STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

KEITH KUTSKA,

Defendant.

FILED
JAN 12 2011
CLERK OF COURTS
BROWN COUNTY, WI

DECISION AND ORDER

Case No. 95-CF-238

Before the Court is Defendant Keith Kutska's ("Kutska") Wisconsin Statutes section 974.06 motion for postconviction relief. Kutska seeks a new trial based upon ineffective assistance of counsel, newly discovered evidence, and in the interests of justice. For the following reasons, Kutska's motion will be **DENIED**.

BACKGROUND FACTS

In its decision denying Kutska's direct appeal, the Court of Appeals described the basic facts of this case as follows:

> Kutska and five other defendants were tried jointly for the November 21, 1992, murder of Thomas Monfils. A jury convicted Kutska and the other defendants of first-degree intentional homicide, party to a crime, contrary to §§ 940.01(1) and 939.05, stats...
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> The State presented evidence that on November 10, 1992, the Green Bay Police Department police received an anonymous tip that Keith Kutska intended to steal an expensive electrical cord from his employer, the James River Corporation, a paper manufacturer. At the end of Kutska's shift, a security guard stopped him and asked to search his bag. Kutska hurriedly left the premises before the guard could check his bag and, as a result, he received a five-day suspension without pay. Kutska obtained a tape of the anonymous tip and determined that the caller was Monfils.
>
> On November 21, 1992, Kutska arrived at work and played the tape for various co-workers. Kutska, Michael Piaskowski, and Randy LePak went to the No. 7 coop and played the tape for Monfils, at which time Monfils admitted he had

made the call. Later, at 7:30 a.m., Monfils performed a turnover (a change in the paper roll) on his paper machine. Between 7:30 and 8 a.m., a group of employees, including Kutska and the five other defendants, confronted Monfils. A verbal confrontation became physical, and Monfils was beaten.

Brian Kellner, a friend of Kutska's, testified that on July 4, 1994, while at the Fox Den Bar, Kutska described to him the November 21 confrontation with Monfils, himself, Basten, Moore, Johnson, Piaskowski and Hirn. Kutska told Kellner that he stood back and watched as the others shouted at Monfils and shook the tape in his face. Kutska described the events in terms of "what if" somebody had hit Monfils in the head with a wrench or a board. Hirn shoved Monfils in the chest. Kutska admitted telling Hirn, whom Kutska considered to be a "good instigator," to "go give [Monfils] some shit." The record also contains evidence that Kutska punched Monfils in the face with his fist.

James River employee David Wiener testified that on November 21, at approximately 7:40 a.m., he saw Basten and Johnson walking toward a vat connecting the No. 7 and No. 9 paper machines. They were walking hunched over, approximately six feet apart, and appeared to be carrying something. Shortly thereafter, Kutska told Piaskowski to notify a supervisor that Monfils was missing. At approximately 8 a.m., Piaskowski informed the supervisor that "some heavy shit was coming down." On November 22, Monfils' partially decomposed body was found in a pulp vat; a heavy weight was tied around his neck. He died from asphyxiation from inhaling paper pulp and strangulation by a rope tied to a weight.

State v. Kutska, 222 Wis. 2d 218, 587 N.W.2d 214 (Ct. App. 1998) (unpublished).

POST-CONVICTION HEARINGS

Kutska filed the current section 974.06 postconviction motion on October 31, 2014. Kutska previously filed a postconviction motion on May 27, 1997, which was denied by the Court on September 23, 1997. The Court of Appeals affirmed this Court's decision on September 22, 1998.

In this motion, Kutska asserts that he should be granted a new trial due to ineffective assistance of counsel, newly discovered evidence, and in the interest of justice. Kutska's arguments center around the same theme: that Kutska's attorneys should have pursued a suicide theory at the time of trial, and/or that new evidence supporting the suicide theory warrants a new

trial. Kutska also argues that there is newly discovered evidence that Kellner perjured his trial testimony based upon pressure by detective Randy Winkler ("Winkler"). The Court held evidentiary hearings on Kutska's motion on July 8, 9, and 22, 2015.

At the hearings, Kutska presented 14 witnesses: a forensic pathologist to critique the conclusions drawn by Dr. Helen Young; Kutska's trial and appellate counsel; an attorney to assess the reasonableness of counsels' strategic decisions; several lay witnesses including relatives, friends, and co-workers of Kutska, Kellner, and Monfils; a former Coast Guard member to discuss various types of knots; and Winkler. The Court will briefly summarize some of the important points of testimony of each witness. This is not a complete summary, but instead, a brief synopsis of some of the important points for each witness.[1]

INEFFECTIVE ASSISTANCE WITNESSES

Dr. Mary Ann Sens, a forensic pathologist, coroner, and medical examiner, testified that autopsy photos of Monfils' body revealed advanced decomposition, which causes challenges when assessing subtle and major injuries and can make it more difficult to determine whether an injury occurred pre- or post-mortem. (Postconviction Motion Hearing, Day 1, 26:20-27:22.) Dr. Sens also testified that based upon the state of the body and the injuries observed, she could not distinguish between homicide or suicide in this case. Accordingly, she would have listed the cause of death as "unknown" or "undetermined." (Hrg. 1, 40:21-41:9.)

Dr. Sens, therefore, concluded that she could not have ruled Monfils' death a homicide at the time of the autopsy. (Hrg. 1, 56:16-19.) Dr. Sens similarly concluded that she would have been unable to rule that certain injuries occurred pre-mortem versus post-mortem, and that she

[1] For purposes of analyzing the voluminous evidence heard at the three-day evidentiary hearing, the Court has placed the witnesses into two categories: ineffective assistance of counsel witnesses and newly discovered evidence witnesses. However, this is merely a general categorization and the Court has fully considered all relevant evidence that Kutska has presented in support of each argument.

had no way of knowing whether injuries that *were* pre-mortem occurred inside or outside of the vat. (Hrg. 1, 61:15-62:25.) However, Dr. Sens clarified her testimony as follows:

> I practiced back in the eighties and nineties. And boy, we really thought we could tell premortem and postmortem. I mean, down to the minute. And we find out that we really can't do it, that the human body can react in different ways. So, in some aspects the – I don't know if the science has changed or we've gotten more humble and realistic in our opinions.
>
> ...[I]n all fairness to Dr. Young, back in the eighties and nineties when I started this, we thought we could do it. You probably could look at some of my old reports and find them, calls I wouldn't make today.

