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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

EUGENE CHRISTOPHER WRIGHT,

Petitioner,

v.

STATE OF UTAH,

Respondent.

**PETITIONER'S MEMORANDUM
OPPOSING STATE'S MOTION FOR
SUMMARY JUDGMENT**

Case No. 220904680
(Judge Heather Brereton)

Underlying Criminal Case No. 081400519FS

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In addition to the affidavits and documents attached to the Petition, the following are attached hereto:

- Exhibit 1** Declaration of Jeffrey Wright, dated July 14, 2024 (“J.Wright Dec.”)
- Exhibit 2** Primeau Forensics Report, dated February 24, 2015 (“Primeau Report”)
- Exhibit 3** Motion in Limine, dated April 5, 2010
- Exhibit 4** Affidavit of Todd Gabler, dated August 18, 2020 (“Gabler Aff.”).
- Exhibit 5** Transcript of Telephone Call
Leslie Mower and Kenneth Doleszar, November 14, 2007
- Exhibit 6** Transcript of Telephone Call
Bart Bailey and Leslie Mower, date unknown
(upon belief, approximately November 7, 2007)
- Exhibit 7** Detective Chris Thomas, Supplemental Report, dated December 19, 2007 (“Thomas Report”)
- NP**
- Exhibit 8** Transcript of Police Interview with Jason Golly (“Golly Interview”)
- Exhibit 9** Letter from Bart Bailey to Ken Doleszar, dated April 7, 2007 (“April 7 Letter”)
- NP**
- Exhibit 10** Transcript of Police Interview with Robert Steed (“Steed Interview”)
- Exhibit 11** Sandy Police Department Tip Sheet, dated November 21, 2007 (“Tip Sheet”)
- Exhibit 12** Video Interview with Leslie Mower, Bart Bailey, and Jamie Ross dated May 20, 2008 (“Video Interview”).

19. The State Is Not Entitled to Summary Judgment on Ground 19:
Police and Prosecutorial Misconduct in Failing to Investigate
Alternative Suspects

- a. Mr. Wright's conviction was obtained in violation of the United States Constitution or Utah Constitution

An individual may file an action for post-conviction relief on the ground that “the conviction was obtained . . . in violation of the United States Constitution or Utah Constitution.” Utah Code § 78B-9-104(1)(a). In Ground 19, Mr. Wright asserts the substantive claim that his conviction was obtained in violation of the Due Process Clauses of the United States and Utah Constitutions because of prosecutorial misconduct. As set forth more fully in the Prosecutorial Misconduct section, *supra*, prosecutorial misconduct offends due process as guaranteed by the state and federal constitutions. *E.g.*, U.S. Const. Amend XIV; Utah Const. Art. 1, §7. Relatedly, Due Process also protects an accused when the State either destroys or fails to preserve potentially exculpatory evidence. *See Youngblood*, 488 U.S. at 58; *DeJesus*, 2017 UT 22, ¶ 19.

The police unfairly targeted Mr. Wright as the suspect in this case as soon as they discovered that he had purchased the prepaid cell phone, a fact that he has never disputed. However, due to their tunnel vision, both the police and prosecution wholly failed to independently investigate any alternative suspects who were readily apparent and who had more motive to murder the victim than did Mr. Wright, who had no motive whatsoever. Some of the alternative suspects included the following:

*David Novak*³²²

Novak should have been a clear focus of the police investigation from the beginning. Novak was a business associate of the victim's and was due to repay secret loans of \$1.6 million that the victim had taken from his wife's accounts to give to Mr. Novak. The loan payment was due a month after the victim's murder, so Novak had a financial motive to eliminate the victim.³²³

Further, the police knew that Novak introduced Mr. Wright to the victim in September 2007 and proposed a business deal between the three men.³²⁴ Novak also initially directed police to investigate Mr. Wright when he identified Mr. Wright in a still photograph taken from the surveillance video at an AT&T store, where Mr. Wright purchased the prepaid phone that the

³²² Novak had a long history of criminal enterprises and was no stranger to police. *See* Declaration of Susan Leiser in Support of Petition for Relief Under the Utah Post-Conviction Remedies Act ("Leiser Dec."), attached to Petition as Exhibit B. First, Novak was terminated from Boeing for stealing multiple computer hard drives. Leiser Dec. ¶ 8. Novak then worked at Microsoft where he founded a Microsoft employee-based flying club from which he later stole aircraft equipment, defrauded club members through personal loans, and then stole a small aircraft owned by the club. *Id.* at ¶¶ 9-10. In 1996, Novak faked his own death when he purposely crashed the small aircraft into the Puget Sound, swam to shore and fled to collect the insurance money. *Id.* at ¶ 11. He was later arrested in Hawaii, and ultimately pled guilty to falsely reporting a plane crash and mail fraud. *Id.* He spent one year in federal prison and after his release authored a book entitled *Down Time: A Guide to Federal Incarceration* in which he attempts to provide guidance to white-collar offenders who are about to enter the federal prison system. *Id.* He met the Mowers when they hired him to assist both Tom Mower and Ms. Mower in their transition to federal prison after their convictions for tax evasion and conspiracy to defraud the United States Government. *See* Petition at 15. Mr. Novak continued to work for both Tom and Ms. Mower after they were incarcerated, despite the fact that their financial, business and personal interests were in conflict.

