FILED
04-11-2019
Clerk of Circuit Court
Manitowoc County, WI
2005CF000381

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05 CF 381
	)	
STEVEN A. AVERY, Sr.,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR LEAVE TO FILE DEFENDANT'S REPLY TO THE STATE'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL

Defendant, Steven Avery, by his undersigned attorneys, hereby moves this Honorable Court for leave to file his reply to the State's response to his supplemental § 974.06 motion. In support thereof, Defendant states as follows:

1. This cause is before this Court on remand from the Wisconsin Court of Appeals.

2. The Wisconsin Court of Appeals issued its remand order on February 25, 2019. In its remand order, the Wisconsin Court of Appeals ordered Defendant to file his supplemental postconviction motion within fourteen days.

3. Defendant timely filed his supplemental postconviction motion in this Court on March 11, 2019.

4. The Wisconsin Court of Appeals' February 25, 2019 remand order did not authorize the State to respond to Defendant's supplemental postconviction motion.

5. Without first seeking leave, the State filed an unauthorized and unsolicited response to Defendant's postconviction motion on March 29, 2019.

6. Defendant now seeks leave to reply to the State's unauthorized and unsolicited response because there are issues and matters of record raised by the State which Defendant disputes. Defendant believes the correction of matters of record will aid this Honorable Court in resolving Defendant's pending supplemental postconviction motion. If this Court denies Defendant's motion for leave, this Court should strike the State's response because it was unauthorized under the Court of Appeals' February 25, 2019 order.

7. A copy of Defendant's reply to the State's response is attached hereto as **Exhibit 1**.

8. This request is made in good faith and not for purposes of delay.

WHEREFORE, Defendant Steven Avery respectfully requests this Honorable Court grant leave to reply to the State's response to his supplemental postconviction motion.

Respectfully submitted,

Dated: April 11, 2019

KATHLEEN T. ZELLNER
Counsel for Defendant Steven Avery

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CERTIFICATE OF SERVICE

I certify that on April 11, 2019, a true and correct copy of **Defendant's Motion for Leave to File Defendant's Reply to the State's Response in Opposition to Defendant's Motion for New Trial** was furnished via electronic mail and by Federal Express, postage prepaid, to:

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1010 South 8th Street
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Honorable Judge Angela W. Sutkiewicz
Circuit Court Judge
Sheboygan County Courthouse
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Lynn Zigmunt
Clerk of the Circuit Court
Manitowoc County Courthouse
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/s/ Kathleen T. Zellner
Kathleen T. Zellner

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STATE OF WISCONSIN **CIRCUIT COURT** **MANITOWOC COUNTY**

STATE OF WISCONSIN,)
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Plaintiff,)
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v.) Case No. 05 CF 381
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STEVEN A. AVERY, Sr.,)
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Defendant.)

DEFENDANT'S REPLY TO THE STATE'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL

Defendant, Steven Avery, by his undersigned attorneys, respectfully submits the following reply in support of his supplemental § 974.06 motion for post-conviction relief pursuant to the State's violation of WIS. STAT. § 968.205 and *Youngblood v. Arizona.*

I. THE STATE'S PROCEDURAL BAR ARGUMENTS ARE THEMSELVES BARRED UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL.

In its February 25, 2019 order granting Steven Avery's ("Mr. Avery") motion to stay appeal and remand for proceedings in connection with his § 968.205 and *Youngblood v. Arizona* claims, the Wisconsin Court of Appeals expressly stated "[it] desire[s] a ruling on the merits." (Ct. App. Order, at 3).[1] In contravention to the Court of Appeals' directive, the State in its response largely ignores the merits of Mr.

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[1] Mr. Avery notes that nowhere in its February 25, 2019 remand order did the Court of Appeals authorize the State's response to his supplemental postconviction motion. For this reason, Mr. Avery moves this Court for leave to file this response.

EXHIBIT 1

Avery's claims; perplexingly, the State has opted to attack Mr. Avery's motion on primarily procedural grounds. Based upon the Court of Appeals' directive for an adjudication on the merits, Mr. Avery respectfully asks this Court to reject the State's procedural arguments. Indeed, the State, in its response, is asking this Court to disobey the Court of Appeals' order by disposing of Mr. Avery's claims based upon purported procedural defects. If the State wished to challenge Mr. Avery's claims on procedural grounds, it should have appealed the Court of Appeals' order to the Wisconsin Supreme Court.

Instead, the Court of Appeals' directive for an adjudication on the merits is properly considered law of the case and the State's procedural arguments should be disposed of as beyond the scope of the remand order. *State v. Moeck*, 2005 WI 59, ¶ 18 (quoting *Univest Corp. v. Gen. Split Corp.*, 148 Wis. 2d 29, 38 (1989)) ("The law of the case doctrine is a 'longstanding rule that a decision on a legal issue must be followed in all subsequent proceedings in the trial court or on later appeal.'").

Additionally, the State's procedural bar argument fails under the doctrine of judicial estoppel because the State previously encouraged Mr. Avery to pursue his claims related to the destroyed bone fragments lest they become procedurally barred. The doctrine of judicial estoppel prevents a party from asserting a position in one legal proceeding that directly contradicts a position taken by that same party in an earlier proceeding. *See, e.g.*, *Brandon v. Interfirst Corp*, 858 F.2d 266, 268 (5th Cir. 1988); *Patriot Cinemas, Inc. v. Gen. Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987).

In Wisconsin, judicial estoppel "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." *State v. Perry*, 201 Wis. 2d 337, 347 (1996). "The doctrine is equitable in nature, intended to protect the proceedings against 'cold manipulation[.]'" *CED Props., LLC v. City of Oshkosk*, 2018 WI 24, ¶ 31 n.12 (quoting *Perry*, 201 Wis. 2d at 347).

In this case, the State argued in its January 29, 2019 response to Mr. Avery's motion to remand in the Wisconsin Court of Appeals that, if Mr. Avery could establish a sufficient reason for failing to raise his claim, he could file a new WIS. STAT. § 974.06 motion. According to the State:

> [A] Wis. Stat. § 974.06 motion "may be made at any time." Wis. Stat. § 974.06(2). And, if "the court finds a ground for relief asserted which for sufficient reason was not asserted" in a previous Wis. Stat. § 974.06 motion, the new motion is not subject to the procedural bar of *State v. Escalona-Naranjo* . . . .
>
> If Avery can establish a sufficient reason for failing to raise this claim *in the motions currently under review*, the claim will not be barred, and he can file a new Wis. Stat. § 974.06 motion once this appeal has concluded.

