12] Bradley Rhodes was disbarred in 2007 after repeated disciplinary proceedings and violations of the Minnesota Rules of Professional Conduct dating back to 1991.

story, specifically inquired about whether the deadbolt was locked:

> Q. Was the dead bolt locked, or the bottom one locked?
>
> A. (No response)
>
> Q. You can't lock a dead bolt going out the door. You've got to do it with a key.
>
> A. I'm not sure how to respond.
>
> MR. RHODES: Well, I think you have already answered the question. The key was found in the position that it was normally found in.
>
> MADAM FOREPERSON: That's what I meant. You can't lock the door on the way out. The key was hanging there.
>
> MR. RHODES: Not the deadbolt?
>
> GRAND JUROR: Right.
>
> By Male Grand Juror:
>
> Q. Which one was locked?
>
> MR. RHODES: I don't know that this witness can answer that.
>
> A. Yeah, that would be best.
>
> By Male Grand Juror:
>
> Q. You said you needed a key on the inside and outside both on that dead bolt?
>
> A. Yes, sir.
>
> MR. RHODES: I believe when we have Special Agent Bjerga, we will show the tape of the crime scene and you will be able to see that door a little clearer in the set up. All right?...

[Grand Jury pp. 205–208]

The subsequent testimony of Special Agent Bjerga, whom Rhodes had just represented to the Grand Jury was the person who could answer questions about the deadbolt lock, was almost comically preposterous:

MR. RHODES:

Q. There has been some questions by members of the panel relative to the lock setup and the doorways. Did you, at any time, have an opportunity to examine the doorways and the locks?

A. I personally did not.

Q. All right. With respect to the front door at all, are you aware of what the lock setup was?

A. There was a dead bolt on the top, and then a doorknob which could be locked with a button on the inside. The dead bolt had to be locked with a key.

Q. Was that key recovered?

A. That key? Yes, it was hanging in its normal spot behind the cash register up on a special hook. At the time we were at the scene examining it, that key was there.

Q. As we sit here today, are you able to say whether that dead bolt had been locked or not?

A. I have an idea that it was, but I can't specifically say that it was, or that it was not. The dead bolt was not locked, the door knob, I believe, was.

Q. Okay. So, it was possible to turn the knob and lock the bottom lock and exit, and the door would lock behind you?

A. Right. You need the key, though, to lock that dead bolt.

Q. All right. Why do you believe the dead bolt wasn’t locked?

A. Because of, two individuals that were involved in this particular incident have both told us that they know Keith Misquadace opened the door to allow Brian Pippitt and either Donald Hill or Raymond Misquadace into the store.
They both are consistent when they say that, when the perpetrators exited the store, they used the front door.

There is no way to lock that door behind you, once you are outside of that building, unless you have a key to do so, with a dead bolt. You can do it with the door handle lock.

[Grand Jury pp. 227–229]

The Grand Juror astutely asked whether the deadbolt was locked in order to determine if the defendants could have feasibly exited through that door. ***Mr. Bjerga's answer uses his own desired conclusion—that the defendants went through that door—as his purported proof that the deadbolt was not locked***. This is a quintessential example of the fallacy known as circular reasoning.

Bjerga's testimony is not based on forensics, an examination of the lock in the door jamb, crime scene observation, or photographs. It is based solely on Raymond Misquadace's (inconsistent and now fully recanted) story as to how the perpetrators supposedly gained entrance to, and how they exited from, the store.

Bjerga so testified because admitting the truth that the deadbolt was locked would render Raymond Misquadace's story impossible—and the entire case against Brian Pippitt and his co-defendants would collapse.

At trial, defense counsel Tom Murtha asked Investigator Beck about the door lock. Here is that exchange:

> By Mr. Murtha:
>
> Q. Investigator Beck, you were asked by my investigator whether the front door was dead-bolted when you got there and you declined to answer that question, is that correct?
>
> A. I told him the information was in the discovery.
>
> Q. You declined to answer that question. Is that correct?
>
> A. I told him I would not respond, yeah.
>
> Q. Okay. I'm going to ask you the question now. Was the door dead-bolted when you got there?

A. I don't know.

Q. Did you later learn that the door was dead-bolted?

A. I don't know.[13]

[Brian Pippitt trial pp. 610–611]

The State's next artifice was to try to suggest that the bolt clearly visible in the photograph is not the bolt at all but rather the "strike plate." The strike plate, however, is the flat piece embedded in the door jamb that the bolt slides into when engaged. It is not visible in the photographs. [Paluski Decl. ¶¶ 7–8] No one with any actual expertise offered the conclusion that the metal piece pictured in the photograph was a strike plate. Rather, while cross examining Mike Kirt (the investigator for the public defender's office), Rhodes suggested, in a leading question, that the bolt in the photograph could actually be the strike plate. Kirt was a field investigator who had a degree in business and no expertise or experience with locks. Here is the exchange:

Mr. Rhodes: With respect to those photos, there's an area of gold near the lock, is that correct? (Referring to trial Exs. 54 and 55)

Mr. Kirt: Yes, sir.

Q. Is that what the photos were blown up to show?

A. I believe so.

Q. Okay. You can't tell us as you sit here today what that is, can you?

A. Appears to be the deadbolt activated.

Q. As far as the door?

[13] This professed lack of knowledge by the lead investigator seems remarkably implausible. The theory of the crime was a burglary gone wrong, but the lead investigator claims not to know whether the front door to the premises was locked with the deadbolt?

A. Yes.

Q. You can't say that's the deadbolt for sure?

A. I think if someone looked—

Q. Can you say for sure that's the deadbolt?

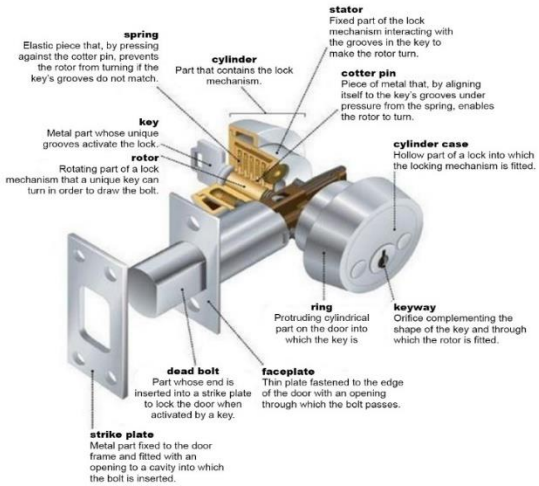
A. No.

Q. Can you say for sure it's not the strike plate?

A. No I can't.

[Brian Pippitt trial p. 554]

Perhaps Mike Kirt, who has no expertise, could not answer that question but forensic locksmith Stanley Paluski can. He readily puts the issue to rest—the picture is of the bolt, not the strike plate. The strike plate is not visible in the photograph. As Mr. Paluski explains in detail, using forensic analysis, the gold part visible in the photograph is the bolt and the deadbolt lock is engaged. [Paluski Decl. ¶¶ 5–8] The difference between the bolt and the strike plate is quite evident in this illustration of the double deadbolt lock, as shown in Stanley Paluski's declaration:



This approach by the investigating officers and the prosecutor is a study in obfuscation, evasion, and dishonesty. It was crucially important that they not admit the deadbolt was locked, because they knew it killed their case. They worked to muddy the waters, instead of conceding that their case was fatally flawed.

The deadbolt was in fact locked. Raymond Misquadace's testimony was a lie. The crime could not have been committed in the manner he described. Thus, Brian Pippitt is innocent.

b. *New Forensic Crime Scene Analysis*

New crime scene analysis reveals that the theory relied on to convict Mr. Pippitt (regarding, among other things, the point of entry through a basement window, and the robbery motive for the killing) has no forensic support, and indeed that the theory was false.

Linda Netzel has a 25-year career in law enforcement, including 14 years as the Director of the Kansas City Police Crime Laboratory. Ms. Netzel has attended and participated in hundreds of crime scene investigations and was responsible for the quality of work performed by Crime Laboratory scientists in the areas of biology/DNA, chemistry, crime scene investigation, digital imaging, firearms and toolmarks, latent prints, and trace evidence. [Netzel Report, p. 5] After examining the evidence, Ms. Netzel reached the conclusion: "The evidence associated with the south window was staged."