(Hrg. 1, 71:6-13; 88:20-24.)

Attorney Royce Finne, Kutska's trial counsel, testified that he did not consult with or hire an independent forensic pathologist to review Dr. Young's conclusion that Monfils' death was a homicide, because he saw no reason to question her findings. (Hrg. 1, 101:16-20, 105:11-13.) Attorney Finne further testified:

> The position that the six defendants and the attorneys were in was such that [the defendants] didn't do it. Someone else did it...So, it really didn't matter a whole lot whether all these pre/postmortem things were involved. They were more a distraction than anything else...
>
> As long as they had an expert that could establish a cause of death, that it was in fact a homicide, the circumstances surrounding it really didn't matter that much. Because everybody's position was that they didn't know what happened, because they weren't involved.

(Hrg. 1, 113:9-16, 113:24-114:4.) Attorney Finne later clarified that there were several reasons he did not question Dr. Young's conclusions:

> One was that we had confidence in Dr. Young's finding. We all knew her by her reputation. I worked with her in the past. A couple of others did too. So, we had no reason to question her competency. We know that she was – We sort of figured that we would have to shop for more than one forensic specialist if you're going to get one, because the likelihood was that the closer you were to this area people familiar with her work would likely come to the similar conclusions that she did.

> We also did not think we were going to get to prove it was a suicide, and we saw little profit in attempting to show that. We probably couldn't prove it, and we didn't think that would sit well with the jury.
>
> And as I said before, in some ways it didn't matter, because the basic defense was that the State's witnesses were not credible, and they had arrested the wrong defendants.

(Hrg. 1, 126:1-19.) Furthermore, Attorney Finne as well as the other defendants' attorneys had the opportunity to depose Dr. Young during discovery in Monfils' wrongful death case prior to Kutska's trial, and no issue came up "as to cause of death being a concern" which would have caused Attorney Finne to investigate the cause of Monfils' death further. (Hrg. 1, 128:10-25.)

Attorney Finne also testified that he recalled that some witnesses made statements to police that Monfils may have committed suicide, but could not recall specifically whether he interviewed those witnesses further. (Hrg. 1, 116:3-8.)

Attorney James Connell, Kutska's appellate counsel, testified that he did not consult with any expert witnesses as part of Kutska's postconviction or appellate proceedings. (Hrg. 1, 138:24-139:1.) Specifically, Attorney Connell did not consider hiring a forensic pathologist to review Dr. Young's conclusion that Monfils' death was a homicide because he "had settled on the theory of defense that was presented at trial, and it seemed to make the most sense to [him]." (Hrg. 1, 146:7-13, 168:10-12.)

Attorney Connell also testified that he was aware that witnesses had provided statements that they believed Monfils may have committed suicide, and reviewed the statements as part of his review of Kutska's case. (Hrg. 1, 144:7-14.) However, Attorney Connell testified that at trial, Kutska "directly pointed the finger, and frankly I thought that was the appropriate thing to do, at David Wiener" as an alternative suspect. (Hrg. 1, 148:8-11.) Because Attorney Connell thought that the theory presented by Attorney Finne was reasonable, he did not investigate the issue of

whether Monfils' death could have been a suicide. (Hrg. 1, 151:15-24.) Attorney Connell further thought that pursuing investigation of the suicide theory was not necessary based on the fact that there was "almost no mention of suicide during the trial." (Hrg. 1, 166:3-4.)

Finally, Attorney Connell testified about his interactions with Wiener during the postconviction hearing. Specifically, Attorney Connell testified that he asked Wiener if he had a deal or an expectation of a benefit for his trial testimony, and that Wiener answered that there was no deal. (Hrg. 1, 154:16-155-4.) At the time of the postconviction hearing, Attorney Connell was aware that Wiener had received a sentence reduction after Kutska's trial ended, and that "Wiener thought he was doing something that would get him out early" by testifying, but that the State took the position that there was no deal. (Hrg. 1, 158:8-159:1, 160:13-17.)

Attorney Stephen Glynn, offered as an expert in criminal defense, stated that it would be objectively unreasonable for a trial attorney to *not* consult with an independent forensic pathologist in this case, because "Dr. Young's report is not very solid...[because] it talks about an area which is by itself subject to great dispute among pathologists." (Hrg. 1, 189:1-3, 190:7-10.) Accordingly, Attorney Glynn concluded that Kutska's counsel could not have made a strategic decision about conceding homicide as the cause of death without consulting with an independent expert. (Hrg. 1, 195:1-10.) Attorney Glynn also testified that Kutksa's defense at trial – the "SODDI defense," (an acronym for "some other dude did it") – is "basically the weakest defense there is to start with." (Hrg. 1, 194:2-6.) Finally, Attorney Glynn felt that Kutska's postconviction counsel was deficient for failing to raise lack of investigation by Attorney Finne as an issue in Kutska's postconviction motion. (Hrg. 1, 206:16-19.)

NEWLY DISCOVERED EVIDENCE WITNESSES

Ardis Kutska ("Ardis"), Kutska's ex-wife, testified that Kutska did not "demonstrate or try to do a reenactment of what happened at the paper mill the day that Tom Monfils disappeared" at the Fox Den Bar in July 1994. (Hrg. 1, 226:20-24.) Ardis testified that Kellner's testimony to the contrary was false and that she was willing to testify the reenactment never happened, but was not called as a witness at trial because she was told, as Kutska's wife, she would not be believed by a jury. (Hrg. 1, 228:14-229:1.)

Amanda Williams, Kellner's daughter, testified that in 1994 and 1995, she was about 13 years old and her parents were in the process of divorcing. (Postconviction Motion Hearing, Day 2, 6:5-12.) Williams testified that she was aware that Winkler had contacted Kellner during his investigation of Kutska, and also that Winkler interviewed her without her parents' knowledge or permission. (Hrg. 2, 11:2-11, 13:4-13.) Williams also testified that while at school she had also been called to the principal's office, where she was questioned by a female about her home life as well as the Monfils case. (Hrg. 2, 20:19-21:7.) Williams then testified that the woman brought her to the Oconto Falls police station, but she was not questioned further.[2] (Hrg. 2, 21:14-22:5.)