(St. Resp. to Mot. to Remand, at 7) (emphasis added). Clearly, the State was attempting to induce Mr. Avery to dismiss the pending appeal to pursue his § 974.06 claim, thereby—as the Court of Appeals observed—waiving any future review of the orders from which Mr. Avery has appealed.

On appeal, the State clearly argued that the only procedural hurdle Mr. Avery need jump to bring his destruction of evidence claim was the "sufficient reason" standard set forth in *Escalona-Naranjo*, 185 Wis. 2d 168, 185 (1994). Mr. Avery has submitted and renews his submission that the sufficient reason for which he could

not raise this claim earlier is the State's concealment of Deputy Hawkins's September 20, 2011 report and the updated evidence disposition ledgers that reflected the State's return of human bone fragments located in the gravel pit to the Halbach family. Notably, the State did not argue that Mr. Avery would be procedurally barred because he had not raised this claim in a motion before the Court of Appeals.

Now, the State argues Mr. Avery's claim is procedurally barred, not because he has not articulated a sufficient reason for not raising it in his prior § 974.06 motions, but because he did not raise it in a prior motion before the Court of Appeals. (St. Resp., Dkt. 132, at 6–7). This argument runs directly contrary to the State's prior position. Therefore, the State's recent, contradictory argument triggers the doctrine of judicial estoppel because it argues a position wholly incompatible with its prior argument; i.e., Mr. Avery's claim cannot both be cognizable with a showing why he could not raise it in a prior § 974.06 motion <u>and</u> barred because he did not raise it before the Court of Appeals during the pendency of this appeal. For this reason, Mr. Avery respectfully asks this Court to reject the State's internally inconsistent argument for the procedural preclusion of Mr. Avery's claim.

Notably, the Court of Appeals' order recognizes the duality implicit in the State's argument: "Due to this case's extensive history, there is a benefit to having existing claims developed or litigated while they are relatively fresh, rather than positioning the claims to be procedurally barred in a future proceeding." (Ct. App. Order, at 2–3). The Court of Appeals recognized that this is the proper time and

forum for Mr. Avery's claims. It would be manifestly erroneous to dismiss them on procedural grounds.

However, even the State's procedural arguments fail. For these reasons, Mr. Avery respectfully requests this Court grant his supplemental § 974.06 motion and order an evidentiary hearing on the substantive issues.

II. THE SUCCESSIVE SUPPLEMENTAL MOTION IS NOT PROCEDURALLY BARRED.

The State argues Mr. Avery's claims arising under *Youngblood v. Arizona* and WIS. STAT. § 968.205 are procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168 (1994). In *Escalona-Naranjo*, the Wisconsin Supreme Court interpreted § 974.06 to procedurally bar a defendant's grounds for relief if they have been finally adjudicated, waived, or not raised in a prior postconviction motion absent a showing of sufficient reason. *Id.* at 181.

In this case, the State first argues Mr. Avery's claims are barred because he failed to raise the issue of retesting the Manitowoc County Gravel Pit bones in his direct appeal and postconviction motions. (St. Resp., Dkt. 132, at 5–6). Here, the State misapprehends Mr. Avery's claims. In this postconviction motion, Mr. Avery is not stating a sufficiency of evidence or ineffective assistance of counsel claim relating to inadequate testing of bone fragments. Rather, Mr. Avery's claims pertain to the constitutional violation stemming from the State's destruction of the human bone fragment evidence. The retesting of the bones is relevant to this constitutional claim on the matter of the exculpatory nature of the destroyed evidence; however, the retesting of the bone fragments is not a claim in its own right.

Therefore, notwithstanding the Court of Appeals' directive to resolve Mr. Avery's claims on the merits, that Mr. Avery did not raise a bone-testing issue earlier does not preclude him from raising a constitutional destruction-of-evidence issue now. On this point, the State argues that Avery could have raised a claim regarding the destruction of bone fragments in the Court of Appeals in connection with a prior remand order. (St. Resp., Dkt. 132, at 6). The State's argument fails for two reasons: (1) its premise is factually untrue; and (2) even if its premise were true, a prior motion to expand the scope of a remand order is not cognizable as a "prior postconviction motion" as contemplated by the Wisconsin Supreme Court in *Escalona-Naranjo*.

First, the State's rendition of events is factually inaccurate: neither Mr. Avery nor his current postconviction attorneys received Deputy Hawkins's September 20, 2011, report until after December 17, 2018. The State's representation that it mailed the Hawkins report to Mr. Avery's private investigator on May 29, 2018 as part of a complete set of Calumet County Sheriff's Department reports is untrue. Indeed, although Mr. Kirby, acting as Mr. Avery's private investigator, remitted payment for the copying and shipping of the Sheriff's Department's 1,117-page file, that file was never delivered to Mr. Kirby and, therefore, was never tendered to current postconviction counsel.

Specifically, in his affidavit attached and incorporated herein as **Exhibit A**, Mr. Kirby avers he received one package from the Calumet County Sheriff's Department on May 30, 2018. Without first opening the package, Mr. Kirby delivered it to the law offices of Kathleen T. Zellner & Associates, P.C. Mr. Kirby did not see the

contents of the package. In addition to paying for the 1,117-page report, Mr. Kirby paid for the copying and shipping of the Sheriff's Department's 64-page[2] postconviction investigation report.

Mr. Kirby viewed the Sheriff's Department's May 29, 2018 transmittal letter for the first time after the State attached it as Exhibit 3 to their response to Mr. Avery's supplemental § 974.06 motion. Mr. Kirby noted that, unlike letters he had received from the Sheriff's Department before, this letter was unsigned by Sheriff Ott and appeared to have been copied from a three-ring binder.