³²³ Petition at 145. Mr. Wright, on the other hand, stood to benefit from a two-million-dollar loan from the victim that Mr. Wright was scheduled to receive shortly after the murder and, therefore, had no such motive. Indeed, he had every interest in keeping the victim alive. Wright Dec. ¶¶ 9, 14, 19

³²⁴ Petition at 146.

victim had requested.³²⁵ They also knew that Novak had access to Mr. Wright’s apartment where Mr. Wright’s gun was stored.³²⁶

Oddly, and without any tangible basis, Novak also told police that he was “scared to death; [Mr. Wright] had something to do with it.”³²⁷ Notably, Novak once told his friend John Fife that “[t]he key element to [planning the perfect murder] is making sure that someone is caught and charged with the crime. Once they have somebody, they will stop looking and that’s how you can really get away.” Dateline, *Suspicion*, aired February 3, 2012.³²⁸ Three months after the victim’s murder and once the police had targeted their investigation on Mr. Wright, Novak, who had just remodeled his home, fled from Salt Lake City.³²⁹

What is more, the victim’s wife, Dee Mower, believed Novak was most likely responsible for her husband’s death.³³⁰ She told police that she believed the victim was meeting with Novak on the morning of his death and that Novak was “the guy she really believe[d] had something to

³²⁵ *Id.* Mr. Wright asserted in his declaration that after he purchased the cell phone, he gave it to Mr. Novak to give to the victim. *See* Wright Dec. ¶ 13. Furthermore, the historical cell phone data upon which the State relied to convict Mr. Wright actually put the prepaid cellphone closer to Mr. Novak than to Mr. Wright on the day before the murder. *See* Ground 6, *supra*.

³²⁶ Petition at 146.

³²⁷ *Id.*

³²⁸ Available at <https://vimeo.com/233381369>; <https://vimeo.com/233399283>; <https://vimeo.com/233419798>; <https://vimeo.com/233420460>; <https://vimeo.com/233420824> (Last visited July 11, 2024).

³²⁹ Petition at 146. Mr. Wright asserted in his declaration that after he purchased the cell phone, he gave it to Mr. Novak to give to the victim. Wright Dec. ¶ 13. Furthermore, the historical cell phone data upon which the State relied to convict Mr. Wright actually put the prepaid cellphone closer to Mr. Novak than to Mr. Wright on the day before the murder. *See* Ground 6, *supra*.

³³⁰ Petition at 146.

do with it.”³³¹ She ultimately filed a wrongful death suit against Novak and was awarded an

³³¹ Ms. Mower was in federal prison, so all of her non-privileged conversations were recorded. On November 14, 2007, the night before he was murdered, the victim spoke with Ms. Mower. During the conversation, the following exchange occurred:

KD: Um, So I’m actually meeting with my friend tomorrow at 7:00 a.m., go figure that out.

LM: Ooooh, I love it.

KD: 7 a.m. in the morning. So I have to get up.

LM: Talk about Derrick [sic] and Tommy as well, cause evidently they’ve been talking to him.

KD: Ok. Well I will. At 7 a.m. so...

LM: See what they have to say.

KD: Okay, I will, I’ll try to broaden the stroke and try to include a lot more of the people and see what happens.

LM: Okay.

KD: So, yeah, 7a.m. tomorrow morning.

LM: Well, he knows now, nothing will leak out, nothing is being said, nothing is ...

KD: Yeah, exactly. So tomorrow morning at 7 a.m. so tomorrow night I should know more.

Transcript of November 14, 2007, telephone conversation between Leslie Dee Mower [Ms. Mower] and Kenneth Doleszar [the victim], page 6, attached as Exhibit 5.

Despite this recorded conversation, Ms. Mower later denied she knew who the victim was meeting on the morning of his death or that she had “forgotten” about the conversation with the victim on the night before his death. When confronted with her lie, she again admitted that the victim was likely meeting with Novak. *See* Detective Chris Thomas, Supplemental Report, dated December 19, 2007, p. 17 (summarizing December 13, 2007, interview with Ms. Mower) (“Thomas Report”), attached as Exhibit 7.