John Lundquist, Kutska's postconviction counsel for the current motion, testified that through his representation of Kutska, he met with Kellner to discuss Kellner's testimony in February 2014. (Hrg. 2, 37:24-38:1.) Attorney Lundquist testified that Kellner made statements "that [Attorney Lundquist] considered to be against his interest or of a confessional nature." (Hrg. 2, 38:7-9.) Essentially, Attorney Lundquist testified that Kellner told him "the Fox Den

[2] Williams also testified regarding several statements made to her by both Winkler and Kellner. As stated by the Court on the record at the hearing, the Court finds that these hearsay statements are minimally relevant to the issues currently being decided, and therefore will not be discussed in greater detail in this decision.

incident simply did not happen," and that the statement signed by Kellner was completely written by Winkler.[3] (Hrg. 2, 39:4-17.)

Attorney Lundquist testified that he prepared a written affidavit based upon Kellner's statements, and that Kellner had agreed to review it. (Hrg. 2, 41:21-25.) However, as Attorney Lundquist was travelling to Green Bay to meet with Kellner, Attorney Lundquist received a phone call that Kellner had passed away that morning. (Hrg. 2, 42:22-25.) Accordingly, the affidavit was never executed, although Attorney Lundquist expected "that [Kellner] would sign it, possibly with some minor changes." (Hrg. 2, 43:1-2, 44:10-11.)

Cal Monfils ("Cal"), Monfils' brother, testified that Monfils had been in the United States Coast Guard for approximately four years. (Hrg. 2, 49:15-17.) Cal testified that after Monfils' death, he went into Monfils' home and found several knots tied to nails in a screen porch area of the house. (Hrg. 2, 54:2-13.) Cal testified that his brother regularly tied knots, and he believed that his brother had tied the knots found in the screen porch. (Hrg. 2, 55:20-25.) Cal further testified that upon seeing photographs of the rope and weight which were found with Monfils' body, he informed Winkler that thought the rope knots might be of the type his brother could have tied. (Hrg. 2, 57:2-8.)

Cal further testified that after Monfils' death, he picked up Monfils' wife Susan after her release from a psychiatric ward. (Hrg. 2, 61:5-25.) While driving, Cal testified that they heard on the radio that Monfils' body had been found with a rope and a weight, and Susan "slumped over in the passenger seat, kind of in this state and just, you know, five, ten seconds of silence, and

[3] The Court stated at the hearing that it did not believe either Kellner's hearsay statements to Attorney Lundquist or the unsigned affidavit (Hrg. Ex. 142) were admissible as statements against Kellner's interest. After reviewing the briefs of the parties, the Court stands by its initial determination that these statements are hearsay and are not otherwise admissible under a hearsay exception. However, as will be discussed further below, even if these hearsay statements are admissible, they are minimally relevant and will accordingly are given little to no weight in the Court's final determination.

she asked me to take her to the bank." (Hrg. 2, 62:16-63:1.) Cal testified that Susan went to her security deposit box, and then left without telling Cal why.[4] (Hrg. 2, 63:12-25.)

George Jansen, a former Coast Guard engineman, testified as to the training that members of the Coast Guard received regarding knot-tying. (Hrg. 2, 79:3-23.) Jansen testified that Coast Guard members were required to know how to tie a two half-hitch knot. (Hrg. 2, 80:18-24.) Jansen identified the rope knots pictured in Monfils' autopsy photos as two-half hitch knots. (Hrg. 2, 82:17-83:20, Exs. 128-129.) Jansen also identified the knots which Cal found in Monfils' house as two half-hitch knots. (Hrg. 2, 83:21-84:7, Exs. 143-145.) However, Jansen conceded that two half-hitch knots are taught by the Boy Scouts as part of the knot tying badge. (Hrg. 2, 85:20-25.)

Steven Stein, an individual who worked at the mill with Kutska and Monfils, testified that Monfils did not have many friends at the mill. (Hrg. 2, 88:23-25.) Stein also testified that Monfils had spoken to him about his time in the Coast Guard and about the recovery of drowning suicide victims. (Hrg. 2, 92:8-25.) Stein testified that he informed police of these conversations that he had with Monfils, and told police after Monfils' body was found that he thought Monfils had committed suicide. (Hrg. 2, 94:13-16, 97:7-17.)

Stein also testified that in the days before his disappearance, Monfils "got very quiet…he didn't want to talk to his partners [in the mill] at all." (Hrg. 2, 103:15-20.) Stein further testified that he felt pressured by Winkler and others in law enforcement to say that he had seen Monfils being beaten. (Hrg. 2, 108:17-22, 121:5-19.)

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[4] Cal also testified that his mother had told him that Susan had made statements to her that she thought Monfils may have committed suicide or left suicide notes. (Hrg. 2, 68:3-70:19.) Cal also testified that these statements by Susan upset his mother and the she thought "Sue was just talking foolish." (Hrg. 2, 70:8-19.) The Court ruled at the hearing that these double hearsay statements were inadmissible, but allowed Kutska to make an offer of proof as to their admissibility. The Court now stands by its ruling at the hearing that the statements are inadmissible double hearsay, and in any case are of such limited relevance that they will be given little to no weight by the Court.

Finally, Stein testified that Kellner was a friend of his, and that after the trial Kellner made statements to Stein on five or six occasions that Kellner had lied to the police because he was afraid of losing his job and family. (Hrg. 2, 114:1-117:1.)

Jody Liegois, testified that she previously worked with Kellner's ex-wife, Verna Irish, at a restaurant in Abrams. (Postconviction Motion Hearing, Day 3, 20:17-21:13.) Liegois testified that in late 1995, after the trial, Irish told Liegois that both she and Kellner were forced into making statements about the reenactment at the bar. (Hrg. 3, 25:5-26:17.) Liegois testified that she did not inform anyone of this conversation at the time because she thought it was a "done deal." (Hrg. 3, 27:3-10.)