Indeed, the package Mr. Kirby delivered to current postconviction counsel's office did not contain the Deputy Hawkins's report or the 1,117-page investigation report the State alleges it delivered. In his affidavit (attached and incorporated herein as **Exhibit B**), current postconviction counsel's law clerk, Kurt Kingler, avers when he opened the package Mr. Kirby delivered, it contained only the 64-page postconviction investigation document. Further, the package did not contain the cover letter attached to the State's response as Exhibit 3.

Further, the State's contention that current postconviction counsel acknowledged receiving the investigative reports on or about May 30, 2018, in Mr. Avery's motion to compel production of recent examination of the Dassey Computer filed July 3, 2018, misstates the record. Specifically, paragraph 2 of that document states:

[2] It bears noting that, while the pages of this document are numbered 1–63, the document contains 64 pages. The second and third pages are both numbered "2" and numbering continues sequentially thereafter, i.e., the fourth page is numbered "3" and so on.

> On May 30, 2018, current post-conviction counsel's investigator, James Kirby . . . pursuant to the Freedom of Information Act ("FOIA"), received 64 pages[3] of new reports pertaining to a "follow-up investigation, regarding several allegations or questions raised in several filings of STEVEN AVERY's current defense attorney, KATHLEEN ZELLNER" from the Calumet County Sheriff's Department.

(Mot. Comp. Prod. Rec. Ex., at ¶ 2). This statement supports the fact that Mr. Avery received the 64-page postconviction investigation report. However, the State's argument that it indicates Mr. Avery received the 1,117-page complete investigative file is a non-sequitur; i.e., it does not follow that because Mr. Avery received the 64-page report, he have received the 1,117-page report.

Therefore, because the State did not send to Mr. Avery's current postconviction counsel Deputy Hawkins's report on May 29, 2018, it cannot make the argument that Mr. Avery waived claims related thereto when he did not raise them in his next motion for remand order in the Wisconsin Court of Appeals. Because there was no opportunity for Mr. Avery to raise claims related to the destruction of human bone fragment evidence until after December 17, 2018, Mr. Avery is not procedurally barred from raising them in the instant motion. It bears noting the reason Mr. Avery could not raise a claim related to the destruction of bone fragment evidence earlier was the State's continued withholding of Deputy Hawkins's September 20, 2011 report. Indeed, the State's attachment of Deputy Hawkins's September 9, 2011 report as Exhibit 2 to its reply constitutes the first and only time it has tendered the same to Mr. Avery.

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[3] *See supra* note 2.

Further, even if, *arguendo*, the State had produced Deputy Hawkins's report on May 29, 2018, that Mr. Avery did not raise claims related to the destruction of bone-fragment evidence in his next filing in the Wisconsin Court of Appeals does not preclude him from raising it now. After a diligent review of Wisconsin jurisprudence, Mr. Avery submits no Wisconsin court has concluded motions to remand—and, by extension, supplemental postconviction motions limited in scope to the remand order—in the Wisconsin Court of Appeals are cognizable as "prior postconviction motions" as contemplated by the Wisconsin Supreme Court in *Escalona-Naranjo*. Indeed, the State cites no authority for the proposition that anything but a defendant's failure to raise claims in (1) a prior postconviction motion in the trial court or (2) their direct appeal serves as a waiver of that claim. *See, e.g., State v. Bullock*, 2019 WL 761653, ¶ 12 (Wis. Ct. App. 2019) (citing § 974.06(4)); *Escalona-Naranjo*, 185 Wis. 2d at 185) (limiting analysis of *Escalona-Naranjo* waiver to claims raised in a prior § 974.06 motion and direct appeal). Therefore, even if the State did tender Deputy Hawkins's September 20, 2011 report to current postconviction counsel on May 29, 2018, that Mr. Avery did not raise his destruction-of-evidence claims as a motion to expand the scope of the Wisconsin Court of Appeals' remand order should not bar consideration of it now. Because Mr. Avery's claim could not have been raised earlier, it cannot be barred by *Escalona-Naranjo*. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 643–45 (1998) (if a claimant takes the first chance they can to raise a claim, that claim should not be barred by "second and successive" waiver rules).

Moreover, the State's argument cuts against the Wisconsin Supreme Court's recalibration of the *Brady* doctrine in *State v. Wayerski*, 2019 WL 471276 (Wis. 2019). In *Wayerski*, the Wisconsin Supreme Court corrected the course of Wisconsin's *Brady* jurisprudence to focus on the State's misconduct instead of the defense's due diligence. *Id.* at ¶ 55. In this case, the State's argument related to bone fragments returned to the Halbach family smacks of precisely the prosecution practices the Wisconsin Supreme Court condemned in *Wayerski*. The State has repeatedly concealed and withheld evidence related to the return of bone fragments—e.g., the Deputy Hawkins report and updated evidence disposition logs—and then blamed Mr. Avery for not raising claims related thereto. The State is engaging in a course of conduct proscribed by the United States and Wisconsin Supreme Courts. *Wayerski*, 2019 WI 11 at ¶ 55 (quoting *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process.")). The State should not now be rewarded for engaging in this pattern of conduct. Mr. Avery's claim deserves a hearing on its merits.

III. MR. AVERY'S SUPPLEMENTAL MOTION IS PROPERLY RAISED UNDER § 974.06.

In its reply, the State argues that Mr. Avery's *Youngblood* claim lacks merit because it lacks valid constitutional or jurisdictional basis. (State's Reply, at 7–9). The State's argument stands on the following premises: (1) a petition under WIS. STAT. § 974.06 is limited to jurisdictional and constitutional issues; and (2) following *D.A.'s Office v. Osborne*, 557 U.S. 52 (2009), there is no constitutional due process

right to the preservation of forensic evidence. For the following reasons, both premises fail; without legs, the State's argument cannot stand.

First, the State argues § 974.06 applies only to jurisdictional and constitutional claims. In support thereof, the State cites *State v. Baillette*, 2011 WI 79, ¶ 34, and *State v. Nickel*, 2010 WI App 161, ¶ 7. *Baillette*, for its part, borrows the relevant language from *State v. Allen*, 2010 WI 89, ¶ 22, which in turn paraphrases WIS. STAT. § 974.06(1). Thus, the *Baillette* reasoning on the scope of § 974.06 jurisdiction is rooted in the statutory language itself. As for *Nickel*, the Court of Appeals' comment that "a § 974.06 motion is limited to constitutional and jurisdictional challenges" (2010 WI App 161 at ¶ 7) is in dicta and is made without reference to any authority. In any case, Mr. Avery respectfully submits *Nickel* misstates the law.