Further, it is undisputed that Mr. Wright had never meet Tommy or Darick Mower so this conversation could not have been about Mr. Wright. Novak had met and worked with all three of the Mowers.

almost seven million dollar default judgment against him in 2012.³³² Inexplicably, however, police never seriously investigated Novak for the victim's murder.³³³ Police did not search his apartment, his office, or his computers.³³⁴ While they did interview Novak twice at his condominium, they never asked him where he was the morning that the victim was killed.³³⁵ They did not fingerprint Novak, nor did they take his DNA for comparison.³³⁶ The police and prosecution's failure to investigate Novak was objectively unreasonable and ultimately tantamount to the destruction of evidence.

The Mowers

Aside from David Novak, the police and prosecution also failed to independently investigate whether members of the Mower family were involved in the victim's murder – Leslie Deeann Mower (the victim's widow),³³⁷ Tom Mower (Ms. Mower's ex-husband), and Tommy and Darick Mower (Tom and Dee Mower's sons).³³⁸

³³² Petition at 146. *See Leslie D. Mower v. David Novak*, Case No. 100423985, Third Judicial District Court, Salt Lake County, State of Utah.

³³³ Petition at 146.

³³⁴ *Id.*

³³⁵ *Id.* at 146-47.

³³⁶ *Id.* at 147.

³³⁷ Leslie Deeann Mower, the victim's widow, sued the victim's estate on January 24, 2008, just over two months after the murder. *Leslie Deeann Mower v. Estate of Kenneth G. Dolezsar*, Case No. 080403748, Fourth Judicial District - Provo District Court, State of Utah.

³³⁸ For factual background about the Mowers, *see* Petition at 12-13. For brief context (citations omitted), the victim and Ms. Mower met at Neways, a multi-level marketing company Ms. Mower founded with her ex-husband. Neways had offices and distributors in twenty-three countries, including Russia, Colombia, the Czech Republic, and Ukraine, and had gross annual sales of over \$400 million. In 2006, a judge required Ms. Mower and her ex-husband to sell Neways. When the victim was killed, Ms. Mower was incarcerated in federal prison for

Ms. Mower, and others, told police that her ex-husband and their two sons were tied to the Russian Mafia and suggested that the victim's killer could very well be a Russian.³³⁹ The record is replete with references to Tom Mower's contacts in Russia,³⁴⁰ which is consistent with the eyewitness description of the shooter having an Eastern European or Russian accent.³⁴¹ Others agreed that Tom Mower and his sons, either on their own or through their connections in Russia, could have had something to do with the victim's death.³⁴²

A number of documents and interviews exist showing that Ms. Mower, the victim, and

conspiracy to defraud the United States and tax evasion; however, she had over \$120 million dollars from the sale of Neways which the victim controlled through a power of attorney. Tom Mower was also incarcerated when the victim was killed but had remained in business with his two sons, Tommy and Darick.

³³⁹ Petition at 18, 148. For example, Tom Mower was married to Lidia Vladimirovna Tkachuka, a Russian national who, along with her mother, was rumored to be involved with Solntsevskaya Bratva, which is loosely translated as the Sunshine Mob or Sunshine Mafia. *See* Thomas Report at 21.

³⁴⁰ Police interviewed Jason Golly, a long-time employee of Neways, about Tom Mower. Police asked Mr. Golly how Tom Mower was connected with Russia. Mr. Golly responded that Mr. Mower had Russian contacts through "Neways and through his new business ventures." Transcript of Police Interview with Jason Golly, Disc 21 ("Golly Interview"), p. 4, attached as Non-Public Exhibit 8. Police also asked Mr. Golly, "Are you talking Russian mafia?" and Mr. Golly responded, "Yes." *Id.*

³⁴¹ Petition at 148. Mr. Wright does not have an Eastern European or Russian accent. *Id.* However, Robert Zmelik does, and he also fits the description of the shooter. *See* Steed Interview at 8.

³⁴² In his interview with police, Mr. Golly stated, "Well, I know there's been a lot of supposition on the part of, [Ms. Mower's] family that Tom had something to do with this, or Tom's family had something to do with it. And I should probably go on record as saying, I wouldn't put it past either any three of them [Tom, Tommy or Darick]. I really would not put it past them." Golly Interview at 3. Mr. Golly also stated, "[I]t wouldn't surprise me in the least that, that [Tom Mower] would [murder the victim] just to hurt [Ms. Mower], I mean, I really wouldn't put it past him based on his personality and what I know of him just to hurt [Ms. Mower] and send a message." *Id.* at 4.