Gary Thyes, who worked as a barber in Green Bay between 1992 and 1995, testified that detectives came into his barber shop during the Monfils investigation and "would give [him] things and tell [him] to sign them," but he refused because the statements were untruthful. (Hrg. 3, 30:13-31:13.) Thyes further testified that Kellner told him that he had signed a statement because "they threatened to take his kids away," but immediately told a lawyer that he had signed a false statement. (Hrg. 3, 32:9-23.) However, Thyes testified that he did not contact counsel for any of the defendants with this information at the time of Kutska's trial. (Hrg. 3, 34:15-19.)

Randall Winkler, the former Green Bay Police Department Detective who led the Monfils investigation, testified about the investigation that occurred in the mill after Monfils' body was discovered. Winkler testified that he believed there were eye witnesses to Monfils' beating, but that people in the mill denied seeing a beating to "cover up" what happened. (Hrg. 3, 70:2-15.) Winkler testified this led him to use certain interrogation tactics to get them to talk.

(Hrg. 3, 70:16-19.) Winkler stated that he did not threaten Kellner with the loss of his children or job at any time during his investigation of Monfils' death. (Hrg. 3, 107:20-24.)

With regard to the knots found in the rope tied to Monfils' body and the weight, Winkler testified that the knots were sent to the state crime lab, but no fingerprints or trace evidence were found. (Hrg. 3, 70:20-71:4.) Winkler testified that he did not know whether the knots were ever checked by an expert in the Coast Guard or Navy, but that he never took steps to have them examined once he became lead investigator. (Hrg. 3, 72:9-15.) Further, Winkler also testified that there were people at the mill who told him during the course of the investigation that Monfils often discussed drowning and the recovery of drowning victims while Monfils was in the Coast Guard. (Hrg. 3, 137:19-25.)

Finally, Winkler testified that Wiener was on the initial suspect list. (Hrg. 3, 148:4-7.) Winkler testified that Wiener "was a witness, and he had some important information, but not a key witness." (Hrg. 3, 154:7-8.) Despite receiving a letter from Wiener's attorney, Winkler denied making statements to Wiener which "intimated" that his "cooperation" could affect his 10-year prison sentence.[5] (Hrg. 3, 157:22-24, 159:15-20.)

PROCEDURAL BAR

Before considering the specific issues Kutska raises, the Court will first consider if Kutska is procedurally barred from bringing this motion. A postconviction motion under Wisconsin Statutes section 974.06 allows a prisoner to attack his conviction after the time for appeal has expired. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 176, 517 N.W.2d 157, 160

[5] Winkler's lengthy testimony also included a large amount of hearsay testimony as well as a number of documents offered under various hearsay exceptions. As the Court noted at the time of the hearing, the Court finds this evidence to be somewhat removed from the actual issues before it, and therefore finds that the evidence is of minimal value in rendering this decision. The summary of Winkler's testimony above includes the most relevant portions of Winkler's testimony from the Court's perspective, but does not include all of the evidence which the Court considered.

(1994). A defendant is barred from raising in a postconviction motion an issue that was fully and fairly adjudicated and decided on the merits in a direct appeal. *See* Wis. Stat. § 974.06(4). Additionally, all grounds for relief under section 974.06 "must be raised in [the defendant's] original, supplemental or amended motion." *Id.* A defendant must demonstrate a sufficient reason to raise a constitutional issue in a section 974.06 motion if the issue could have been raised on direct appeal. *Escalona-Naranjo*, 185 Wis. 2d at 185.

Kutska asserts that he has two sufficient reasons for failing to allege or adequately raise these issues in his direct appeal: (1) ineffective trial and appellate counsel; and (2) newly discovered evidence.

I. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Kutska first argues that ineffective assistance by his appellate counsel is a sufficient reason to pass the procedural bar in this case. The Court will consider: (a) the standard and (b) its application to this case. "[I]n some circumstances...ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not." *State ex rel. Rothering v. McCaughtry,* 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996). Here, Kutska asserts that Attorney Connell deficiently (i) failed to consult with a forensic pathologist, and (ii) failed to raise ineffective assistance of counsel arguments that Attorney Finne: (a) failed to investigate Dr. Young's conclusions regarding the manner of Monfils' death; (b) failed to investigate and present evidence that Monfils was suicidal and proficient at tying the types of knots found on the rope and weight; and (c) unreasonably relied on an "uninformed" SODDI defense at trial. While Kutska generally refers to defense counsel collectively, Kutska does not make any argument that ineffectiveness of trial counsel *alone* could pass the procedural bar.

A. Standard

Defendants are not entitled to an ideal or perfect defense. *State v. Harper*, 57 Wis. 2d 543, 557, 205 N.W.2d 1, 9 (1973). Instead, courts consider "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *State v. Franklin*, 2001 WI 104, ¶ 11, 245 Wis. 2d 582, 588, 629 N.W.2d 289, 292 (quoting *Strickland v. Washington*, 466 U.S. 668, 686, (1984). There is a strong presumption that counsel provided reasonable assistance. *State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 659, 782 N.W.2d 695, 704. To analyze ineffective assistance of counsel, courts apply a two-part test; a defendant must show 1) that his counsel's performance was deficient; and 2) that this deficient performance resulted in prejudice. *Id.*, ¶ 21.

To determine whether performance was deficient, courts examine whether "counsel's representation fell below an objective standard of reasonableness." *Id.*, ¶ 22 (citation omitted). Generally courts will not second-guess a trial attorney's "selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel." *State v. Elm*, 201 Wis. 2d 452, 464, 549 N.W.2d 471, 476 (Ct. App. 1996) (quoting *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W. 2d 161, 169 (1983)).

To prove deficient performance, a defendant must raise specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Carter*, ¶ 23. In evaluating counsel's decision not to investigate, this court must assess the decision's reasonableness in light of all the circumstances applying a heavy measure of deference to counsel's judgments. *Id.* (quotation omitted).

Under the second prong of prejudice, a defendant is required to show that "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, ¶ 37; *see also State v. Domke*, 2011 WI 95, ¶ 54, 805 N.W. 2d 364, 378. Courts consider a reasonable probability one sufficient to undermine the confidence in the outcome. *Domke*, ¶ 54. "When a defendant challenges a conviction, the question is whether there is a reasonably probability that, absent the error, the factfinder would have had a reasonable doubt respecting guilt." *Id.* (quoting *Strickland*, 466 U.S. at 695).