Indeed, this Court should look to the scope provision the Wisconsin legislature wrote into § 974.06. In relevant part, § 974.06(1) states as follows:

> After the time for appeal or postconviction remedy . . . has expired, a person in custody under sentence of a court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution <u>or the laws of this state</u> . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(Emphasis added). Clearly, claims arising under Wisconsin statutes are cognizable under § 974.06.

Regardless, Mr. Avery's *Youngblood* claim related to the destruction of human bones from the Manitowoc County Gravel Pit is cognizable under § 974.06 because it is constitutional in nature. On this point, the State argues "*Youngblood* and its progeny do not apply to postconviction proceedings." (St. Resp., Dkt. 132, at 7). Here,

the State's argument wholly ignores the state of the law in Wisconsin: Postconviction defendants have a due process liberty interest in the posttrial destruction of evidence.[4] *State v. Parker*, 2002 WI App 159, ¶ 13 ("There is a long line of cases addressing the pretrial destruction of evidence and a defendant's due process rights. We see no reason why this line of cases should not apply to [a postconviction challenge to the postconviction destruction of evidence].").

The *Parker* court adopted the due process destruction of evidence test set forth in *State v. Noble*, 2001 WI App 145, ¶ 17, 246 Wis. 2d 533, 629 N.W.2d 317, *rev'd on other grounds*, 2001 WI 117, 247 (2002). *Parker*, 2002 WI App 159 at ¶ 14. *Noble*, in turn, reiterates the destruction-of-evidence due process test in *State v. Greenwold*, 181 Wis. 2d 881, 885 (Ct. App. 1994) (*Greenwold I*): "The defendant's due process rights are violated by the destruction of evidence if: (1) the evidence destroyed is apparently exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means; or (2) if the evidence was potentially exculpatory and was destroyed in bad faith." *Noble*, 2001 WI App 145 at ¶ 17 (citing *Greenwold I*, 181 Wis. 2d at 885–86); *Parker*, 2002 WI App 159 at ¶ 15.

Thus, there is a cognizable due process right to the preservation of evidence post-conviction; Wisconsin courts have recognized the constitutional dimension of the State's failure to preserve potentially exculpatory DNA evidence. Here, the State

[4] Mr. Avery notes that this outcome is in line with the United States Supreme Court's reasoning in *Osborne*. *E.g.*, *Osborne*, 557 U.S. 52 at 72–73 (noting the Supreme Court's deference to states' self-determination in the arena of postconviction access to DNA testing).

violated Mr. Avery's due process right to the post-conviction preservation of potentially exculpatory evidence. As previously stated and in line with the Court of Appeals' directive, this claim deserves to be heard on its merits.

It is important to note that *Osborne* involved a civil-rights claim under 42 U.S.C. § 1983 asserting a federal constitutional due process right to access evidence for DNA testing. *Osborne*, 557 U.S. at 52. It was into this context the Supreme Court held the post-conviction preservation of DNA evidence is not a protected due process right. Indeed, the Supreme Court consistently criticized Osborne for failing to request the sought-after evidence in state court. *Id.* at 71 ("His attempt to sidestep state process through a new federal lawsuit puts Osborne in a very awkward position. . . . It is difficult to criticize the state's procedures when Osborne has not invoked them. . . . [I]t is Osborne's burden to demonstrate the inadequacy of the state-law procedures available to him in state postconviction relief. . . . These procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice.") Thus, *Osborne* is, in application, more a case about waiver of state-law postconviction remedies than it is a blanket proscription of any due-process rights after conviction.

Mr. Avery, not wanting to stand in Osborne's shoes, now marshals state-law postconviction remedies, including remedies related to the destruction of apparently exculpatory or potentially exculpatory human bone evidence from the Manitowoc County Gravel Pit. In so doing, Mr. Avery relies upon the due process right to postconviction preservation of evidence conferred in *Parker*. This reliance is not at

odds with *Osborne*; rather, it is the exercise of *Osborne*'s broadest holding—the states should retain the authority to extend due process liberty interests to a criminal defendant after conviction. *Id.* at 72–73 ("If we extended substantive due process to this area, we would cast [state remedies] into constitutional doubt[.])".

Because § 974.06 expressly contemplates claims arising under Wisconsin statutes and because post-conviction destruction of evidence claims are cognizable due process claims in Wisconsin, Mr. Avery has stated a cognizable claim for relief under § 974.06.

IV. MR. AVERY, HAVING STATED A COGNIZABLE CLAIM FOR RELIEF UNDER § 974.06, HAS MET HIS PLEADING BURDEN

The State next argues that Mr. Avery has not sufficiently pled his postconviction destruction of evidence claim because the bone fragment evidence is—according to the State—neither apparently nor potentially exculpatory. (St. Resp., Dkt. 132, at 10). Here, the State makes a fatal error in its argument: it conflates Mr. Avery's burden to show that the testing of the destroyed bone fragments was exculpatory—either (1) apparently exculpatory or (2) potentially exculpatory and the destruction was made in bad faith—with the burden Mr. Avery would face were he making a claim of third-party liability under *State v. Denny*, 120 Wis. 2d 614 (Ct. App. 1984). The State is plainly misstating Mr. Avery's argument—Mr. Avery's destruction of evidence claim is not a third-party liability claim. Indeed, nowhere is the burden to show the identity of the true perpetrator imposed upon Mr. Avery; Mr. Avery need only marshal evidence demonstrating the testing of now-destroyed evidence was (1) apparently exculpatory or (2) potentially exculpatory and the

destruction was made in bad faith. "[E]xculpatory evidence is evidence the suppression of which would 'undermine confidence in the verdict.'" *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). Thus, Mr. Avery's burden is to explain why this evidence undermines confidence in the verdict, not prove someone else's guilt.

The State is arguing that it is Mr. Avery's burden not only to present substantial evidence in support of his innocence, but also show that someone else perpetrated the crime of his conviction. These burdens are far from the same. By way of analogy, the State's argument is akin to requiring a criminal defendant convicted on disputed DNA evidence to show not that the DNA excludes them but prove whose DNA it really is. Such a burden cannot be imposed here.