Dr. Brent Turvey is a forensic scientist, crime scene analyst, crime reconstructionist, forensic criminologist, and criminal profiler, with extensive experience serving law enforcement agencies (police and prosecutors), attorney clients,

and private entities all over the world. His published works are considered an authority on these topics. [Turvey Decl.-CV Ex. 1] Dr. Turvey has ***independently*** concluded that no one gained entrance to the Dollar Lake Store through the basement window and that the scene was staged to appear as though it was a burglary.

i. *No entry was made through the basement window*

The point of entry was assumed by investigators to be the basement cellar window. As set forth above, Raymond Misquadace's story evolved over time to fit this theory. Misquadace initially said that Brian Pippitt kicked in the front door (a memorable event, one would think) but, by the time of trial, Raymond had Keith Misquadace going to the side of the building where the basement window was, somehow gaining entrance to the building, before opening the front door for Mr. Pippitt from the inside.

However, according to the forensic and scientific analysis conducted by Ms. Netzel and Dr. Turvey, this possibility is eliminated based on the following facts and evidence:

1. The concrete trough outside of the window is too small and narrow for an adult of average size or more to squeeze down into and make entry without significant contortions and rough contact with multiple surfaces, especially in the dark and without injury to the body and/or clothing, **and without transferring any fiber evidence or blood**. [Turvey Decl. ¶ 27 A]

Keith Misquadace was 6' tall and 170 lbs.; Brian "Fats" Pippitt was 6'2" and 280 lbs.; Raymond Misquadace was 5'10" and 250 lbs.; Donald Hill was 6'3" and 260 lbs. [Raymond Misquadace testimony, Brian Pippitt trial pp. 473-474] Although Neil King was smaller, the police theory has never been that Neil King went through the window.

2. Had anyone squeezed down into the trough outside of the window, they would have crushed and otherwise displaced the leaves and debris that was present in the trough. This area is generally undisturbed and without evident gouging or disturbance. [Turvey Decl. ¶ 27 B]

3. No footwear impressions were identified by law enforcement directly beneath the basement cellar window in the soft sand/dirt section of the cellar (where the broken window would place an intruder). The closest footwear pattern found by law enforcement in the basement was Item 12 in the crime scene diagram. [Turvey Decl. ¶ 26]

   According to the scale on that drawing, that footwear impression is approximately 5 feet away from the window. [Crime scene diagram, A 839–840]

4. A stranger, making entry or exit through this window into the unlit basement cellar, would have transferred shards of broken glass from the concrete trough area into the basement cellar environment directly beneath the window onto the boxes below. There is no evidence that this occurred, as glass is not visible on top of those boxes in the crime scene photos nor was it mentioned or documented by scene investigators. [Turvey Decl. ¶ 27 D]

5. The stacks of boxes stored beneath the basement cellar window were generally lined up and undamaged:

> There is no evidence of disturbance, crushing, or trampling. Had someone entered the dark basement through this window from the outside, these boxes would have been disturbed and even damaged by that movement and weight. These stacks of boxes were undisturbed in terms of positioning, and clearly undamaged in terms of the crushing that would have resulted. [Turvey Decl. ¶ 34 E]

Similarly, Linda Netzel concluded that the forensic evidence eliminates the basement window as a potential point of entry:

1. The removal of lath boards over the basement window was done from ***inside*** the basement, using a tool consistent with a screwdriver. One of the nails on the boards was bent such that the board had to have been twisted downward while being pulled inward. [Netzel Report, p. 25]

2. The muntins (wood bars separating the planes of glass) were also removed from inside the basement. [*Id.*]

3. The pattern and location of broken glass is consistent with the dropping of the pane inside the basement, not with a forceful blow from outside the window using an object. [*Id.*]

These facts and evidence, as independently attested to by two well-qualified experts, combine to eliminate the possibility that the basement cellar window was a point of entry. [Turvey Decl. ¶ 28; Netzel Report, p. 25]

Accordingly, the only possible point of entry is one of the two dead-bolted doors—one at the front entering into the store, and the other at the back entering into the kitchen. These doors both require a key to engage and disengage their respective deadbolts. Both deadbolts were fully engaged. And, there was no evident sign of forced entry at these doors prior to the arrival of law enforcement. [Turvey Decl. ¶ 29]

ii. *The victim posed no threat*

Evelyn Malin was 84 years old at the time of her death. Physically, she suffered from many different vulnerabilities. These included deafness in one ear and the need

for a hearing aid in the other. Additionally, she could only walk with the assistance of a four-legged walker and an additional cane used in tandem. [Turvey Decl. ¶ 22 A]

These intersectional vulnerabilities indicate an elderly woman who would not be aware of a stranger or strangers entering her home; who would not be physically capable of responding to the threat of anyone entering her home should she become aware of it; who would not pose a threat to anyone entering her home should they become aware of her presence, and; who would not require multiple persons to restrain her if this very unlikely sequence of events occurred. [Turvey Decl. ¶ 23]

The victim was dressed in nightclothes and in bed when attacked, lacking general awareness and posing no responsive threat to any intruders. This is based on the following facts and evidence:

1. Evident in the crime scene photos, the victim was dressed for bed and had her curlers in. This indicates that she had gone through her ritual for getting into bed and sleeping prior to being attacked. [Turvey Decl. ¶ 30 A]

2. Evident in the crime scene photos, the victim was not wearing her hearing aid or glasses (her glasses were photographed in the kitchen area). This indicates that she would not be easily startled in bed, as she could not have heard or seen anything very well. This includes intruders entering through the basement cellar trap door in the dark. [Turvey Decl. ¶ 30 B]

3. Evident in the crime scene photos, the victim was not near her canes and was not wearing shoes or slippers. This indicates that she was not in the process of responding to intruders when she was attacked. [Turvey Decl. ¶ 30 C]

As a consequence of these facts, there is no evidence that the victim perceived intruders were in her home; and no evidence that she posed a threat requiring anyone to seek her out in the dark and attack her. [Turvey Decl. ¶ 31]

iii. *The injuries to the victim are evidence of "overkill"*

The behavioral evidence in this case demonstrates the presence of overkill—the use of brutal levels of force beyond that necessary to subdue or even kill the 84-year-old, physically limited, victim. This is demonstrated by the following: a sustained beating to the victim's head and face; and evidence of manual strangulation. According to the autopsy report, she had been severely beaten and manually strangled to death. [Autopsy report, A 374, 381–86] Although strangulation was the primary cause of death, Malin had been struck numerous times with sufficient blunt force to cause internal injuries to her head. [Medical Examiner Michael McGee testimony, Brian Pippitt trial pp. 114–15, Turvey Decl. ¶¶ 32, 33]

The offender entered the victim's bedroom without provocation or necessity; beat her and strangled her despite the absence of any clear awareness or threat; dumped feces on her body, and; covered her with items from the bedroom including her mattress before leaving. This physical and behavioral evidence demonstrates an anger motivation, not a burglary by strangers. [Turvey Decl. ¶¶ 32, 33]

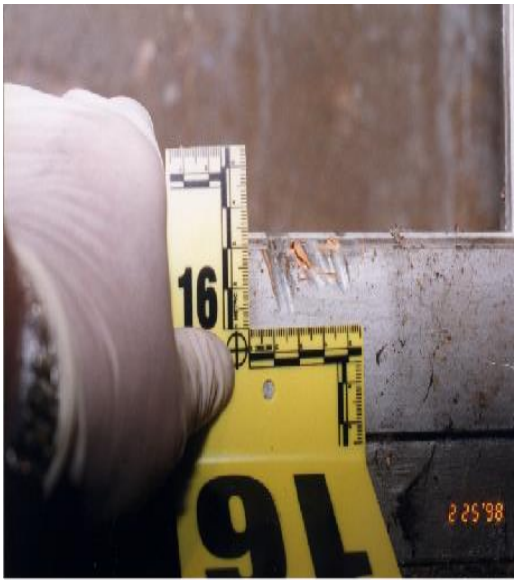
iv. *The crime scene was "staged"*

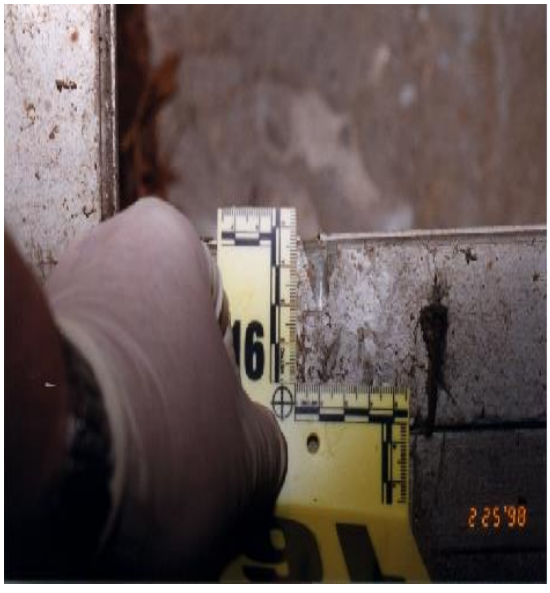
The crime scene in this case presents as an attempt at staging. A *staged crime scene* is one in which the offender has purposely altered evidence so as to mislead authorities or redirect the investigation, suggesting an alternate cause of events (Chisum and Turvey, 2012). In the vast majority of cases, this is done because the offender would be an immediate suspect, directly associated with the scene or the victim. [Turvey Decl. ¶ 34]