B. Application

Kutska argues that Attorney Connell provided ineffective counsel because he did not (i) independently consult with a forensic pathologist or (ii) raise various ineffective assistance of counsel claims against Attorney Finne.

i. Failure to Consult with an Independent Pathologist

First, Kutska argues that Attorney Connell was ineffective for failing to do any independent investigation to either corroborate or cast doubt upon the conclusions drawn in Dr. Young's report. Specifically, Kutska argues that Attorney Connell was ineffective because he failed to hire a forensic pathologist to review Dr. Young's conclusions.

Kutska's argument that it was unreasonable for Attorney Connell to not pursue an independent forensic pathologist's opinion as to Dr. Young's conclusions stems largely from Dr. Sens' testimony as to perceived deficiencies in Dr. Young's report. Dr. Sens concluded that based upon the autopsy photos and other materials provided, she would not be able to rule Monfils' death either a homicide or suicide, but would have had to list the manner of death as "undetermined." Dr. Sens also stated that she would have ruled most of Monfils' injuries as peri-

mortem, as opposed to pre-mortem, and that she could not definitively say that Monfils' injuries occurred either inside or outside of the vat.

Kutska relies on *State v. Zimmerman*, 2003 WI App 196, 266 Wis. 2d 1003, 669 N.W.2d 762, for the proposition that failure to consult with an expert can be grounds for both deficient performance and prejudice prongs of an ineffective assistance of counsel claim. However, in *Zimmerman,* the Court of Appeals held that the cumulative effect of many deficiencies – including failure to present available expert testimony – was sufficient to undermine confidence in the trial's outcome. However, in that case, the expert testimony offered was exculpatory and conclusive. *See State v. Haldemann*, 2009 WI App 129, ¶ 20, 321 Wis. 2d 239, 773 N.W.2d 225 (unpublished, cited for persuasive value only).

Similarly, Kutksa's conclusion that Dr. Young's report is provably false or unreliable overstates the testimony of Dr. Sens. Dr. Sens did *not* testify that Dr. Young's conclusions were provably incorrect, but merely that Dr. Young made determinations that Dr. Sens would not feel comfortable making based on the evidence before her at this time. Notably, Dr. Sens did not conclude that Monfils' death was definitely *not* a homicide or that the pre-mortem injuries definitely did *not* occur outside the vat, but simply that she could not reach a definite conclusion on either question. Most importantly, Dr. Sens clearly stated that she believes this hesitancy to make definite rulings is distinctly different than the opinions held by forensic pathologists at the time of Monfils' trial:

> I practiced back in the eighties and nineties. And boy, we really thought we could tell premortem and postmortem. I mean, down to the minute. And we find out that we really can't do it, that the human body can react in different ways. So, in some aspects the – I don't know if the science has changed or we've gotten more humble and realistic in our opinions.

> ...[I]n all fairness to Dr. Young, back in the eighties and nineties when I started this, we thought we could do it. You probably could look at some of my old reports and find them, calls I wouldn't make today.

(Hrg. 1, 71:6-13; 88:20-24.)

A defense attorney's "decision not to investigate a defense must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *State v. Zimmerman*, 266 Wis. 2d at ¶ 42 (internal citation omitted). In this case, Attorney Connell testified that he reviewed Kutksa's case and determined that the defense presented by Attorney Finne – that Wiener had actually murdered Monfils – was the defense that made the most sense under the circumstances. Furthermore, Attorney Connell *did* review witness statements in Kutksa's file in which individuals told police that they believed Monfils may have committed suicide, but did not continue investigating the suicide theory because he believed the defense presented was a stronger trial strategy than a suicide theory. Accordingly, Attorney Connell *did* investigate suicide as a potential defense theory, but made the strategic decision that another theory had a better chance of success.

Under these circumstances, it makes little sense that Attorney Connell would have consulted with an independent forensic pathologist to determine whether the cause of death could have actually been suicide as opposed to homicide. Based upon the totality of the information available to Attorney Connell, the Court finds that this was a reasonable strategic decision, and cannot find that Attorney Connell's representation was deficient.

Finally, the Court concludes that even if Attorney Connell was deficient in failing to consult with an independent forensic pathologist as to Monfils' manner of death, Kutska has not demonstrated that he was prejudiced by this failure. Dr. Sens clearly testified that at the time of this investigation, forensic pathologists "really thought we could tell premortem and postmortem.

I mean, down to the minute." (Hrg. 1, 71:6-13.) This is the type of determination that Dr. Young made in her report. Even Dr. Sens testified that during the 1980's and 1990's she made "calls [she] wouldn't make today," because either "the science has changed or [forensic pathologists have] gotten more humble and realistic in our opinions." (Hrg. 1, 88:20-24.)

In either case, it is pure speculation by Kutska that if Attorney Connell had contacted an independent forensic pathologist, that at that time that individual would have disagreed with Dr. Young as Dr. Sens now does with the benefit of 20 years of scientific advances. Accordingly, the Court cannot conclude that Kutska has demonstrated the reasonable probability of a different result if Attorney Connell had consulted with an independent forensic pathologist.

ii. Failure to Raise Ineffective Assistance of Counsel

Next, Kutska asserts that Attorney Connell failed to raise several key arguments regarding ineffective assistance of trial counsel in his postconviction motion. Specifically, Kutska argues that Attorney Finne was ineffective for: (a) failure to investigate Dr. Young's conclusions regarding the manner of Monfils' death; (b) failure to investigate and present evidence that Monfils was suicidal and proficient at tying the types of knots found on the rope and weight; and (c) unreasonably presented an "uninformed" SODDI defense at trial.

However, based upon the reasons set forth in more detail in the Court's discussion of the merits of Kutska's arguments below, the Court does not find that Attorney Finne acted deficiently or that any deficient performance prejudiced Kutska with regards to these issues. Accordingly, Attorney Connell was not ineffective for failing to raise ineffective assistance of counsel claims against Attorney Finne on those particular issues.

II. NEWLY DISCOVERED EVIDENCE

Newly discovered evidence may be sufficient to establish a manifest injustice so as to warrant a new trial. *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707, 710 (1997). Kutska advances three general arguments in support of his newly discovered evidence claim: (i) that Kellner recanted his statements to police and testimony at the trial and postconviction hearing; (ii) that new witnesses now say that Monfils was suicidal; and (iii) that the State offered Wiener a deal in return for his testimony. Kutska argues that this evidence never came to light because Dr. Young ruled that Monfils' death was a homicide and because Detective Winkler failed to properly investigate the case.