Bart Bailey (Dee Mower's attorney) were cooperating with government officials to gather evidence against Tom Mower, Tommy Mower and Darick Mower.³⁴³ The victim was the "centerpoint" of this clandestine investigation which also included cooperation with Golden Gate Capital, the successor company to Neways.³⁴⁴ In an interview with police, Bart Bailey told the investigators that he and the victim had retained Jim Bruton, the former director of the Tax Division of the United States Department of Justice, to help with Ms. Mower's case.³⁴⁵ Mr. Bruton advised Mr. Bailey and the victim that if they could find some way for Ms. Mower to

³⁴³ *Id.* In a letter to the victim dated April 7, 2007, Mr. Bailey stated,

"Third, is our effort to conduct a comprehensive investigation to discover evidence of crimes committed by others, provable with documents and witnesses, that will be important enough to the U.S. Department of Justice so that a deal can be worked to reduce Dee's 'points' and thereby reduce or change her sentence to community or home detention. This is really labor intensive and time consuming, but it is the best hope for getting Dee's sentence changed to home detention before winning her appeal. Robert is working on getting his 'facts and evidence' together. Bill and I are expanding our previous investigation with Robert, Ken and Dee's help. Keith Arbogast and Richard Clark, two experienced and seasoned professional investigators, will be coming to Utah to help us conduct our investigation and interview prospective witnesses. Jim Bruton will work the deal for us if and when we get sufficient culpable information."

Letter from Bart Bailey to Ken Doleszar [the victim] dated April 7, 2007, ("April 7 Letter") attached as Exhibit 9.

Mr. Bailey explained in later interviews that the victim's death was a "warning" that the investigation should be abandoned. Transcript of Video Interview with Leslie Mower, Bart Bailey, and Jamie Ross, dated May 20, 2008 ("Video Interview"), p. 22, attached here as Exhibit 12.

Further, Robert Steed, another of Dee Mower's son's, confirmed both the investigation and the possibility that the victim was killed because of his involvement in the investigation. Steed Interview at 5.

³⁴⁴ In his interview, Robert Steed said "Ken is at the center point of all of these activities, you know, he's the one that's running the money. He's the one that's paying the attorneys. He's the one that's trying to find the dirt. He's the one that's connecting the pieces." Steed Interview at 5

³⁴⁵ Video Interview at 20.

cooperate with the government's investigation into Tom, Tommy and Darick, they could possibly shorten her sentence.³⁴⁶ Mr. Bailey went onto say:

So we launched into a little investigation, because we knew Tom had done some other things. I mean, we didn't know the detail. Frankly, we didn't have any way to prove it two or three years earlier. But we hired some people, went out and helped us with the investigation. We came up with some information. The government already had it.

So then we learned some more stuff. And the more stuff involved Tom, Tommy, and Darick, Tommy and Darick being her sons. And we were in the middle of that investigation. In fact, we had already brought two former IRS special agents to our office. They had already conducted a couple interviews. We had three or four more interviews set up for them. And they were just scheduled to come out to Utah to -- to help us with that.³⁴⁷

Mr. Bailey then explained why the investigation was not successful:

Ken [the victim] got killed, and we just put a stop on all of it, because we couldn't tell if that was somebody trying to send us a message if they -- if that was what it was, we got the message. And we just stopped the investigation.³⁴⁸

Finally, Mr. Bailey emphasized the seriousness and possible consequences of the investigation:

But there's millions of dollars involved here of unreported income, enough that could have put Tom Mower – certainly a concern enough that could have put her sons, Tommy and Darick, in concern. And -- and Ken [the victim] would have been aware of all this, because Ken's [the victim] the guy that's paying the attorneys to do the investigation.³⁴⁹

³⁴⁶ Video Interview at 20-21.

³⁴⁷ Video Interview at 21.

³⁴⁸ Video Interview at 21.

³⁴⁹ Video Interview at 21-22. It appears from available information that Novak was also involved in this investigation; however he was playing both sides of the fence. Ms. Mower told police that she had tried to dissuade the victim from interacting with Novak, but the victim ignored her. Video Interview at 14-17. Ms. Mower stated that the victim trusted that Novak was working them when he was actually leaking information about the investigation to Tom, Tommy and Darrick. *Id.* She stated, “[The victim] really believed that David Novak wasn't having

Indeed, Ms. Mower confirmed, when interviewed by police, that Tom, Tommy and Darick, had animosity towards the victim.³⁵⁰ Ms. Mower indicated that she believed her “ex-husband had something to do with it.”³⁵¹ She further indicated that her ex-husband always hated the victim, and that the victim was scared of Ms. Mower’s ex-husband.³⁵² Finally, she stated that the victim was also scared of her two sons, Tommy and Darick.³⁵³ Novak also told police that

anything to do with Tom, or Tommy or Darick, or any of them. But he was the whole time.” *Id.* Robert Steed also believed that Novak could have leaked information about the investigation to Tom, Tommy and Darick. Transcript of Police Interview with Robert Steed (“Steed Interview”), p. 4, attached as Non-Public Exhibit 10.