(i) *The destroyed-bone evidence was apparently exculpatory or potentially exculpatory.*

Next, the State argues—in the context of its misguided *Denny* third-party liability argument—that the bone fragments were neither apparently nor potentially exculpatory. (St. Resp., Dkt. 132, at 11–12). Additionally, the State argues "there are many fragments from the quarry that may or may not be human still in evidence available for testing." The State's argument misses the point. Mr. Avery's claim concerns the testing of human bone fragments from the gravel pits to adduce their identity and demonstrate that the evidence was not, as the State argued at trial, concentrated around Mr. Avery such that he was the sole suspect. Indeed, Mr. Avery's claim concerns destroyed bone fragments <u>identified as human</u> by Dr. Leslie Eisenberg. These bones are listed in Exhibit 10 to Mr. Avery's Supplemental Motion,

Dkt. 1031, at page 8. The skeletal remains contained in this table that can be reliably traced to the gravel pits are WSCL Nos. 7411, 7412, 7413, 7414, 7416, 7419, and—followed by "(?)"—8675. Without exception, every one of these items was returned to the Halbach family. There is no comparable evidence now available to Mr. Avery for testing because there are no human skeletal remains recovered from the gravel pit preserved in State custody.

The State limits its argument to WSCL No. 8675, the pelvic bone fragments Dr. Eisenberg classified as "possible human" and which Dr. Steven Symes has, based upon his examination of the forensic anthropology photographs, confirmed were human. This choice is perplexing because Mr. Avery's claim concerns all human bone fragments recovered from the Manitowoc County Gravel Pit[5] then returned to the Halbach family in September 2011. Dr. Eisenberg—without qualification or equivocation—identified as human WSCL Nos. 7411, 7412, 7413, 7414, 7416, and 7419. (Exhibit 10 to Mr. Avery's Supplemental Motion, Dkt. 1031, at 8).

For the State to now argue that Mr. Avery's claim fails because a he has made no showing that the bones were human is disingenuous and misstates Mr. Avery's argument. First, the State's argument is disingenuous because it is beyond argument that WSCL Nos. 7411, 7412, 7413, 7414, 7416, and 7419 were human in origin; it is past time for the State to credit the conclusions of its own expert. Second, evidence of the identity—as opposed to the species—of the bones tends to prove Mr. Avery was

[5] Throughout its response, the State refers to the origin of the bones as the "Radandt Quarry." Based upon Mr. Radandt's statements and plat maps maintained by the Manitowoc County recorder of deeds, the property on which the bone fragments were located belonged to Manitowoc County and operated as a gravel pit.

not the perpetrator of Ms. Halbach's murder because, if the bones were identified as Ms. Halbach, her murder, mutilation, and the disposal of her remains did not occur in a location tied exclusively to Mr. Avery. No reasonable trier of fact could conclude that, if Mr. Avery murdered and mutilated Ms. Halbach in the Manitowoc County Gravel Pit, he would move her bones from the gravel pit to his own burn pit and thereby incriminate himself.

This evidence should be considered in light of the opinions of Dr. DeHaan, who—to a reasonable degree of certainty in the field of fire forensics—has concluded Mr. Avery's burn pit was not the primary burn location. Thus, it is reasonable to conclude the gravel pit was the primary burn site. This evidence, therefore, tends to show the murder, mutilation, and destruction of Ms. Halbach's remains did not occur—as the State argued at trial—in locations controlled exclusively by Mr. Avery. This evidence is exculpatory of Mr. Avery because it undermines confidence in the verdict. In the words of one of Mr. Avery's trial attorneys, Jerome Buting:

> [I]f that body was burned somewhere and then moved and dumped on Mr. Avery's burn pit, then Steven Avery is not guilty, plain and simple. . . . Now that is why the State has gone to such trouble avoiding the fact that the bones were moved, that's why you heard nothing about it here. Because it does not fit with their theory that Avery is guilty.

(715:148–49).

While the jury at Mr. Avery's trial rejected Buting's argument, it did not have the benefit of hearing evidence that the bone fragments later returned to the Halbach family were originally located in the Manitowoc County Gravel Pit and were unwaveringly identified by Dr. Eisenberg as human. This, coupled with the other

incriminating evidence linking the Manitowoc County Gravel Pit to the crime scene (*see* Mr. Avery's March 11, 2009 Supp. § 974.06 Motion, Dkt. 1000, at 12–13[6]), significantly undermines confidence in Mr. Avery's verdict because no reasonable trier of fact could have concluded, considering this significant evidence pointing away from Mr. Avery, that Mr. Avery is guilty beyond a reasonable doubt.

The State makes much of the Dassey burn barrel and its theory that Mr. Avery placed the bones in the Gravel Pit to evade detection. (St. Resp., Dkt. 1032, at 12–13). This theory ignores Dr. DeHaan's scientific opinion that Ms. Halbach was not burned in Mr. Avery's burn pit. As previously stated, the notion that Mr. Avery would burn Ms. Halbach's body at some location other than his burn pit then transfer her remains there defies logic. Because it is logically unsound and because it stands against the weight of Dr. DeHaan's opinions, the State's theory should be rejected.

For these reasons, Mr. Avery has sufficiently pled the apparent or potential exculpatory value of the destroyed bone evidence.

(ii) ***The bones were destroyed in bad faith.***

Next, the State argues that it did not act in bad faith when it released the bone fragments to the Halbach family. (St. Resp., Dkt. 1032, at 13–14). In support thereof, the State argues that it undertook reasonable efforts to test WSCL No. 8675 before Mr. Avery's trial and that it was justified in destroying the bones because they were not at issue in Mr. Avery's direct appeal.

[6] Mr. Avery shall refer to page numbers in the header as applied by the Court.

In so arguing, the State wholly ignores the trial court's April 4, 2007, DNA evidence preservation order and the duty to preserve evidence imposed by § 968.205 (*infra*, Section V). As for the April 4, 2007, preservation order, the State was on notice that forensic evidence collected in this case should be preserved for future testing by Mr. Avery at any time. That the order expressly contemplates only blood evidence is not dispositive; the parties have construed the order to cover the testing of skeletal remains, a bullet fragment, and the swab taken from the RAV-4 hood latch. It should also be understood to cover human skeletal remains from the Gravel Pit.