A. The Standard

To set aside a conviction based on newly discovered evidence, the evidence must be "sufficient to establish that a defendant's conviction was a manifest injustice." *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42, 52 (internal quotation and citation omitted). Therefore, to obtain a new trial based on newly discovered evidence, Kutska must show by clear and convincing evidence that "(a) the evidence was discovered after conviction; (b) the defendant was not negligent in seeking evidence; (c) the evidence is material to an issue in the case; and (d) the evidence is not merely cumulative." *State v. Edmunds*, 2008 WI App 33, ¶ 13, 308 Wis. 2d 374, 384-85, 746 N.W.2d 590, 595 (citation omitted).

If Kutska establishes these four criteria, then the Court must determine "whether a reasonable probability exists that a different result would be reached in a trial." *Id.* (citation omitted). The standard for determining whether the evidence creates a "reasonable probability of a different outcome" is "whether there is a reasonable probability that a jury, looking at [the new evidence] would have a reasonable doubt as to the defendant's guilt." *State v. McCallum*, 208 Wis. 2d at 474; *see also State v. Love*, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 134, 700 N.W.2d

62, 74; *State v. Avery*, 2013 WI 13, ¶ 25, 345 Wis. 2d 407, 424-25, 826 N.W.2d 60, 69 *reconsideration denied*, 2013 WI 40, 347 Wis. 2d 115, 829 N.W.2d 752. In other words, a court should consider whether a jury would find that the evidence "had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt." *State v. Avery*, ¶ 25 (citation omitted).

B. Application

The evidence which Kutska argues is newly discovered falls roughly into three categories: (i) evidence that Kellner perjured his trial testimony, (ii) evidence that Monfils was suicidal, (iii) evidence that the State improperly offered Wiener a reduced sentence in exchange for his trial testimony. The Court will consider each of these arguments separately.

i. Evidence of Brian Kellner's Recantation

Kutska offered extensive hearsay evidence to suggest that Kellner recanted his statements and testimony wherein he claimed to have seen Kutska describe a confrontation with Monfils at the Fox Den Bar. This evidence included testimony by Attorney Lundquist that Kellner intended to sign an affidavit recanting his prior statements, as well as testimony from several lay witnesses who claimed that Kellner revealed he signed the false statement under pressure by Winkler and out of fear that he would lose his children or job. However, Kutska is unable to demonstrate by clear and convincing evidence that he meets the standard for newly discovered evidence.

"A motion for a new trial based on a witness' recantation is entertained with great caution." *State v. Kutska,* 222 Wis. 2d 218 (citing *Terrance J.W.*, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996)). Although the Court does agree that the evidence presented by Kutska at the postconviction hearing is material to an issue in the case, the Court remains unconvinced at Kutska's broad and generalizing statement that the evidence he seeks to

introduce was not available at the time nor that he was unaware of its existence. Based on the testimony presented at the postconviction hearing, Kellner had already recanted his statement to witnesses *before* Kutska even proceeded to trial. However, despite this alleged recantation, Kellner proceeded to testify about the incident at the Fox Den Bar at trial *and* a subsequent postconviction hearing. This testimony that Kellner was already recanting his statement prior to trial is therefore somewhat moot, because if Kellner had truly recanted his statement he would have testified accordingly at trial.

The Court similarly believes the unsigned affidavit prepared by Attorney Lundquist is of limited value based upon Kellner's prior testimony. First, it is significant that Kellner never indicated to Lundquist whether he believed the contents of the affidavit were accurate – Lundquist only testified that he believed the affidavit was correct and anticipated only minor changes. This testimony does not put the Court in a position to know whether Kellner actually would have signed the affidavit upon reading its contents. Furthermore, the Court cannot discount that Kellner *did* testify in two separate proceedings that the incident at the Fox Den Bar occurred, although the specifics of his recollections varied slightly in each case.

The Court is also aware that Kellner previously testified that he perceived Winkler's interrogation tactics to be coercive nature. Other witnesses at Kutksa's trial testified extensively as to Winkler's interrogation techniques, and Winkler's character was a key point of contention that the jury had to consider. The hearsay testimony by Williams, Liegois, Thyes, and Stein corroborating these statements, even if relevant, are therefore cumulative in nature. Accordingly, Kutska is unable to satisfy that he was not negligent in finding the information nor that the evidence is not merely cumulative to the evidence available at the time of his trial.

ii. Evidence that Monfils was Suicidal

Kutska also presented several witnesses who testified that either they or others had reason to believe that Monfils was suicidal in the period of time leading up to his death. This evidence falls into two categories: statements that Monfils was suicidal, and evidence that Monfils was skilled at tying knots.

a. Statements that Monfils was Suicidal

Several individuals testified that they believed Monfils was suicidal based upon his behavior leading up to his death. Specifically, Stein testified that he had several conversations with Monfils about recovering drowning victims in the Coast Guard, and that Monfils had been acting strangely before his disappearance. However, Stein specifically testified that he told investigators that he thought Monfils committed suicide. This is also reflected in a statement signed by Stein which was a part of Kutska's original case file. Accordingly, Stein's statement is not new evidence as it was clearly available to Kutska prior to trial.

Cal also offered testimony that Monfils' wife may have believed that Monfils committed suicide. The Court places limited weight upon this testimony in the first place, given that it is clearly hearsay, and even double hearsay at times. However, even if relevant, Cal's testimony merely corroborates other statements, such as Stein's which indicated that other people thought Monfils may have committed suicide. It is well documented in the case file that several individuals told investigators from the outset that they believed Monfils committed suicide. Therefore, even if the information that some of Monfils' family members may have considered suicide a possibility in this case is new, its value is limited because it is cumulative to evidence which was available to Kutska prior to trial.

b. Evidence of Monfils' Knot-Tying Abilities

In addition, Kutska introduced evidence that Monfils was skilled at tying knots from his time in the Coast Guard, and offered expert testimony by Jansen that the knots found in Monfils' home were the same type as the knots tied in the rope found with Monfils' body. Again, Kutska has not adequately demonstrated that he was not negligent in seeking this information prior to trial. The significance of the knots in the rope were known to investigators from the time that Monfils' body was found. For that reason, the rope was sent to the state crime lab to be tested for fingerprints or trace evidence, but no meaningful evidence was found.