³⁵⁰ *Id.* In addition to their involvement in the investigation of Tom, Tommy and Darick’s illegal activity, the victim, Ms. Mower and another of her son’s, Robert Steed was cooperating with Golden Gate Capital (the successor company to Neways) when Golden Gate Capital civilly sued Tom, Tommy and Darick for violation of a non-compete clause and theft of trade secrets. *See Neways v. Mower*, Case No. 2:07-CV-339, filed May 23, 2007, United States District Court for the District of Utah. In a phone call between Bart Bailey and Ms. Mower, Mr. Bailey indicated that the attorney for Golden Gate, Chris Crump, was willing to pay the expenses of Chad Doherty, the former operator of Neways in Russia, to bring him over from Russia to speak with the investigators in charge of the investigation against Tom, Tommy and Darick. *See* Transcript of telephone call between Bart Bailey and Leslie Mower, date unknown (upon information and belief, approximately November 7, 2007), p. 3, attached here as Exhibit 6. Golden Gate had also agreed to provide information to help Ms. Mower and to exclude Ms. Mower, the victim and Robert Steed from the lawsuit if they continued to cooperate in the investigation. *Id.* at 1.

³⁵¹ Thomas Report at p. 17.

³⁵² *Id.* The victim’s fear of Tom Mower was justified. Mr. Golly described Tom Mower as “incredibly egotistical,” “spiteful,” “very controlling,” “vengeful” and “hateful.” Golly Interview at 4. Mr. Golly also described Tom as “narcissistic” and indicated that “he used to boast about his capabilities in Russia, and how he could, how he would get somebody knocked off for a thousand bucks . . .” *Id.*

³⁵³ *Id.*

the victim was scared of Darick Mower.³⁵⁴ Moreover, when the victim’s brother, Robert Dolezsar, learned of his death, he fell to his knees and said “[i]t’s that [blinking] Darick.”³⁵⁵

Police also had information that Darick may have made a death threat against the victim a few months before his murder³⁵⁶ and he was also angry at Ms. Mower for supporting his wife during their divorce.³⁵⁷ Although the police interviewed Darick on the day the victim was killed, Darick claimed he had an alibi –that he was at home asleep until 6:58 a.m. and that he took his two children to school that morning between 8:30 –9:00 a.m.³⁵⁸ Even though this “alibi” could not be independently verified, police did not investigate Darick Mower any further.³⁵⁹ Police did not search his home, his office, or his computers. They did not fingerprint Darick Mower, nor did they take his DNA for comparison. The same can be said of Tommy Mower, although it is unclear if he was even interviewed.

The police and prosecution were aware that information existed suggesting that Tom, Tommy and Darick Mower had a motive to murder the victim, and had connections with Russian

³⁵⁴ *Id.* Mr. Wright also indicates that the victim was afraid of Darick Mower. *See* Wright Dec. ¶ 10.

³⁵⁵ Petition at 147.

³⁵⁶ *Id.* *See also* Steed Interview at 5.

³⁵⁷ Darick and his ex-wife, Cheris, had been involved in a contentious divorce where Cheris alleged that Darick had abused her. Ms. Mower aligned with Cheris and assisted her financially with “all the resources she needed to feel safe and secure.” Steed Interview at 4. When Darick learned that his own mother was supporting his estranged wife, he was “very upset.” *Id.* *See In the Matter of The Marriage of Cheris Mower and Darick E Mower*, Case No. 064401052, Fourth Judicial District - Provo District Court, Utah County, State of Utah.

³⁵⁸ Petition at 148.

³⁵⁹ *Id.*

Mafia.³⁶⁰ However, the police and the prosecution failed to conduct an independent and competent investigation into the Mowers potential involvement. This failure to investigate was objectively unreasonable and was, in essence, the destruction of important evidence.

Other Alternative Suspects

The police and prosecution also had reason to pursue a variety of other individuals who may have been responsible for the victim's murder and failed to do so.

Ms. Mower also told police that *David Simpson* was third (after Novak and her exhusband and sons) on her list of potential suspects who could have been involved in the victim's death.³⁶¹ Mr. Simpson had bought property from Ms. Mower, and she sued him and another man for fraud.³⁶² Ultimately, Mr. Simpson was ordered to pay Ms. Mower twelve million dollars.³⁶³ However, it appears that Mr. Simpson was never seriously investigated by the police or the prosecution.