Further, the State demonstrated its awareness of Wisconsin's forensic evidence preservation statute, § 968.205, at trial. (710:9) (Special Prosecutor Gahn noted, "[l]et's wait [to arrange the preservation of evidence] until these proceedings are over, because Wisconsin does have a mandatory preservation statute that would be applicable in this case."). Mr. Avery submits this recognition confirms his contention that the State knowingly violated the preservation statute when it returned human skeletal remains from the Gravel Pit to the Halbach family in September 2011. That is, the State knew it had a duty to preserve the evidence or, prior to destroying it, notify Mr. Avery and his attorneys. Yet, it did neither. This knowing deviation from its duty under the law confirms the State acted in bad faith when it destroyed the human bones from the Gravel Pit.

It bears noting that Assistant Attorney General Fallon and Special Prosecutor Gahn, both of whom represent the State in this proceeding, were the State attorneys who participated in the return of human bones from the Gravel Pit to the Halbach

family. They are interested parties and their bad faith is directly at issue in this case. Their protestations and denials are therefore suspect; this Court must discern whether their arguments themselves are made in good faith or in the simple interest of self-preservation. Given the manifest weight of the evidence and the arguments offered by the State, Mr. Avery suspects the latter is true. After all, the upshot of Mr. Fallon and Mr. Gahn's arguments is that they reawakened the Halbach family's grief in 2011 to give them animal bones.

Further, Mr. Avery has alleged sufficient material facts in support of his destruction of evidence claim to secure a postconviction hearing. *State v. Allen*, 2004 WI 106, ¶¶ 14, 36. As for "who," Mr. Avery has alleged Investigator Wiegert, Deputy Hawkins, Assistant Attorney General Fallon, and Special Prosecutor Gahn destroyed every human bone recovered from the Gravel Pit by returning them to the Halbach family. As for "what," Mr. Avery has alleged the bones were identified as human by Dr. Eisenberg and were recovered from multiple locations in the Manitowoc County Gravel Pit. As for "where," Mr. Avery has provided this Court with the exact locations of the human bones recovered in the Manitowoc County Gravel Pit. (*See* Group Exhibit 11 to Mr. Avery's March 11, 2019 Supp. § 974.06 Motion, Dkt. 1012). As for "when," Mr. Avery has alleged the human bones from the Gravel Pit were returned to the Halbach family on or after September 20, 2011, during the pendency of his direct appeal. As for "why," Mr. Avery has alleged he is entitled to relief on his claim because the State violated his due process rights—extended to postconviction proceedings in *Parker*—to the preservation of apparently or materially exculpatory

evidence and the State acted in bad faith in so doing. As for "how," Mr. Avery has alleged, *inter alia*, facts supporting his contentions that the destroyed bone evidence was, in fact, exculpatory and the State acted in bad faith in destroying them. Each of these facts substantiates Mr. Avery's destroyed evidence claim. Because each of these facts has been sufficiently pled, Mr. Avery has stated a cognizable claim for relief under the framework of *Trombetta* and *Youngblood*.

V. THE STATE VIOLATED WIS. STAT. § 968.205.

The State argues that the human bone fragments from the Gravel Pit were not subject to preservation under WIS. STAT. § 968.205. (St. Resp., Dkt. 1032, at 14–17. The State correctly notes that § 968.205(2) protects biological material from the victim or that may reasonably be used to incriminate or exculpate any person for the offense. However, the State makes its first misstep when it equates the evidentiary value of human bones located in Mr. Avery's burn pit or the Dassey burn barrel with human bones located in the Manitowoc County Gravel Pit. The location from where the human bones were recovered is the key to their evidentiary value. Additionally, the State never ascertained the identity of any of the human bones from the Gravel Pit. Now, by the State's actions, their identity may never be ascertained. Thus, no comparable evidentiary material is available to Mr. Avery.

Additionally, Mr. Avery is not positing § 968.205 should be interpreted as a mandate to preserve every single piece of biological evidence recovered during an investigation. Indeed, Mr. Avery is simply positing the State should comply with

Wisconsin law when considering the preservation of evidence that may reasonably be used to exculpate someone.

In this case, as described herein and in Mr. Avery's March 11, 2019 Supplemental § 974.06 Motion, the human bones recovered from the Gravel Pit may reasonably be used to exculpate Mr. Avery because they undermine confidence in the verdict and the evidence, if tested, could reasonably prove Mr. Avery's innocence. Here, again, the State contends "none of the bone fragments recovered from locations in the quarry were positively identified as human." (St. Resp., Dkt. 1032, at 16). This allegation is patently untrue. Without qualification or equivocation, Dr. Eisenberg—the State's own expert—identified as human WSCL Nos. 7411, 7412, 7413, 7414, 7416, and 7419. (Exhibit 10 to Mr. Avery's Supplemental Motion, Dkt. 1031, at 8). The State had a statutory obligation to preserve the evidence because the human bones from the Gravel Pit, if determined to be Ms. Halbach, would prove Mr. Avery innocent. As described herein, proof that Ms. Halbach was murdered or mutilated in an area outside Mr. Avery's control proves his defense that her remains were planted in his burn pit, and, therefore, his innocence.

Thus, even if the human bones from the Gravel Pit were not subject to § 968.205 preservation because they were identified as Ms. Halbach, they were subject to § 968.205 preservation because they were reasonably likely to exculpate Mr. Avery.

VI. THE STATE'S ARGUMENT RELIES ON STALE SOURCES AND MISREPRESENTS THE VALIDATED AND ACCEPTED CAPABILITIES OF ANDE RAPID DNA IDENTIFICATION TECHNOLOGY.

Lastly, the State argues that, because Rapid DNA technology "is not authorized or approved for forensic use," this Court should not entertain Mr. Avery's argument that ANDE Rapid DNA identification analysis could have, to a reasonable degree of certainty, yielded probative evidence of the identity of the Gravel Pit bones. (St. Resp., Dkt. 1032, at 17).