Even if the knot evidence meets the first four criteria of newly discovered evidence, the Court is not satisfied that the evidence would create a reasonable probability of a different outcome at trial. While there is now evidence that the type of knot used was the type of knot taught in the Coast Guard and that Monfils likely knew how to tie it, Jansen also testified that the two half-hitch knot is taught in the boy scouts and is a fairly common knot. Even if Kutska's counsel had presented the suicide theory at trial, this evidence would not establish that Monfils tied the knot in the rope, but merely that he would have been one of an undetermined number of people who would have known how. The Court cannot conclude that this fact alone would have caused a jury to doubt Kutska's guilt in light of the other evidence presented at trial.

iii. Evidence of a Deal with Wiener

Finally, Kutska presented evidence to suggest that the State offered Wiener a reduced sentence in exchange for his testimony at Kutska's trial. In support of his argument, Kutska relies on hearsay documents including newspaper articles in which Wiener stated that he would not participate in the trial unless given some sort of consideration, and the fact that the State did not oppose Wiener's petition for a sentence modification. From this, Kutska draws the tenuous conclusion that the district attorney's office offered Wiener an illicit deal in exchange for his

testimony. Much of the evidence offered is blatant hearsay whose contents were not authenticated by witnesses as to the truth of the matter asserted. Accordingly, the Court affords very little weight to most of these documents and related testimony.

The most reliable evidence of any perceived "deal" was offered by Attorney Connell, who testified that he believed "Weiner thought he was doing something that would get him out early," but that the State took the position that there was no deal. (Hrg. 1, 160:13-17.) The only other non-hearsay testimony as to an alleged deal was offered by Winkler, who agreed that Wiener may have expected some sort of consideration in exchange for his testimony, but that he was not aware of any having been given. At best, this evidence shows that Wiener *expected* a deal, but does nothing to establish that the District Attorney's office offered him one. Kutska's conclusions as to the actions or motives of the District Attorney's office for Wiener's later sentence modification are purely speculative.

In any case, Wiener's testimony at trial and the later sentence modification are not newly discovered evidence because they were known at least to Attorney Connell at the time that he filed his postconviction motion. In fact, Attorney Connell's contention that "Wiener's testimony was false and given in expectation of a reduction in his current sentence for an unrelated crime" was explicitly rejected as newly discovered by the Court of Appeals in Kutska's direct appeal. *State v. Kutska,* 222 Wis. 2d 218.

On that issue, the Court of Appeals held, *inter alia*, that "it makes no sense that an expectation of a reduced sentence motivated Wiener's testimony given that Wiener gave police his version of the events long before Wiener was convicted of an unrelated homicide." Kutska has not provided any evidence which would cause this Court to distinguish Kutska's current claim from the Court of Appeals' earlier decision on this issue. Accordingly, the Court does not

find that there is newly discovered evidence. Kutska is not able to pass the procedural bar based on this argument.

ARGUMENTS FOR RELIEF

Because Kutska is unable to pass the procedural bar, it is not necessary for the Court to consider his additional arguments. However, even if Kutska did pass the procedural bar, his other arguments would fail. The Court will briefly explain its reasoning. The Court will not reiterate its determinations concerning ineffective assistance of appellate counsel and newly discovered evidence. Instead the Court will focus on Kutska's arguments concerning: (1) ineffective assistance of trial counsel; and (2) interests of justice.

I. Ineffective Assistance of Trial Counsel

Kutska argues that trial counsel provided ineffective assistance of counsel because he: (a) failed to investigate Dr. Young's conclusions regarding the manner of Monfils' death; (b) failed to investigate and present evidence that Monfils was suicidal and proficient at tying the types of knots found on the rope and weight; and (c) unreasonably relied on an "uninformed" SODDI defense at trial.

A. Failure to Investigate Dr. Young's Conclusions

Kutska argues that Attorney Finne was ineffective because he failed to hire an independent forensic pathologist to review Dr. Young's conclusions, or to challenge Dr. Young's conclusion that Monfils' death was a homicide at trial.

Attorney Finne testified that he did not question Dr. Young's findings about the manner of death for several reasons. First, he was aware of her work and was convinced that she was competent and that other forensic pathologists familiar with her work "would likely come to similar conclusions that she did." (Hrg. 1, 126:1-19.) Attorney Finne had also heard Dr. Young's

testimony at the preliminary hearing, as well as reviewed her deposition testimony from the civil wrongful death case. He did not see any issues arise "as to cause of death being a concern" which triggered him to investigate the cause of death further. (Hrg. 1, 128:10-25.) Finally, Attorney Finne concluded that there was "little profit in attempting to show [suicide]...we didn't think that would sit well with the jury." (Hrg. 1, 126:1-19.)

The Court cannot conclude that Attorney Finne performed deficiently because he failed to hire an independent forensic investigator in this case. As stated above, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Carter*, 324 Wis. 2d at ¶ 23. Here, contrary to Kutska's arguments, Attorney Finne had more information available to him than just Dr. Young's initial report containing her conclusions. Attorney Finne also had the benefit of Dr. Young's preliminary hearing and deposition testimony, and saw no reason to question her findings based upon those proceedings.

Attorney Finne also made a reasonable strategic decision, based upon his familiarity with the area and the case, that a suicide theory would not sit well with a jury. While Kutska argues vehemently that Attorney Finne would not have had to "prove" a suicide theory at a jury trial, but only establish reasonable doubt, the fact remains that in order to counteract Dr. Young's strong conclusions a great deal of additional evidence and testimony would have been required to adequately present suicide as a viable theory to the jury. Attorney Finne concluded, based upon all of the evidence before him, that suicide was not the best defense theory available in this case. Given the way this case has progressed, Kutska may now believe with the benefit of hindsight that suicide was the best defense theory available, but the Court is not required to impose such a stringent standard when determining whether Attorney Finne acted "outside the *wide range* of

professionally competent assistance." *Strickland*, 466 U.S. at 690 (emphasis added). "Applying a heavy measure of deference to counsel's judgments," the Court cannot conclude that Attorney Finne was deficient in failing to consult with an independent forensic pathologist in this case.