The following evidence supports this conclusion:

1. It is unlikely that a break-in at night would have resulted in the careful and symmetrical removal of two windowpanes into the yard (pictured below). [Turvey Decl. ¶ 34 A]

2. The crime scene photographs demonstrate that the tool-marks on the window, associated with removing the panes of glass, were made on the interior of the window. This demonstrates that the panes of glass were removed from the inside. If an intruder were making these marks to gain entry at this location, the tool marks would be on the exterior of the window (pictured below). [Turvey Decl. ¶ 34 B] Linda Netzel made this same observation. [Netzel Report p.25]





3. Broken glass associated with the third windowpane is in the concrete trough outside of the basement window, atop the leaves and other debris. This fact, along with the absence of glass on the soft sand/dirt floor inside of the basement directly beneath the window, demonstrates that this window pane was actually broken from the inside (pictured below). [Turvey Decl. ¶ 34 C]

4. Wooden supports from the broken basement cellar window were collected by law enforcement at the scene. These slats were nailed in place on the interior of that window. One is pictured below, with an ungloved officer approximating its original location inside of the basement cellar window. The wooden slat is unbroken, meaning that it was not removed by force from the outside subsequent to breaking the window. The other photo demonstrates that the tool-marks associated with its removal were made by someone prying it free from inside of the basement. [Turvey Decl. ¶ 34 D]

Linda Netzel likewise concluded that the evidence associated with the south basement window was staged:

> No one climbed through the south window. At least four areas on the window could have caught on the perpetrator's clothing and possibly skin; the raw wood where the two muntins attached to the top rail, a nail protruding from the window frame and the raw wood of the broken lath board still attached to the jamb. Moreover, there is a general lack of damage, debris or glass beneath the window.
>
> ---
>
> It is my opinion that the perpetrator(s) of this homicide, meticulously staged evidence inside and outside the basement window so it would appear to be the point of entry. It is also my opinion that the perpetrator(s) exited from the main floor of the building, which required they have a key to lock the deadbolt.

[Netzel Report, p. 26.]

The forensic findings can be summarized as follows:

1. Evelyn Malin was an elderly woman who (i) would not be aware of a stranger or strangers entering her home; (ii) would not be physically capable of responding to the threat of anyone entering her home should she become of aware of it; (iii) would not pose a threat to anyone entering her home should they become aware of her presence, and; (iv) would not require multiple persons to restrain her if this very unlikely sequence of events occurred;

2. The basement cellar window could not have been the point of entry;

3. At least one offender entered the victim's home with a key;

4. The motivation for the murder was anger, as the offender deliberately sought her out after she had gone to bed and then beat her and manually strangled her to death;

5. The crime scene was subsequently staged to make it appear as though

this was the result of a stranger burglary;

6. At least one offender exited the victim's home and locked it securely with a key upon completion of the murder and subsequent staging efforts. [Turvey Decl.¶¶ 35 A–F]

Obviously, the forensic scenarios explained by Dr. Turvey, Ms. Netzel, and Mr. Paluski are wholly incompatible with the State's theory of the crime. Additionally, there is absolutely no forensic evidence to remotely support the State's theory of the crime.

2. Raymond Misquadace recants.

The known facts not only support Raymond Misquadace's recent recantation, but they also fully refute his earlier statements and testimony purporting to incriminate Brian Pippitt. Raymond Misquadace has declared under penalty of perjury that he was pressured and intimidated into providing his confession that falsely incriminated Keith Misquadace, Donald Hill, Neil King, and Brian Pippitt. [Raymond Misquadace Declaration, attached as Exhibit L to the Petition, ¶¶ 2–8] Raymond has confirmed this recantation in a recorded interview with the Minnesota Attorney General's Office [*see* CRU Report pp. 27 n. 188, p. 63] All of those individuals (except Donald Hill, who is presently housed in a psychiatric facility) have vehemently and steadfastly denied any involvement—and all have alibis. Donald Hill, too, in a recent interview with the Minnesota Attorney General's Office, stated unequivocally that he was not present at the Dollar Lake Store on the night of the murder.

Raymond's description of the interrogation process and the transcripts thereof support his recantation. It is also clear from the reports and from the interrogators' questions that they had lengthy, unrecorded conversations with Raymond that are not

reflected in the final transcripts. On several occasions, the investigators drove him from one location to another and, during those drives, they had unrecorded discussions where they provided Raymond with information about people they thought were involved. This is evident from questions interrogators posed that included information Raymond had not yet revealed in his recorded interview. In fact, Special Agent Bjerga admitted in the taped part of one interview that he had conversations with Raymond during their car ride from Bagley to Bemidji. [Raymond Misquadace interview 4/28/99]

Raymond's new, sworn statement and the statements in his CRU interview—that the interrogators repeatedly lied to him and falsely claimed they already had numerous statements proving he was at the scene and a participant in the murder—is borne out by the transcripts. The police told him he had to be "first at the trough" to get the best deal. These are the same tactics they used in questioning Brandon Misquadace. In truth, they did not have such statements and they used that tactic to intimidate Raymond into providing a false narrative to "help himself." What's more, his own attorney participated in this process: he convinced Raymond to accept the deal, asking leading questions during an interview to try to prompt more incriminating details from Raymond to ensure the deal would stick.

Raymond now admits that he made up his whole story; that he was never in a car with Keith Misquadace, Donald Hill, Neil King and Brian Pippitt; and that he was not at the Dollar Lake Store when Evelyn Malin was murdered. [Raymond Misquadace Decl. ¶¶ 2–10]

Just as important, the details of Raymond's ever-evolving statements are contradicted by the known facts and by other newly discovered evidence. For example,

Raymond claimed at trial that the group went in and out through the front door, but that is not possible because that door was locked with a deadbolt that could only be opened with a key that they did not have.

Raymond claimed that they were all driving around in a gold Toronado but no one owned a gold Toronado at that time. [Keith Misquadace Decl. ¶¶ 9–10] He was probably remembering a gold Gran Torino that Agnes Chief had owned in 1993, a car that she no longer owned at the time of the crime. At trial, Raymond changed his testimony about the gold Toronado, claiming he did not know what kind of car it was, what color it was, or who owned it. [Brian Pippitt trial pp. 418, 426, 464–465, 468]

Raymond, in his confession, claimed that Keith, Neil, and Brian picked him and Donald up at Donald Hill's mother's house at around three or four in the afternoon on February 24, 1998. But that is impossible. Keith was not home from school at that time. Neil King was in Virginia, Minnesota. Brian was at the Mille Lacs Grand Casino with Brandon and Michael Misquadace.

Raymond also claimed (in one of the enhanced versions of his confession) that Keith said Mrs. Malin caught them when she came out of her room. That too never happened; Mrs. Malin was murdered in her bed and she never came out of her room.

Raymond claimed (again, in his enhanced version) that Keith had cut his hand and was bleeding badly, but there was no sign of any cut or injury to his hands when Investigator Beck interviewed Keith within days of the murder, nor was there any blood found at the crime scene. [BCA Lab and Field report 04/02/98—the blood found on the broken glass by the basement window was animal, not human, blood]

3. Mari Blegen Confirms that Raymond Misquadace's Story was Fabricated.

The fictional nature of Raymond Misquadace's trial testimony is further confirmed by a witness, Mari Blegen, who had never before testified nor been interviewed by police. [Mari Blegen Declaration, attached as Exhibit F to the Petition] Ms. Blegen confirms under oath that, in February 1998, she was living with her boyfriend at 54046 Loon Avenue in McGregor, Minnesota. [Blegen Decl., ¶ 2] This is the house that formerly belonged to Raymond Misquadace's father, the supposedly abandoned house to which the five defendants retreated on February 24, 1998 immediately after robbing the Dollar Lake Store and killing Evelyn Malin. [Blegen Decl., ¶ 2]

Raymond described the house as unoccupied, junky, ripped up and a party house with shag carpeting. [Raymond Misquadace interview 4/30/99; Brian Pippitt trial p. 457] Although this description matched the condition of that house when he was last there (years before the murder), it had since been remodeled and was, in February 1998, inhabited by Ms. Blegen, her boyfriend, and their three children. [Blegen Decl., ¶ 5] Thus, on the night of the murder, the house was no longer abandoned, junky, ripped up or a party house, had been "completely remodeled," and the shag carpeting had been replaced with new tile flooring. [Blegen Decl. ¶¶ 2–6] Mari Blegen confirms as follows:

> I can state with certainty that Raymond Misquadace's description of the house, and who was in it, could not have been true at the time. Bryan [her boyfriend] and I, who had the only keys, would have locked the house. If we were home, then I would have remembered them coming to the premises, and I would not have permitted them in our house.