In support thereof, the State contends such a forensic application is beyond the scope of the Rapid DNA Act of 2017 (Pub. L. No. 115-50, 131 Stat. 1001 (2017) ("Rapid DNA Act" or "Act")). The State relies on stale standards and inapposite policy positions. Specifically, the State conflates the scope of the Rapid DNA Act with the universe of applications in which ANDE Rapid DNA technology has been successfully used. This argument is fallacious and reductive; it wholly discounts the development, validation, and widespread acceptance achieved by the ANDE system in forensic applications in recent years.

The successful iteration of the Rapid DNA Act was introduced by United States Representative Jim Sensenbrenner (R-Wis.) on January 12, 2017.[7] It is notable that the language of the Rapid DNA Act did not change from its first introduction in the House on January 13, 2015.[8] That is, the 2017 Rapid DNA Act is composed of language that reflects the state of Rapid DNA technology in January 2015.

For its part, the 2017 Rapid DNA Act was enacted to authorize law enforcement agencies to use Rapid DNA instruments to test arrestees upon booking

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[7] *H.R.510 - Rapid DNA Act of 2017*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/510.

[8] *H.R.320 - Rapid DNA Act of 2016*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/320.

at police stations to screen them for connection to other crimes before being released.[9] Thus, the Act did not contemplate the universe of forensic applications for which Rapid DNA analysis has been proven suitable in the four years since its initial introduction.

Moreover, the language the State claims is "specifically stated" in the Act is, in fact, not contained in the Act. (St. Resp., Dkt. 1032, at 17). The quoted text—"[a]t present, Rapid DNA technology can only be used for identification purposes, not crime scene analysis"—comes from the House Judiciary Committee's May 11, 2017 report. First, this quote is a simple statement of the focus of the Act; i.e., to identify suspects in the same way a fingerprint is used. It should not be read as a definitive delimitation of the usefulness of Rapid DNA technology. Second, this report—like all the persuasive authority marshaled by the State[10]—is fatally outdated. It states the capabilities of the technology before May 2017.

The capabilities of Rapid DNA technology have developed considerably since May 2017. As described in Dr. Richard Selden's second supplemental affidavit (attached and incorporated herein as **Exhibit C**), ANDE Rapid DNA identification

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[9] *Bipartisan Rapid DNA Passes in the House of Representatives,* Press Releases & Statements – Congressman Jim Sensenbrenner (May 16, 2017), https://sensenbrenner.house.gov/2017/5/bipartisan-rapid-dna-passes-the-house-and-senate. Attached as **Exhibit 2** to Second Supplemental Affidavit of Richard Selden, attached and incorporated herein as **Exhibit C**.

[10] Indeed, the most recent publication cited by the State is the National District Attorneys Association's position statement on the use of Rapid DNA technology dated January 30, 2018. The statement reads, in relevant part, "NDAA does not support the use of Rapid DNA technology for crime scene DNA samples unless the samples are analyzed by experienced DNA analysts using that technology working in an accredited DNA laboratory." (St. Resp., Dkt. 1032, at 18). This position, recognized over one year ago, comports with Defendant's position, not the State's. Rapid DNA technology is suitable for the analysis of crime scene DNA samples when the samples are analyzed by experienced DNA analysts in an accredited DNA laboratory, e.g., ANDE.

technology has garnered widespread validation and acceptance in jurisdictions across the country for the analysis of crime scene samples. (Selden Aff., Exhibit C, at ¶¶ 9–15).

Specifically, the American Society of Crime Lab Directors ("ASCLD"), whose November 15, 2017, position paper the State cited, has recognized Rapid DNA's usefulness in the field of disaster victim identification. Disaster victim identification using Rapid DNA technology involves the analysis of degraded samples—far more complex than the single-source identification samples referenced by the State. Clearly, the ASCLD's interest in Rapid DNA technology for forensic samples has evolved considering significant technical developments over the past several years. (Selden Aff., Exhibit C, at ¶ 9).

Additionally, Rapid DNA technology has been implemented in jurisdictions across the country to process forensic samples. On April 10, 2019, Kentucky Governor Matt Bevin announced that, after months of careful consideration, his Commonwealth is using the ANDE Rapid DNA Identification system in sexual assault investigations. As described by Dr. Selden, "Sexual Assault Evidence Kits (SAEKs) contain among the most difficult of forensic samples—vaginal swabs that contain a mixture of female epithelial cells and male sperm cells. These complex forensic samples can be processed on the ANDE system." (Selden Aff., Exhibit C, at ¶ 11).

In Fall 2018, the Utah Attorney General announced that Utah has implemented the ANDE Rapid DNA system for the processing of forensic and crime

scene samples. Indeed, Attorney General Sean Reyes announced Rapid DNA technology solved its first case within one week of its implementation. In that case, blood and other forensic samples were processed to identify a burglar. (Selden Aff., Exhibit C, at ¶ 12).

On February 11, 2019, the Office of the New York Chief Medical Examiner presented its work using the ANDE Rapid DNA Identification system to the American Academy of Forensic Sciences. The Chief Medical Examiner's office reported its conclusion that Rapid DNA analysis of bone samples was comparable to conventional laboratory methods and described two cases where the ANDE System was superior to conventional methods—the ANDE system generated DNA identifications from skeletal remains from the September 11, 2001 World Trade Center tragedy which yielded no useful results when analyzed using conventional methods. (Selden Aff., Exhibit C, at ¶ 13).

Lastly, the Sacramento County Coroner recently published a paper describing her experiences with—and lauding the usefulness of—ANDE Rapid DNA technology. Using ANDE Rapid DNA technology to identify victims in the Camp Fire, the Coroner successfully identified no less than 85% of the human remains from the Camp Fire. (Selden Aff., Exhibit C, at ¶ 14; Supp. Selden Aff., Dkt. 1028, at ¶ 15). This accomplishment is notable because many of these bone samples were severely degraded by fire, just as the skeletal remains recovered from the Manitowoc County Gravel Pit were. (Supp. Selden Aff., Dkt. 1028, at ¶ 19). Thus, the successful implementation of ANDE Rapid DNA technology in the aftermath of the 2018

California wildfires directly supports the applicability of ANDE Rapid DNA technology in this case.