Further, on the morning before the victim was murdered, his assistant overheard a call between the victim and someone named Robert.³⁶⁴ The victim did not initially recognize the caller (indicating that he knew "twenty Roberts") but once he did, he got extremely excited, telling Robert he had waited months to meet him and confirming a 7:00 a.m. meeting the next

³⁶⁰ This, alone, was deeply significant as it would have explained the eyewitness account on the day of the murder that the perpetrator had an Eastern European accent. *See* Grounds 7 and 13, *supra*. *See also Wright*, 2021 UT App at ¶ 48.

³⁶¹ Petition at 148.

³⁶² Petition at 19-20. *See Leslie D Mower et al. v. David R Simpson et al.*, Case Number 090403844 Fourth Judicial District - Provo District Court, Utah County, State Of Utah.

³⁶³ Petition at 148.

³⁶⁴ Petition at 13.

morning at Mimi's Restaurant in Sandy, forty miles away.³⁶⁵ Although the person the victim had scheduled to meet was named "Robert" and was someone the victim had been hoping to meet for some time, it appears the police made no effort to determine who "Robert" might be after they discovered Mr. Wright had purchased the prepaid cell phone that was used to set up the meeting between the victim and Robert.³⁶⁶ However, at least three known "Roberts" exist in this case including Robert Steed,³⁶⁷ Robert Zmelik,³⁶⁸ and Robert Dolezsar.³⁶⁹ Bart Bailey mentioned a fourth unknown "Robert" in the April 7, 2007, letter to the victim regarding the investigation that Bart Bailey and the victim were conducting into Tom, Tommy, and Darick Mower.³⁷⁰

³⁶⁵ *Id.*

³⁶⁶ Petition at 149.

³⁶⁷ Robert Steed is another of Ms. Mower's sons who ran her new MLM company, Trivani, while his mother was in prison. He, along with his mother, were civilly sued by at least two of their distributors while the Ms. Mower was in federal prison. Further, he was part of the investigation of Tom, Tommy, and Darick. Steed Interview. Finally, the victim, Mr. Steed and Ms. Mower were supporting Golden Gate Capitol, the successor company to Neways, in their investigation and lawsuit against Tom, Tommy and Darick Mower. *See* Steed Interview.

³⁶⁸ A friend of Mr. Zmelik's, Erward Vosar (who worked at Sesil, the company owned by Tom, Tommy, and Derick), claimed Zmelik was not in the United States when the victim was murdered, and Mr. Zmelik claimed the same. It does not appear that police confirmed Mr. Zmelik's "alibi" or investigated him in anyway. Both Mr. Vosar and Mr. Zmelik speak with thick Eastern European accents. *See* Steed at 8-9; Interview with Erward Vosar; Phone interview with Robert Zemelik.

³⁶⁹ Robert Dolezsar is the victim's brother who had also had dealings with Tom, Tommy and Darick Mower.

³⁷⁰ "Robert is working on getting his 'facts and evidence' together. Bill and I are expanding our previous investigation with Robert, Ken and Dee's help. Keith Arbogast and Richard Clark, two experienced and seasoned professional investigators, will be coming to Utah to help us conduct our investigation and interview prospective witnesses. Jim Bruton will work the deal for us if and when we get sufficient culpable information." April 7 Letter at 2.

Most troubling of the “Roberts,” is Robert Zmelik. Mr Zmelik is a Czechoslovakian citizen and a good friend of Tom, Tommy, and Darick’s.³⁷¹ Despite the fact that Mr. Zmelik had sued Neways,³⁷² he and Tom remained friends and were “chummy.”³⁷³ Robert Steed told police that he believed that Mr. Zmelik had “done a lot of things in the Czech Republic that were illegal,” so he would never willingly give information about Tom, Tommy, Darick to police or investigators.³⁷⁴

Finally, the police received a number of “tips” regarding the murder.³⁷⁵ One of the tips was from Bruce Murdock, a former attorney for Neways, who called the Sandy Police and reported that Christopher Pair had a contentious business relationship with Ms. Mower and that he fit the “description of the suspect to a ‘T’ and Mr. Pair has a ponytail.”³⁷⁶ Police chose not to follow up on this tip.³⁷⁷ Less than a year later, Mr. Pair filed a lawsuit against Trivani International, Leslie Mower, Robert Steed, and John Does 1-100.³⁷⁸

Essentially what happened here is that once Novak identified Mr. Wright as the person who bought the prepaid cell phone, the police targeted Mr. Wright to the exclusion of all other

³⁷¹ Steed Interview at 7.

³⁷² *Zmelik v. Neways*, Case No. 2:06-cv-00136-TS, filed February 15, 2006, United States District Court for the District of Utah.

³⁷³ Steed Interview at 7.

³⁷⁴ Sandy City Police Department Tip Sheet, dated 11/21/2007, attached as Exhibit 11.