[Blegen Decl. ¶ 6]

4. Peter Arnoldi recants

Peter Arnoldi has acknowledged under oath in a video deposition that, when he and Brian Pippitt spoke at St. Peter Hospital, Brian did not admit his involvement in the murder, but only described the accusations against him.[14] [Transcript of Arnoldi Deposition attached as Exhibit D to the Petition] Indeed, Brian could not possibly have been confessing, as many of the things Mr. Arnoldi thought he understood about the crime from Brian were wholly inaccurate. In particular, Mr. Arnoldi firmly believed that the victim had been gang-raped by Brian and his codefendants. [Peter Arnoldi Dep. pp. 8] In reality, Evelyn Malin had not been sexually assaulted—although there were rumors to that effect circulating within the local Native American community. Mr. Arnoldi basically conceded that no one would boast about raping a disabled elderly woman had no such crime occurred at all. [Peter Arnoldi Dep. pp. 8, 24]

Nine months after Brian Pippitt's trial, the defense learned that Peter Arnoldi was before a federal judge to be sentenced on a federal bank robbery charge. During the sentencing hearing on October 2, 2001, Peter Arnoldi's lawyer repeated the false belief about a sexual assault when she argued that his cooperation in the State's prosecution of Mr. Pippitt was grounds for a downward departure of the sentencing guidelines.

> If we acknowledge that Your Honor has that power, it is completely appropriate for it to be exercised in this case. Mr. Arnoldi has given extraordinary cooperation to state authorities. ***The case was a rape and murder of an elderly woman***. According to the letter written by Bradley Rhodes, the assistant county attorney who prosecuted the case, Mr. Arnoldi's testimony was pivotal and it was not given for free, although

[14] This acknowledgement is consistent with Craig Licari's recollection of conversations he had with Brian Pippitt and Peter Arnoldi when they were together at St. Peter Hospital. Mr. Licari confirms that Brian vehemently insisted he was innocent, but Brian did show the criminal complaint to Mr. Arnoldi.

> he testified without any promise that it would help him, in fact with Ms. Paulose's denial that she would make a 5k1.1 motion on his behalf, with nothing that would help him in front of the state authorities, he gave the testimony in that case. ***He traveled from Rochester to International Falls at a time when his medication was far from stable***. At substantial discomfort to himself for several days, he stayed up there. He didn't have to do that. More than that, he went to the authorities at the commencement of the case and told them what he knew about the person who had confessed to him. He didn't have to do that, and ***according to Bradley Rhodes, that testimony was essential for getting a conviction in that case.*** That deserves some consideration in this sentence. It's important cooperation from any citizen, but it's more important from a guy in the prison system because being labeled a rat exposes you to tremendous internal pressure within the BOP. That's something Mr. Arnoldi has taken on because, as he and I have talked about, he couldn't stand what happened to that woman. [emphasis added]

[Sentencing transcript *U.S. v Arnoldi* 10/02/21 pp. 8-9] [Arnoldi sentencing documents attached as Exhibit E to the Petition.]

Mr. Arnoldi, when addressing the court, repeated his misinformation claiming, ***"The lady was choked to death with Kleenex and raped and killed."*** [Sentencing transcript p. 25] Mr. Arnoldi's false belief that the assailant had stuffed "Kleenex" in the victim's mouth was his misinterpretation of a phrase in the criminal complaint that referred to asphyxia "with multiple soft tissue injuries." There were never any tissues in the victim's mouth. Arnoldi also said that Brian and the others were driving Brian's mother's van when they broke into Mrs. Malin's store. This, too, came directly from the criminal complaint, but was at odds with Raymond's story that they were driving a Toronado. Clearly, his story that Brian Pippitt confessed these facts to him cannot be true—since they were not facts at all.

During the sentencing proceedings, it was disclosed to the court that Arnoldi had been suffering from psychosis, auditory and visual hallucinations, and other severe forms of mental illness for years. [*See* Arnoldi sentencing documents, attached as

Exhibit E to Petition]

Making matters worse, these glaring problems with Arnoldi's testimony and his reliability as a witness were known by the State, but not disclosed to the defense. Mr. Pippitt's defense counsel confirms as follows:

> - It was not disclosed to me that Peter Arnoldi, at the time he allegedly heard the statements from Mr. Pippitt, was suffering from serious psychoses causing him to hear voices and to hallucinate and he had also received electroshock therapy.
>
> - It was also not disclosed to me that Mr. Arnoldi was of the erroneous belief that the 84-year-old murder victim, Evelyn Malin, had been sexually assaulted….
>
> - It was not disclosed to me that the Aitkin County Attorney…would write a letter to the sentencing judge in a federal bank robbery case pending against Mr. Arnoldi…commend[ing] Mr. Arnoldi and exalt[ing] his testimony as having been crucial to Mr. Pippitt's conviction…[including a] request for a downward departure from sentencing guidelines.

[Murtha Decl., ¶¶ 10–12]

5. Neil King Comes Forward to Confirm Brian Pippitt's Innocence.

As discussed above, Neil King was tried and acquitted in connection with Ms. Malin's murder. Until now, Mr. King has been unwilling to discuss this case, "as the experience of being falsely accused and tried for a crime I had nothing to do with caused me and my family great distress and anguish." [Neil King Decl., attached as Exhibit H to the Petition, ¶ 8] King has been especially unwilling to discuss the case with Brian Pippitt or his representatives because police had falsely told King that Brian Pippitt had implicated King in the crime. [*Id.*]

Now King has broken his silence, in the form of a declaration made under penalty of perjury:

- I was not with Raymond Misquadace, Donald Hill, Keith Misquadace or Brian Pippitt on February 24, 1998, I was not present at the Dollar Lake Store on that date, and I was not involved in any manner in the robbery or murder of Evelyn Malin….I was never there at all.

- I have never been in a vehicle with Raymond Misquadace, Donald Hill, Keith Misquadace and Brian Pippitt.

- Raymond Misquadace's story that I was driving around on February 24, 1998 with him, Don Hill, Keith Misquadace and Brian Pippitt and that we went to the Dollar Lake Store is completely false.

[N. King Decl., ¶¶ 2; 3; 4; 7]

6. Keith Misquadace Comes Forward to Confirm Brian Pippitt's Innocence.

As referenced above, Keith Misquadace pled guilty in his case, which he unsuccessfully tried to withdraw, ultimately refusing to allocute and instead taking an Alford plea. Keith Misquadace confirms, under oath, that Raymond Misquadace's story was a fantasy and that Brian Pippitt is innocent:

- I was not present at the Dollar Lake Store on February 24, 1998 when Evelyn Malin was murdered and I was not involved in any manner in the incident….

- [On the evening of February 24, 1998] [m]y brothers, Michael and Brandon Misquadace, and my uncle Brian Keith Pippitt, came home in my mother's gray Dodge Caravan at approximately 10:30 to 11 p.m. They had been at Mille Lacs Grand Casino and then in Onamia that day and evening.

- Raymond Misquadace's story that I was driving around with him, Donald Hill, Neil King and Brian Pippitt and that we went to the Dollar Lake Story is completely false.

[Keith Misquadace Decl., attached as Exhibit G to the Petition, ¶¶ 3; 6; 11; 13]

Keith Misquadace has again recently confirmed these statements in a recorded interview with the Minnesota Attorney General's Office [*See* CRU Report p. 78 n. 555]

ARGUMENT

Brian Pippitt's conviction cannot stand as a matter of Minnesota law or simple justice. New evidence—both testimonial and forensic—not previously presented to any court now confirms that (1) Mr. Pippitt was convicted based on false evidence; (2) Mr. Pippitt is actually innocent, and; (3) the prosecution violated Mr. Pippitt's due process rights by withholding and/or destroying exculpatory evidence.