Finally, as discussed with respect to Attorney Connell above, Kutska has not demonstrated that he was prejudiced by Attorney Finne's failure to hire an independent expert on this issue because the testimony from the postconviction hearing did not establish that another forensic pathologist would have disagreed with Dr. Young. Even Dr. Sens conceded that Dr. Young's conclusions *could* be consistent with the injuries observed on Monfils' body, but that the "humbler" approach was to conclude the cause of death was undetermined. What conclusions another forensic pathologist would have reached upon reviewing Dr. Young's report at the time are therefore entirely speculative, and Kutska has not demonstrated that a different outcome at trial was reasonably probable.

B. Failure to Investigate Evidence that Monfils was Suicidal

Kutska also asserts that Attorney Finne was ineffective for failing to investigate and present evidence that Monfils was suicidal. In making this argument, Kutska relies on lay witness testimony that Monfils had a fixation with death and drowning and was depressed, hearsay testimony that family members thought Monfils could have committed suicide, and evidence that Monfils knew how to tie the type of knots found on the rope and weight found with his body.

Attorney Finne testified that he recalled statements made by individuals to the police that Monfils may have committed suicide when preparing Kutska's case. However, he could not recall specifically whether he interviewed those witnesses further. It is unclear what evidence Kutska believes the additional investigation would have yielded for Attorney Finne. Aside from

the medical evidence already discussed, the only evidence that Kutska presents in support of his suicide theory are additional witness statements and the fact that Monfils knew how to tie the type of knot found in the rope. Given that Attorney Finne and Kutska were already aware of witness statements that Monfils may have committed suicide, additional statements would merely have been cumulative for the jury. Additionally, as previously discussed, the knot evidence provides only a tenuous conclusion that Monfils knew how to tie certain knots. That evidence is of limited value in light of the other evidence presented at trial.

In any case, Attorney Finne made the decision that based upon all of the evidence before him, the best defense available was that "the State's witnesses were not credible, and they had arrested the wrong defendants." (Hrg. 1, 126:1-19.) As set forth in the previous section, Attorney Finne was in the best position to determine what he believed would be the most effective trial strategy based upon his view of the evidence and the State's case as a whole. Despite the statements that Monfils may have committed suicide, Attorney Finne came to the conclusion that a suicide theory would not have gone over well with the jury in this case. Accordingly, the Court cannot find that Attorney Finne was deficient for failing to further investigate evidence that Monfils may have been suicidal.

C. Unreasonable Trial Strategy

Finally, Kutska argues that Attorney Finne's trial strategy was "neither informed nor strategic." Kutska asserts, based upon the testimony of Attorney Glynn, that the "SODDI" defense advanced by Attorney Finne at trial is an objectively weak defense, but was particularly weak in light of all of the evidentiary issues present in this particular case. The Court has now enumerated thoroughly why Attorney Finne's trial strategy was a reasonable decision based upon all of the information available to him at the time he was preparing Kutska's defense. Attorney

Finne was in the best position to weigh the evidence before him in light of the information that was known in the public about the case and determine what the most effective trial strategy would be.

While Kutska or other attorneys, even highly esteemed criminal defense attorneys such as Attorney Glynn, may now take a different view with the benefit of hindsight, that alone does not make Attorney Finne's trial strategy so unreasonable as to rise to the level of deficiency. In fact, several other attorneys – including the other defendants' counsel and Attorney Connell – agreed with Attorney Finne's conclusion that the "SODDI" defense was Kutska's best option at trial. Attorney Connell went so far as to testify that he was convinced, based upon the record, that the trial strategy was the correct one because he believed Wiener actually killed Monfils. Accordingly, the Court cannot conclude based upon the testimony of Attorney Glynn alone that the defense theory presented by Attorney Finne at trial was so weak or unreasonable as to rise to the level of deficient performance.

II. INTERESTS OF JUSTICE

In addition to his other arguments, Kutska also requests that the Court grant him a new trial in the interest of justice. Circuit courts have the discretion to set aside a verdict in the interest of justice. *State v. Harp*, 161 Wis. 2d 773, 775, 469 N.W.2d 210, 211 (Ct. App. 1991). The broad "interest of justice" language includes cases where the real controversy was not fully tried. *Id.* The procedural bar applies to interests of justice claims. *State v. Henley*, 2010 WI 97, ¶¶ 63, n. 25, 75-77, 328 Wis. 2d 544, 573, 578-81, 787 N.W.2d 350, 364, 367-68.

However, even if Kutska was able to pass the procedural bar, the Court still declines to exercise its discretion in this case. Kutska's arguments regarding the interests of justice in this case stem from what he calls "erroneous forensic pathology and perjured fact witness

testimony." Specifically, in addition to the medical evidence claims discussed in detail above, Kutska argues that Kellner's testimony at trial was perjured, that Winkler coerced several witnesses into giving false statements, which resulted in Kutska's conviction, and that Wiener perjured his testimony in exchange for a reduced sentence from the district attorney's office.

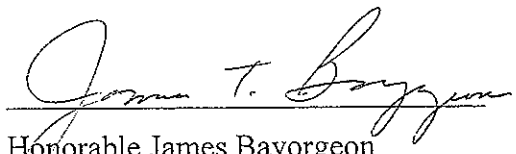
As previously discussed, the Court places limited weight on the unsigned Kellner affidavit and hearsay evidence from various witnesses that Kellner recanted his earlier testimony. Furthermore, Winkler's credibility was a major focus of the trial and first postconviction motion. The jury convicted Kutska despite extensive attacks on Winkler's credibility as a witness at trial, and the Court of Appeals upheld the conviction despite issues related to Winkler which were raised in the first postconviction motion. Similarly, a potential deal with Wiener was explored and rejected both by the trial court and the Court of Appeals during Kutksa's direct appeal process. Accordingly, the Court does not believe this is a case where the interest of justice requires a different result.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby **ORDERED** that Kutska's motion is **DENIED**.

Dated at Green Bay, Wisconsin, this 12th day of January, 2016

BY THE COURT:



Honorable James Bayorgeon
Circuit Court Judge