³⁷⁵ *See id.*

³⁷⁶ *See id.*

³⁷⁷ *See id.*

³⁷⁸ *Pair v. Trivani International LLC*, Case No. 080103672, Fourth Judicial District - American Fork District Court, Utah County State of Utah, filed September 20, 2008.

possible suspects. This type of police tunnel vision is common but can lead to due process violations and even worse, the conviction of innocent people.³⁷⁹ It can also lead to the police discounting important exonerating evidence as well and ignoring evidence which inculpates someone other than their “prime suspect.”

For example, here, Mr. Wright *had an alibi* which the police did not investigate until over a year after the murder; he had *no motive to kill* the victim and in fact, because he was scheduled to receive two million dollars from the victim just two weeks after the murder, *his motive was quite the opposite*; disguising himself in a wig the morning he allegedly killed the victim made no sense since the victim knew Mr. Wright well; the eyewitness could only identify Mr. Wright after looking him up on the internet and meeting alone with the lead detective; the circumstantial evidence (voice recognition, historical cell phone data, firearm toolmark evidence) was unreliable at best, false at worse; and the list goes on.

On the other hand, all of the other suspects outlined above had ample motive and opportunity to kill the victim. However, because of the prosecution’s laser focus on Mr. Wright, police failed to properly investigate any alternative suspects. They ignored the fact that Novak’s cell phone was closer to the prepaid cell phone on the morning before the murder than was Mr. Wright’s; that Novak had a key to Mr. Wright’s loft where Mr. Wright stored his gun; that the shooter had an Eastern European accent; that the victim was in the center of an investigation into illegal behavior by violent and dangerous men who were connected to the Russian mob, at least one of whom had threatened the victim in the months before his death; that the police received tips about other possible suspects who met the description of the shooter; and, again, the list goes

³⁷⁹ Findley & Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291.

on. Proper police procedure would dictate that law enforcement should carefully eliminate each alternative suspect rather than ignore them. To do otherwise violates the accused' due process rights and leads to a fundamentally unfair trial and conviction.

Had the State done its job and investigated the alternative suspects with the rigor with which they investigated Mr. Wright, not only is it quite probable that Mr. Wright would have been acquitted, but it is also equally probable that Mr. Wright would not have been charged in the first instance.

b. Ground 19 is not procedurally barred

The State's Motion for Summary Judgment should also be denied because the State cannot show Ground 19 is procedurally barred as a matter of law. The State asserts that Ground 19 (alleging prosecutorial misconduct for failing to investigate and eliminate alternative suspects) is procedurally barred because it "could have been raised in a prior proceeding" but was not. SJ Motion at 22-23.

Initially, this standalone claim of prosecutorial misconduct is not barred because it could not have been raised previously on appeal. As noted in Point 1.B, *supra*, the Utah Supreme Court has held there are no "stand alone claims for prosecutorial misconduct" that may be raised on appeal. *Hummel*, 2017 UT 19, ¶ 111. Accordingly, because a substantive ground of prosecutorial misconduct "could not have been brought during the direct appeal," the substantive claim is not procedurally barred since this is Mr. Wright's first opportunity to bring the constitutional claim.

In any event, the "exception" to the claimed procedural bar "kicks in when the failure to assert" the ground "results from ineffective assistance of counsel." *Pinder*, 2015 UT 56, ¶ 44.

IAC of Trial Counsel

As noted above, courts have found the conduct of trial counsel to be objectively unreasonable where, among other things, counsel fails to conduct a thorough investigation of the facts; where counsel fails to pose beneficial and meritorious arguments and hold the State to its burdens; and where counsel fails to become informed on the scientific or expert principles at issue. *See supra*, nn. 39, 40, 41, 42 (setting forth relevant law). Objectively unreasonable performance has also been found to include Trial Counsel's failures to object to prosecutorial misconduct. *See Larrabee*, 2013 UT 70, ¶ 26. And indeed, discrediting law enforcement's investigation (i.e. establishing reasonable doubt by attacking the legitimacy of the prosecution's case) is a valid line of defense and the prosecution's rush to judgment here was ripe for the showing. *E.g. Bowen*, 799 F.2d at 613 (noting that "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge").

Trial Counsel followed the substandard police investigation of alternative suspects with an equally substandard defense investigation of those same suspects. While the Utah Court of Appeals states that Wright's defense was that Novak was the shooter, Trial Counsel failed to connect Mr. Novak to any of the four determinative pillars of the prosecution's case.

First, Trial Counsel did little to discredit the eyewitness or have the eyewitness implicate Novak as the man he saw that morning at Village Inn and not Mr. Wright.

Second, Trial Counsel failed to understand the complex DNA mixture, did not ask for any of the DNA to be tested against Novak's, particularly considering that the DNA on the driver's seat and the steering wheel were inconclusive and further testing could have implicated Novak.