A. False Evidence Tainted Brian Pippitt's Conviction.

A criminal defendant "has a right to be tried, insofar as possible, on the basis of true and correct evidence; to deny him this right is to deny him a fair trial." *State v. Caldwell*, 322 N.W.2d 574, 586 (Minn. 1982) In Minnesota, when it is discovered that a witness gave false testimony, a new trial is appropriate where:

> (a) The court is reasonably well satisfied that the testimony given by a material witness is false.
>
> (b) That without it the jury *might* have reached a different conclusion.
>
> (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

Id. at 584–85 (*emphasis in original*); *see also Ferguson v. State*, 645 N.W.2d 437, 442 (Minn. 2002). The last prong (surprise) is relevant but is not an "absolute condition precedent to a new trial." *Id.* at 559. This is known as the *Larrison* test. *See Caldwell*, 322 N.W.2d at 584–85 (citing *Larrison v. U.S.*, 24 F.2d 82 (7th Cir. 1928)).

Similarly, federal constitutional law requires a new trial where there is any "reasonable likelihood" that that false testimony affected the jury's decision. *See Giglio v. U.S.*, 405 U.S. 150, 154 (1972) (citing *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). This standard applies even if the State did not know that the evidence was false. *See, e.g.*, *U.S. v. Young*, 17 F.3d 1201, 1204 (9th Cir. 1994) ("Thus, even if the government unwittingly presents false evidence, a defendant is entitled to a new trial if there is a reasonable probability that [without the evidence] the result of the proceeding would have been different").

1. Several Prosecution Witnesses Testified Falsely.

As discussed in detail above, the primary witnesses against Brian Pippitt were Raymond Misquadace and Peter Arnoldi, both of whom now admit that their trial testimony was false. In addition, the State also presented false evidence regarding the crime scene.

a. *Raymond Misquadace Has Provided a Genuine Recantation.*

As set forth in detail above, the State's principal witness now admits, under penalty of perjury and in an interview with the Minnesota Attorney General's Office, that his testimony against Brian Pippitt was false. He admits that he was pressured and intimidated into providing his confession which falsely incriminated Keith Misquadace, Donald Hill, Neil King, and Brian Pippitt. [Raymond Misquadace Decl. ¶¶ 2–8] All of those individuals have denied any involvement.

Raymond's recantation is overwhelmingly corroborated by other evidence submitted with this Petition, including the Declarations of Mari Blegen (confirming the

falsity of Raymond's testimony about the abandoned house); Neil King and Keith Misquadace (confirming the falsity of Raymond's entire narrative), and; the reports of Dr. Turvey, Ms. Netzel, and Mr. Paluski (Raymond's story about breaking in through the basement window and exiting through the front door is contradicted by the physical evidence).

Raymond's statement that the interrogators repeatedly lied to him and falsely claimed they already had numerous statements proving he was at the scene and a participant in the murder is borne out by the transcripts. The police told him he had to be "first at the trough" to get the best deal. These are the same tactics they used in questioning Brandon Misquadace. [*supra* p. 12] In truth, they did not have such statements and they used that tactic to intimidate Raymond into providing a false narrative to "help himself." His own attorney participated in this process. He convinced Raymond to accept the deal, asking leading questions during an interview to try to prompt more incriminating details from Raymond to ensure the deal would stick.

Raymond admits in his declaration and in his recorded interview with the Minnesota Attorney General's Office that he made up his whole story; that he was never in a car with Keith Misquadace, Donald Hill, Neil King, and Brian Pippitt; and that he was not at the Dollar Lake Store when Evelyn Malin was murdered. [Raymond Misquadace Decl. ¶¶ 2–10] A false confession expert, retained by the CRU, has reviewed Raymond's statements and testimony and concludes that Raymond's "confession" has all the earmarks of coerced falsity. [CRU Report pp. 64, 68, 93]

Raymond Misquadace previously made a similar recanting statement verbally to the Aitkin County Victim's Advocate, Jeri Severson. [Brian Pippitt PCR hearing pp.

37–38] The recantation evidence now before the Court is, however, qualitatively different and far more robust than anything that was previously presented. *See*, *e.g.*, *Pippitt,* 737 N.W.2d at 227, in which the Minnesota Supreme Court denied Mr. Pippitt relief, holding as follows:

> The statements Severson attributed to Raymond do not constitute a genuine recantation. Raymond vaguely claimed that he was pushed into testifying falsely, without explaining which parts of his testimony were false or precisely how he was so coerced. Importantly, Raymond did not tell Severson that he did not commit the crime or that Pippitt did not commit the crime. Severson's second-hand account of Raymond's statements may cast doubt on Raymond's reliability, but it does not satisfy the rigorous genuine recantation standard.

The recantation evidence now before the Court suffers none of the infirmities identified by the Supreme Court in 2007: Raymond's recantation is first-hand, under oath, and factually specific; he explains which parts of his testimony were false; he explains the nature of the coercion; he clearly states that he was not present at the crime scene and therefore could not have seen Brian Pippitt enter or exit the Dollar Lake Store. It easily satisfies prong 1 of *Larrison*.

As further proof that the recantation is genuine, the details of Raymond's previous statements (told in the period leading up to and at Brian Pippitt's trial) are contradicted by the facts as we now know them, including Raymond's description of entry into, and exit out from, the store, what was stolen from the store, the location where the perpetrators traveled after the murder, the type of car they were driving, the victim having come out of her room, and Keith Misquadace having severely cut his hand.

Raymond's recantation is genuine and, as set forth below, established that the only eyewitness testimony connecting Brian Pippitt to the crime was pure fiction.

b. *Peter Arnoldi Has Disavowed His Prior Testimony.*

As set forth in detail above, the State's other key witness, Peter Arnoldi, has acknowledged under oath in a video deposition that when he and Brian Pippitt spoke at St. Peter Hospital, he now believes that Brian Pippitt was describing accusations against him, not admitting his involvement in the murder.

Indeed, Brian could not possibly have been confessing, as many of the things Mr. Arnoldi thought he understood about the crime from Brian were wholly inaccurate. In particular, Mr. Arnoldi firmly (and falsely) believed that the victim had been gang raped by Brian and his codefendants, and represented to a federal court hearing that "The lady was choked to death with Kleenex and raped and killed." [Sentencing transcript, p. 25]

c. *The State Presented False Testimony That the Basement Window Was the Point of Entry, and that the Deadbolt May Have Been Unlocked.*

Raymond Misquadace was not the only prosecution witness who falsely claimed that the south basement window was the point of entry. The State also presented testimony from Crime Scene Coordinator Gary Kaldun who, without equivocation, told the Court at Brian Pippitt's trial that the south basement window was used as the point of entry by the perpetrators. [Brian Pippitt trial p. 373] Kaldun, unlike Ms. Netzel and Dr. Turvey, however, presented no forensic analysis at all to support his conclusory supposition that the window was the point of entry.[15]

In addition, despite photographic evidence and multiple police reports to the

[15] Here is his entire testimony on the topic: "Point of entry into the store was through the basement window. The wood dividers between the two panes was removed, two panes of glass were removed intact, but the other pane was broken and lying on the floor in the basement and on the bottom of the window well itself." [Brian Pippitt trial p. 373]

contrary, the State presented testimony from Beck that he could not remember whether the deadbolt was engaged, thus leaving open the possibility that the perpetrators entered through the basement window then left through the front door.

As set forth in detail above, these conclusions are belied by the crime scene evidence, including, among other things, the placement or distribution of the glass, the condition of the laths, the lack of trace evidence on the window, the fact that the boxes stacked directly underneath the window remained undisturbed, and the pictures depicting the engaged deadbolt. Even if Kaldun and Beck had believed what they were saying at the time, their false testimony nevertheless justifies relief. Indeed, neither Minnesota nor federal law require the misstatements of fact to be intentional. *See*, *e.g.*, *Caldwell*, 322 N.W.2d at 587 (rejecting argument that *Larrison* standard applies "only where the witness' testimony was deliberately false" and recognizing that the relief may be justified even where a witness was "mistaken in his testimony"); *U.S. v. Young*, 17 F.3d at 1204.

d. *The State Presented False Evidence About Items Being Stolen from the Dollar Lake Store.*

The State's theory, based on the now-recanted testimony from Raymond Misquadace, was that the five defendants broke into the Dollar Lake Store to commit a robbery, and that they stole cigarettes and cold beer. To support this, the State also presented testimony from Merle Malin that beer and cigarettes were missing from the store following the murder. Merle Malin was the victim's son, who had resided in New Mexico for the previous 30 years and had not even been in the store for 6 months prior to the murder. [Brian Pippitt trial pp. 200, 203] Specifically, Merle Malin testified at Mr. Pippitt's trial that beer was taken from a cooler, and that the whole bottom

compartment of the cooler was six packs of beer and all of it but for "two six packs left way at the back" were missing. [Brian Pippitt trial., pp. 293–95] He testified that beer was also stolen from under a pinball machine (where it was stored before being placed in the cooler), and that "two rows of cigarettes" were missing from the store. [*Id*. at 289] All of this testimony is belied by photographic evidence of the crime scene and by statements of witnesses with actual knowledge. It is further belied by Merle Malin's distinct lack of knowledge, as he had not been in the store for months.

As pointed out by the Minnesota Attorney General's Office in the CRU Report, "photographs taken the morning after the murder…indicate that those parts of the Dollar Lake Store [where cigarettes and beer were stored] were undisturbed. These photos contradicted the prosecution's theory that five drunk men hurriedly ransacked the store for beer and cigarettes." [CRU Report, p. 60]

The CRU Report further notes as follows:

> The BCA's photographs and videotaped walkthrough of the crime scene, however, directly contradict Merle's testimony….[One picture] undermined Merle's testimony that all beer but for "two six packs left way at the back" of the bottom compartment of the cooler were missing…[showing] a stocked cooler, brimming with items.
>
> Similarly, [other photographs] show stacks of canned products under the pinball machine. Given the volume of stock stacked under the machine, it is difficult to understand how Merle could conclude anything was missing from there.

[CRU Report, p. 61]

Gerald Horsman, the boyfriend of the victim's daughter Norma Horner, confirmed to investigators that he handled stocking at the Dollar Lake Store on a daily basis and did so "that very night [of the murder]," and that all the stock was intact, with nothing missing. [CRU Report, p. 61] Moreover, in a recent interview with the

Minnesota Attorney General's Office, ***Mr. Horsman confirmed that he told the police that no beer or cigarettes were missing, and that Merle was not being truthful***. [CRU Report p. 62]

Early in the investigation, Merle Malin also claimed that money had been stolen from the store, but he later had to concede during cross examination that the money had been found and that he had never updated the police with this information. [Brian Pippitt trial pp 302–304] Also, County Attorney Rhodes eventually admitted that no money had been stolen. [CRU Report, p. 108 n. 825]

2. Without the False Testimony, The Outcome Might Have Been Different.

It is beyond debate that the false testimony was critical to Brian Pippitt's conviction. Without it, Brian Pippitt could not have been charged, much less convicted of this crime. It bears repeating that no physical evidence whatsoever tied Brian Pippitt or any of the other four defendants to this crime scene, and no witnesses, other than the supposed accomplice Raymond Misquadace, placed Brian Pippitt there. Indeed, in forming the house of cards upon which the prosecution was based, the State leaned the unreliable testimony of Raymond Misquadace up against the unreliable jailhouse informant testimony of Peter Arnoldi. Remove either card and the house collapses entirely.

The prejudice standard in claims of false evidence is not onerous; "might" has been defined as "something more than an outside chance, although much less than… 'would probably.'" *Caldwell*, 322 N.W.2d at n.8 (citing *Kyle v. United States*, 297 F.2d 507, 512 (2nd Cir. 1961)). The question for this Court is, without the false testimony, might the jury have reached a different conclusion. *See State v. Turnage*, 729 N.W.2d

593, 598 (Minn. 2007). The question is *not* whether there would be sufficient evidence to convict absent the false testimony. *See id*. Because the false testimony *might* have made a difference, Pippitt's conviction cannot stand.

Without Raymond Misquadace's false testimony, there is simply no conceivable way Brian Pippitt could have been convicted. Without Raymond Misquadace, the only witness to connect Mr. Pippitt to the Dollar Lake Store would have been the mentally ill bank robber and con man Peter Arnoldi, whose story of Pippitt's confession has Pippitt falsely boasting about a rape that never happened, and obviously fabricated details such as stuffing the victim's mouth with Kleenex.

Without Arnoldi's testimony, things are even worse for the State. It is black letter law that a defendant may not be convicted solely on the testimony of an accomplice. *See* Minn. Stat. § 634.04. The statute "embodies the common law's long-standing mistrust of the testimony of an accomplice," who may "testify against another on the hope of or upon a promise of immunity or clemency or to satisfy other self-serving or malicious motives." *State v. Shoop*, 441 N.W.2d 475, 479 (Minn. 1989). The test for determining whether a witness is an accomplice is "whether he could have been indicted and convicted of the crime with which the accused is charged." *State v. Lee*, 683 N.W.2d 309, 314 (Minn. 2004). Here, there is no question that Raymond had to be considered an accomplice—he was in fact charged and convicted in this case. Absent Arnoldi's testimony, there is simply no other evidence connecting Brian Pippitt to the crime. Nothing.

Even if the false testimony of Misquadace and Arnoldi were left undisturbed in the trial record, the truth about the crime scene evidence—that both doors were locked, that the basement window was not the point of entry, that nothing had been stolen

from the store—would nevertheless have likely altered the outcome. Without the false evidence used to shore up Raymond Misquadace's credibility and the veracity of his account, the factfinder would have been far less inclined to believe his story. Without the false evidence about the forensic issues, the factfinder would have faced a situation where: (1) key parts of the only eyewitness's description were demonstrably false; (2) Brian Pippitt had no motive to break into the Dollar Lake Store and kill Evelyn Malin, and; (3) only someone who possessed a key to the deadbolt locks could have committed this crime. This, too, satisfies prong 2 of *Larrison*.

3. Mr. Pippitt Was Surprised by The False Testimony.

While this is not a required element of a *Larrison* claim, it is nevertheless true that Brian Pippitt was taken by surprise when the false testimony was given and was unable to meet it or in some cases did not learn of its falsity until after the trial. Brian Pippitt can be forgiven for not predicting that Raymond Misquadace would falsely confess to this crime and implicate him. Moreover, despite repeated requests, defense counsel was not permitted to inspect and examine the deadbolt lock, which has since gone missing. [Murtha Decl., ¶¶ 15; 17] Nor did defense counsel know about Arnoldi's psychosis and hallucination or his erroneous belief that Ms. Malin had been raped. [Id., ¶¶ 10–13]

In addition, Pippitt and the defense were surprised by the false testimony about cigarettes and beer having been stolen from the Dollar Lake Store. Indeed, at the time of the trial, Brian Pippitt was not and could not have been aware that nothing had been stolen from the store, because he was not there that night. He was not aware that Gerald Horsman had confirmed to police that nothing was stolen, and that Merle's statements to the contrary were wrong. This factor further justifies relief.

B. Newly Discovered Evidence Fatally Undermines The Conviction.

In the alternative, Mr. Pippitt's conviction must be vacated based upon newly discovered evidence. This includes the sworn statements of Mari Blegen, Keith Misquadace, and Neil King, and the detailed forensic analyses of Dr. Turvey, Ms. Netzel, and Mr. Paluski, all of which put the lie to Raymond Misquadace's testimony and strongly support Mr. Pippitt's innocence. There is a reasonable probability that the verdict would have differed if the jury had heard this evidence, and Mr. Pippitt's conviction must be reversed.

A petitioner is entitled to relief based upon newly discovered evidence if: (1) the evidence was not known to the petitioner or counsel at the time of trial; (2) the failure to learn of the evidence before trial was not due to a lack of diligence; (3) the evidence is material, not merely impeaching, cumulative,or doubtful; and (4) the evidence would probably produce either an acquittal or a more favorable result. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997); *see also Bobo v. State*, 820 N.W.2d 511, 518 (Minn. 2012).

Filed with the Petition is significant new evidence that has never been presented in any courtroom. Neil King, after decades of refusing to speak on the record about the case, has now come forward to support Mr. Pippitt's innocence. He has direct knowledge of the fact that Raymond Misquadace's testimony about Brian Pippitt was contrived. This testimony could not have been secured previously, as Mr. King was unwilling to talk. Similarly, Mari Blegen's recently-obtained sworn statement—that the "abandoned" and "junky" house that Raymond Misquadace claimed was the five defendants' next stop after committing the crime, was neither abandoned nor junky,

and that it was in fact occupied by Ms. Blegen, her boyfriend, and their three children, and that no robbers or killers held a meeting at her house that night—makes clear that Raymond's story was fabricated.

Similarly, the forensic opinions regarding the lack of basement window entry, the staging of the crime scene, and the locked front door have never been presented. The defense had limited information to work with, given that the State refused to give defense counsel access to the door and lock mechanism, with the deadbolt lock being the very reason the basement entry story was so important.