Third, Trial Counsel did very little to connect Novak to the voice on the voicemail or the historical cell phone data. Finally, Trial Counsel ultimately failed to connect Novak to the

firearm. And while Trial Counsel attempted to show Novak's motive, the victim's wife's belief that Novak was responsible, and that Novak left Salt Lake soon after the murder—those facts did not affect the pillars of the prosecution's case. While important, those facts were not sufficient to create reasonable doubt. Had Trial Counsel truly understood his case, investigated the facts and legal issues, consulted with and called experts, and investigated the alternative suspects, the outcome of trial would probably have been very different.

Further if trial had understood the breadth and depth of the evidence implicating not only Novak but the other alternative suspects – Tom Mower, the victim's wife's ex-husband; Darick Mower, who terrified most people he met and who had threatened to kill the victim just months before the murder; Darick and Tom Mower, the widow's sons who had connection to the Sunshine Boys, a particularly violent arm of the Russian mafia; or the mysterious "Robert" who the victim was excited to meet at the Village Inn on the morning he was murdered – the outcome of the trial would have been very different.

In short, without a full investigation into all of the alternative suspects, Trial Counsel was not able to fully understand potential exculpatory evidence, nor in a position to fashion a defense or make any tactical decisions about the theory of the defense case, including what pretrial motions to file, and what witnesses and/or evidence to present at trial. Trial Counsel's performance was objectively deficient in failing to investigate and obtain necessary experts who could meaningfully assist in advancing a accurate theory of defense and in countering the prosecution's theory of guilt.

Trial Counsel's deficient performance was also prejudicial. Had Trial Counsel investigated and presented a more accurate and complete defense, the State's theories would have been severely undercut. Trial Counsel's failures allowed the police and prosecution to escape any

responsibility for their tunnel vision. Through investigation and expert consultation, Trial Counsel could have changed the result of this fundamentally unfair trial. In short, Trial Counsel's deficiency "fell below an objective standard of reasonableness," and was severely prejudicial.

IAC of Appellate Counsel

Appellate Counsel did not raise this substantive issue of prosecutorial misconduct, the inadequate police investigation, or an ineffective assistance of Trial Counsel claim for counsel's failures regarding alternative suspects in the 23B Remand Motion or on the appeal. Utah law currently provides, however, that there are no "stand alone claims for prosecutorial misconduct" that may be raised on appeal. *ee Hummel*, 2017 UT 19, ¶ 111. So this ground cannot be procedurally barred.

In any event, Appellate Counsel also failed to investigate or understand the evidence and the existence of alternative suspects. As such, Appellate Counsel failed to learn of the prosecution's failures surrounding this particular evidence and thus, did not assert a *Brady* claim. Nor did Appellate Counsel raise an IAC claim relevant to Trial Counsel's failures to present alternative suspects or in failing to otherwise discredit the investigation. Because of Appellate Counsel's failures, meritorious claims which probably would have resulted in a reversal on appeal were not raised. And because Trial Counsel's deficiencies were prejudicial not only with regard to the alternative suspects, but in failing to raise the prosecutorial failures that occurred surrounding them, Appellate Counsel's failure to raise those deficiencies and/or properly litigate them is necessarily prejudicial in the same way and to the same extent. *See Landry*, 2012 UT App 350, ¶ 11.

ACCORDINGLY, Mr. Wright has met his burden and produced evidence sufficient to defeat summary judgment by setting forth specific facts showing that there are genuine issues of material fact for a hearing on the merits, or that the State is not entitled to judgment as a matter of law. *E.g.*, *Arriaga*, 2020 UT 37, ¶ 19; *Jackson*, 2015 UT App 217, ¶ 13.

ADDITIONALLY, Mr. Wright shows that this ground is not procedurally barred as a matter of law since these post-conviction proceedings afforded Mr. Wright his first opportunity to raise a standalone substantive due process claim of prosecutorial misconduct. Further, Mr. Wright also shows that this ground is not procedurally barred as any failure to raise the issue previously was due to the ineffective assistance of both Trial Counsel and Appellate Counsel. Therefore, the claims made in this Ground are cognizable under the PCRA and the State is not entitled to summary judgment as a matter of law for procedural bar.

ADDITIONALLY, under the principles set forth in *Gregg v. State*, 2012 UT 32, ¶ 49, if this Court finds that the undisputed material facts show that Mr. Wright met his burden to establish prosecutorial misconduct as a matter of law; and/or his burden to establish IAC to meet any exception to the claimed procedural bar, then those same findings as a matter of law warrant the Court vacating Mr. Wright's conviction and granting of a new trial. Mr. Wright urges the Court to take that step as to this ground. Short of that, Mr. Wright requests that the Court allow further discovery as will be requested, and for the Court to ultimately set the matter for a hearing on the merits.