Even if the Court were to disagree that the forensic reports of Turvey, Netzel, and Paluski qualify as "new" evidence under *Rainer*, such evidence must nevertheless be considered in evaluating Mr. Pippitt's claims. In determining whether to grant relief under *Larrison* based on Raymond Misquadace's recantation, for example, the Court must assess the credibility of the recantation. The forensic evidence supports the reliability of Raymond's recantation, because it shows that his trial testimony could not have been true.

Indeed, all this evidence thoroughly undermines Raymond Misquadace's testimony—the only purported eyewitness who can place Mr. Pippitt at the crime scene. Not only does the evidence cast serious doubt on Raymond's testimony, it all points away from Mr. Pippitt's guilt. The new evidence takes out the strongest part of a very weak case and therefore justifies relief under *Rainer*.

C. Relief is Justified Because the State Withheld and Destroyed Material Exculpatory or Potentially Exculpatory Evidence.

Minnesota law provides a remedy where "The conviction obtained or the sentence or other disposition made violated the person's rights under the Constitution

or laws of the United States or of the state." Minn. Stat. § 590.01, subd. 1(1). The State's duty to disclose exculpatory evidence is clear: "The 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 or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Minnesota Rules of Criminal Procedure and the defendant's right to due process guaranteed by the Minnesota Constitution offer additional protections. *State v. Hunt*, 615 N.W.2d 294, 298 (Minn. 2000). The duty to disclose exculpatory evidence includes exculpatory and impeaching information, even in the absence of a request from the defendant. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Hunt*, 615 N.W.2d at 299 (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)).

The criminal rules provide for expansive disclosure by the prosecutor, including "any material or information within the prosecuting attorney's control that tends to negate or reduce the guilt of the accused as to the offense charged." Minn. R. Crim. P. 9.01, subd. 1(6). This obligation covers not only those things within the personal knowledge of the prosecutor, but "material and information in the possession or control of members of the prosecution staff." *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992); Minn. R. Crim. P. 9.01, subd. 1a(1); *State v. Williams*, 593 N.W.2d 227, 235 (Minn. 1999).

A new trial is required when the undisclosed evidence is material, i.e., when there is a reasonable probability that had the evidence been disclosed the outcome would have been different. *Cone v. Bell*, 556 U.S. 449 (2009). A reasonable probability does not mean more likely than not: it means that the likelihood is enough to undermine confidence in the outcome. *Kyles v. Whitley*, 514 U.S. 419 (1995). The

appropriate *Brady* analysis is whether "disclosure of suppressed evidence to competent counsel would have made a different result reasonably possible." *Id.* at 441.

Further, suppression of evidence favorable to the accused violates due process whether the evidence was suppressed willfully or inadvertently. *Brady*, 373 U.S. at 87. In Minnesota, when the State violates discovery rules in criminal cases, courts apply a standard more favorable to the defendant than the United States Constitution affords. Minnesota courts have evaluated discovery violations under a harmless error analysis, granting a new trial if the undisclosed evidence "could have affected the judgment of the jury." *Hunt*, 615 N.W.2d at 298.

1. The State Suppressed Crucial Information Undermining Peter Arnoldi's Credibility.

Peter Arnoldi was one of only two witnesses who claimed to be able to connect Brian Pippitt to the crime, based upon Pippitt's supposed confession. The State did not disclose to the defense that at the time Arnoldi allegedly heard the confession from Mr. Pippitt, Arnoldi was suffering from serious psychoses causing him to hear voices and to hallucinate. The State did not disclose to the defense that Arnoldi was expressing the false belief that Evelyn Malin had been sexually assaulted. The defense was not informed that Mr. Arnoldi was to receive assistance from the Aitkin County Attorney in seeking a downward departure on a federal bank robbery sentence in exchange for his "crucial" testimony against Brian Pippitt. [Murtha Decl., ¶¶ 10–13]

There is no question that this evidence was material, and that to withhold it was prejudicial. The suppressed evidence would not only have effectively impeached Arnoldi but utterly destroyed his credibility, eliminating him as a plausible witness and removing the only corroboration for Raymond Misquadace's "accomplice" testimony.

2. The State Refused to Turn Over the Deadbolt Lock to the Defense.

The deadbolt lock from the front door of the Dollar Lake Store was important evidence. As discussed above, several officers indicated that the doors were securely locked when they arrived at the scene of the crime. This means that the perpetrator had to be someone with a key, as there was no other way to exit through the front door and lock it. If the deadbolt was locked, Raymond Misquadace's story collapses, because he claimed the assailants were walking in and out of the front door, ultimately using it to exit the store.

Understanding the significance of the deadbolt lock after Raymond made his statement, law enforcement, fifteen months after the murder, removed the front door and lock from the crime scene. They took pains to test and ensure that the lock was fully operable, and only with key, and they disassembled the lock mechanism and photographed all the parts, except for the most important part, the bolt itself. Before trial, defense counsel made numerous requests to inspect and examine the deadbolt lock, but the State refused to provide access. [Murtha Decl., ¶ 17]

Although several law enforcement reports noted that both the front and back doors were deadbolted when they arrived at the scene, by the time of trial the State's witness instead testified that he could not remember whether the deadbolt was locked. This left open the possibility that a perpetrator without a key could have exited through the front door and simply pulled it shut behind him. On cross examination by Brian Pippitt's trial attorney, Detective Beck (1) confirmed that he had refused to tell the defense investigator whether the door was deadbolted when he arrived at the scene, (2) insisted that he did not know whether the door was deadbolted, (3) confirmed that his

team had removed the door and lock mechanism for inspection, and (4) could not say whether anyone had looked at the deadbolt. [Brain Pippitt trial., pp. 610–11]

The prosecutor took things a step further, using his cross examination of a defense investigator to try to suggest (falsely) to the jury that the door was not deadbolted, and that the engaged bolt seen in photographs was in fact a strike plate. [Brian Pippitt trial, pp. 553-54] All this obfuscation was necessary in order to avoid contradicting Raymond Misquadace's testimony. Keeping the door and lock away from defense counsel was essential to that project. This is a clear violation of *Brady* and its progeny. Given the importance of the deadbolt to the State's case, Brian Pippitt was prejudiced.

3. Relief is Justified Because the State Destroyed Evidence in Bad Faith.

There is more to the story about the deadbolt. After law enforcement removed the door and lock from the crime scene, after they refused to give the defense access to it, after they successfully kept the door and lock away from the jury [CRU Report, pp. 58–59], the lock went missing from the Aitkin County Evidence Room. In other words, the evidence was important enough to the case for them to remove the door and lock from the premises for closer inspection and disassembly, but not important enough for them to retain the evidence, even if that meant violating established policy.

"A defendant's right to due process is implicated when the state loses, destroys, or otherwise fails to preserve material evidence." *State v. Jenkins*, 782 N.W.2d 211, 235 (Minn. 2010). *See also Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988). While the destruction of clearly exculpatory evidence would violate *Brady*, the "failure to preserve potentially useful evidence" violates due process where the defendant "shows

bad faith" on the part of the State. *Jenkins*, 782 N.W.21d at 235.

Indices of bad faith include "the State's incentive to hide, destroy, or suppress evidence favorable to the defendant," and "whether the State failed to follow standard procedures when it destroyed the evidence." *State v. Hawkinson*, 829 N.W.2d 367, 373–76 (Minn. 2013). Here, evidence of bad faith abounds. First, the State knew the deadbolt was crucial evidence, and it knew the locked position was essentially fatal to its trial narrative. The fact that multiple officers reported that the front door was deadbolted, together with nearly comic obfuscation on this issue both before the grand jury and at trial, further establishes bad faith. Moreover, as uncovered in the CRU investigation, the prosecutor was subjectively troubled by the lock and door evidence, and sought to keep it from the jury. [CRU Report, p. 58 ("The prosecutor kept the door out of sight of the jury.")] The CRU uncovered this note in the County Attorney's files, illustrating the strong desire to keep the door away from the courtroom:

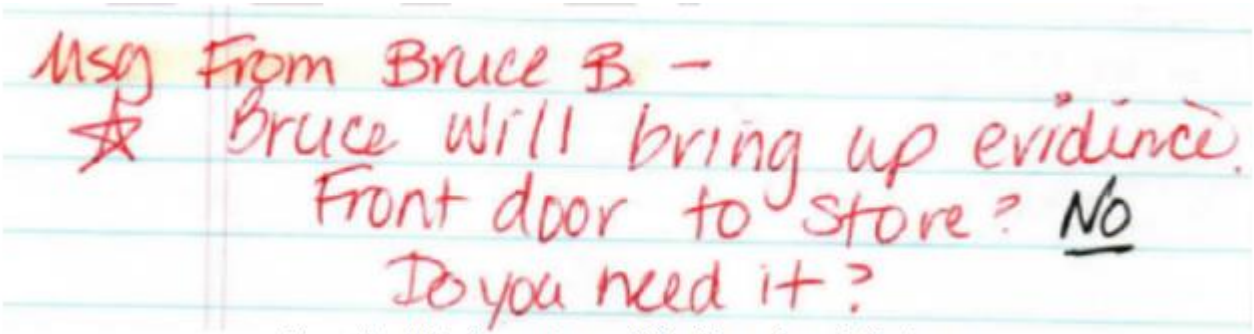


Figure 31 – Aitkin County Attorney Office file note from the Pippitt case

Also telling is the interaction between County Attorney Rhodes and Edith See, Keith Misquadace's attorney, when, during plea negotiations, Ms. See presented a demonstrative exhibit comprised of an enlarged crime scene photograph of the deadbolt in the locked position. Rhodes took the exhibit and threw it at Ms. See, hitting her in the chest. Ms. See understood from this outburst that the deadbolt was a source

of frustration for Rhodes. [CRU Report, p. 54]

In addition, the loss or destruction in this case occurred despite the Aitkin County Sheriff's Department's established protocol of retaining "all evidence" in homicide cases such as this one. [CRU Report, p. 59] The State knew the deadbolt was critical evidence, it knew that it had the potential to exculpate Mr. Pippitt, and it knew that defense counsel was very interested in accessing the evidence. Despite all that, or, rather, because of it, the State kept the evidence out of the defenses hands before ultimately losing or destroying it. This conduct does not comport with due process or fundamental fairness. This alone justifies relief.

D. These Claims Are Not *Knaffla*-Barred, And Are Not Time-Barred Because They Fall Under The Statutory Exception For Newly-Discovered Evidence And The Interests Of Justice.

In Minnesota "where direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). When a petitioner's claim is based upon new evidence, the "claim is not *Knaffla*-barred if the evidence was not available at the time of his direct appeal." *Schneider v. State*, 725 N.W.2d 516, 524 (Minn. 2007). As detailed above, the claims Mr. Pippitt raises in this postconviction proceeding were not known until recently; the claims involve newly discovered evidence, establishing false trial testimony and scientific evidence that was not available until after Mr. Pippitt's conviction and postconviction proceeding. Therefore, they are not *Knaffla*-barred.

Anyone convicted of a crime may petition the court for postconviction relief if: "The conviction obtained or the sentence or other disposition made violated the

person's rights under the Constitution or laws of the United States or of the state." Minn. Stat. § 590.01, subd. 1(1). While postconviction petitions generally must be filed within two years of the appellate court's disposition of the direct appeal, there are several exceptions to the time limit, including newly discovered evidence and the interests of justice. Minn. Stat. § 590.01, subd. 4(b)(2)&(5). Both of these exceptions apply in this case.

Under subdivision 4(b)(2), a petitioner meets the exception for newly discovered evidence if:

> (1) The petitioner alleges the existence of newly discovered evidence, including scientific evidence.
>
> (2) The evidence could not have been ascertained through due diligence within the two year time period.
>
> (3) The evidence is not cumulative to that presented at trial.
>
> (4) The evidence is not for impeachment purposes, and
>
> (5) The evidence establishes by clear and convincing evidence that petitioner is innocent of the offense for which he is convicted.[16]

Roby v. State, 808 N.W.2d 20, 25 (Minn. 2011) (citing Minn. Stat. § 590.01, subd. 4(b)(2)).

The evidentiary basis for these claims was discovered within two-year limit, as modified by the Tolling Agreement. [Exhibit I] As set forth in detail above, the newly-discovered evidence includes: the forensic evidence and expert analysis provided by Netzel, Turvey, and Paluski; the crucial recantations by the state's only two witnesses

[16] In its most recent session, the legislature amended Subsection 5 to lessen the burden of proof from "clear and convincing" to "preponderance of the evidence." [H.F. 5216, Article 4, Section 9 (2024)]

who place Brian Pippitt at the scene—Raymond Misquadace and Peter Arnoldi; the reality that objective facts do not match any of Raymond's ever-changing versions, but they do match his recantation; that Peter Arnoldi was suffering from psychosis (including audio and visual hallucinations) at the time he purportedly heard Brian's confession; confirmation that no beer or cigarettes were stolen from the Dollar Lake Store; the sworn declarations of Neil King that he was not present at the store at all; the sworn declaration of Mari Blegen, further confirming that Raymond Misquadace's trial testimony was a lie, and; the statement of Theresa Colton-Schalz confirming that Keith was not present at the Dollar Lake Store either.

Alternatively, Mr. Pippitt's claims are also properly before this court because this "petition is not frivolous and is in the interests of justice." *See* Minn. Stat. § 590.01, subd. 4(b)(5). As Justice Paul Anderson explained, the interests of justice exception exists because courts "must be wary of a broom that sweeps too broadly and rules are so strictly enforced that justice has the very real potential of being denied. This court must retain the flexibility granted to do what is right despite statutory proscriptions or presumptions." *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 6-7 (Minn. 2003) (Anderson, Paul H., J., concurring in part, dissenting in part).

A petition may meet the interests of justice exception if it has substantive merit and the defendant did not deliberately and inexcusably fail to raise the issue on direct appeal. *Gassler v. State*, 787 N.W.2d 575, 586 (Minn. 2010) (citing *Deegan*, 711 N.W.2d at 93-94). Courts may also consider "the degree to which the party alleging error is at fault for that error, the degree of fault assigned to the party defending the alleged error, and whether some fundamental unfairness to the defendant needs to be addressed." *Gassler*, 787 N.W.2d at 587 (citing *State v. Green*, 747 N.W.2d 912, 918

(Minn. 2008)). Last, action in the interests of justice is appropriate "when necessary to protect the integrity of the judicial proceedings." *Id.* (citing *State v. Kaiser*, 486 N.W.2d 384, 385-386 (Minn. 1992)).

This petition has substantive merit. Newly discovered evidence does not merely undermine the verdict; it establishes Brian Pippitt's innocence. Consideration of these issues is necessary to protect the integrity of the judicial proceedings. Nothing undermines faith in the justice system more than wrongful convictions. *See, e.g.*, Michele K. Mulhausen, *A Second Chance At Justice: Why States Should Adopt ABA Model Rules Of Professional Conduct 3.8(G) And (H)*, 81 U. Colo. L. Rev. 309, 328 (citing Judge Kevin Burke & Judge Steve Leben, Procedural Fairness: A Key Ingredient in Public Satisfaction (Sept. 26, 2007) (unpublished white paper of the American Judges Association) ("The perception that the judicial system is indifferent to innocent people being punished for crimes they did not commit would make a mockery of the law and seriously undermine the public's trust in the judiciary and cause an already skeptical public to question the fairness of the judicial system.").

This new evidence eviscerates a case that was on shaky evidentiary grounds to begin with. There is simply not a shred of evidence to link Brian Pippitt to this murder. Not physical, not testimonial. Nothing at all. Indeed, the Minnesota Attorney General's Office now starkly concludes that "Pippitt was wrongfully convicted of the murder of Evelyn Malin…." [CRU Report, p. 8] It is well past time to correct this injustice.

E. Mr. Pippitt Is Entitled To An Evidentiary Hearing On These Claims Of False Evidence, Newly Discovered Evidence, and Due Process Violations.

As the Minnesota Supreme Court has repeatedly stated, "the showing required for an evidentiary hearing is lower than that required for a new trial." *State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013) (citing *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012); *Osphal v. State*, 677 N.W.2d 414, 420 (Minn. 2004)). Under Minnesota law, the postconviction court must grant an evidentiary hearing "unless the petition and the files and records of the proceeding conclusively show that petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1. Failure to hold an evidentiary hearing when a petitioner raises material issues of fact constitutes an abuse of discretion. *Wilson v. State*, 726 N.W.2d 103, 108 (Minn. 2007).

The required showing is not onerous. The petitioner needs only to allege facts that, if proven, would entitle him to relief. *Bobo*, 820 N.W.2d at 517 (remanding for an evidentiary hearing on a claim of new evidence asserted in petitioner's third postconviction petition). "Any doubts about whether to conduct an evidentiary hearing should be resolved in favor of the defendant seeking relief." *Nicks*, 831 N.W.2d at 504 (citations omitted).

CONCLUSION

Based on the foregoing, Petitioner Brian Pippitt respectfully requests that the Court vacate the conviction and discharge the Petitioner. Alternatively, Mr. Pippitt respectfully requests an evidentiary hearing on the claims raised in the Petition.

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s/ James R. Mayer

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