The State's conclusion that "Rapid DNA testing is not ready for crime scenes" (St. Resp., Dkt. 1032, at 18) relies on stale sources and is ignorant of that technology's development in recent years. While there is a "huge difference between fresh buccal samples and 14-year-old charred and calcined bone fragments" (St. Resp., Dkt. 1032, at 19), ANDE Rapid DNA technology is equipped to process 14-year-old charred and calcined bone fragments. (Selden Aff., Exhibit C, at ¶ 16). That the State has chosen to ignore the multitude of supporting examples referenced by Dr. Selden—and instead selectively rely on outdated policy statements—does not change this fact.

CONCLUSION

For the above-stated reasons, Mr. Avery requests this Court grant his supplemental § 974.06 motion, set his cause for a new trial, reverse his conviction, or grant any other relief this Court deems appropriate.

Dated: April 11, 2019

/s/ Kathleen T. Zellner
Kathleen T. Zellner
Admitted *pro hac vice*
Kathleen T. Zellner & Assoc., P.C.
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127 Main Street
Casco, Wisconsin 54205
(920) 837-2653
sgrlaw@yahoo.com

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05 CF 381
	)	
STEVEN A. AVERY, SR.,	)	
	)	Honorable Judge Angela Sutkiewicz,
Defendant.	)	Judge Presiding

AFFIDAVIT OF JAMES R. KIRBY

Now comes your affiant, James R. Kirby, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements are true and correct to the best of my personal knowledge. I am of sound mind and I am not taking any medication nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit.

2. I am a private detective licensed in Illinois, Indiana, and Wisconsin. I am the president of Edward R. Kirby & Associates, Inc., a professional investigations firm located in Elmhurst, Illinois.

3. Kathleen T. Zellner & Associates, P.C., hired Edward R. Kirby & Associates to issue Freedom of Information Act requests in connection with the above-captioned case. On April 19, 2018, I sent such a request to the Calumet County

EXHIBIT A

Sheriff's Department via fax. In that request, I asked for reports generated between October 31, 2005, and April 19, 2018.

4. On April 20, 2018, the Calumet County sheriff's department responded to my FOIA request. The sheriff's department informed me that it would provide the complete investigative report consisting of 1,117 pages for a copy fee of $279.25 plus shipping costs. I paid the copy fee. The sheriff's department contacted me again on May 18, 2018, informing me it would also release the 63-page post-conviction investigative report for an additional fee. I paid the additional fee and shipping costs.

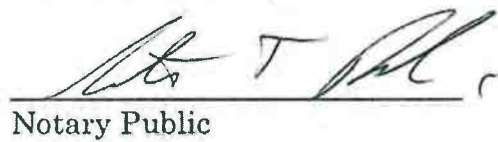
5. On May 30, 2018, I received one package from the Calumet County Sheriff's Office. Without opening the package, I delivered it to the law offices of Kathleen T. Zellner & Associates, P.C. At no time did I see the contents of the package. I have been shown the letter that was attached as the State's Exhibit 3 to its response. Unlike other letters I received on prior FOIA requests from Calumet County Sheriff's Department (attached and incorporated herein as Group Exhibit A), this letter was unsigned by Sheriff Mark Ott and appears to have been copied from a 3-ring binder. At no time after May 30, 2018, did I receive documents responsive to my April 19, 2018, FOIA request to the Calumet County Sheriff's Department.

FURTHER AFFIANT SAYETH NAUGHT

James R. Kirby

State of Illinois
County of DuPage

Subscribed and sworn before me
this 21 day of April 2019.



Notary Public

CALUMET COUNTY SHERIFF'S DEPARTMENT

MARK R. OTT, SHERIFF
Brett J. Bowe, Chief Deputy

Radio Station – KGL 593
WI Teletype Code – CASO

206 Court Street
Chilton, WI 53014

Chilton (920) 849-2335
Appleton (920) 989-2700 Ext. 222
FAX (920) 849-1431

May 18, 2018

James Kirby
Edward R. Kirby & Associates, Inc.
909 S. Route 83, Unit 103
Elmhurst, IL 60126-1313

Re: Public Records Request dated April 19, 2018

Dear Mr. Kirby:

In receipt of your payment totaling $279.29, we have prepared a copy of the complete investigative report. The Calumet County Sheriff's Department will also release the post-conviction investigative report, which consists of 63 pages (0.25 per page) for a total cost of $15.75. The shipping costs for all records totaled $15.83. Upon receipt of payment totaling $31.58, these records will be mailed to you at the above listed address.

In regards to your request for records of the Wisconsin State Crime Laboratory, we have been advised by Wisconsin Department of Justice that the records sought in your request are not available via a public records request as they constitute records containing information, which are derived from analysis of evidence collected by law enforcement in the investigation of a crime and therefore fall within the purview of Wis. Stat. § 165.79(1).

Pursuant to Wis. Stat. § 165.79(1), "[e]vidence, information and analyses of evidence obtained from law enforcement officers by the laboratories is privileged and not available to persons other than law enforcement officers . . . prior to trial, except to the extent that the same is used by the state at a preliminary hearing and except as provided in Wis. Stat. § 971.23 [pre-trial criminal discovery]."

Pursuant to Wis. Stat. §165.79(2), "[u]pon the termination or cessation of the criminal proceedings, the privilege of the findings obtained by a laboratory may be waived in writing by the department [DOJ] and the prosecutor involved in the proceedings." It is the requester's responsibility to request the waivers. DOJ will not consider granting a waiver until it receives a waiver from the prosecutor. It is your responsibility to obtain that waiver and forward it to DOJ.

KIRBY GROUP
EXHIBIT A

If you have any further questions or concerns relating to your requests or the Sheriff's Department's response herein, please contact our counsel, Kimberly Tenerelli, at (920) 849-1443.

Sincerely,

Mark R. Ott, Sheriff
Calumet County Sheriff's Dept.

CALUMET COUNTY SHERIFF'S DEPARTMENT

MARK R. OTT, SHERIFF
Brett J. Bowe, Chief Deputy

Radio Station – KGL 593
WI Teletype Code – CASO

206 Court Street
Chilton, WI 53014

Chilton (920) 849-2335
Appleton (920) 989-2700 Ext. 222
FAX (920) 849-1431

April 20, 2018

Mr. James Kirby
909 S. Route83, Unit 103
Elmhurst, IL 60126-1313

Re: Public Records Request dated April 19, 2018

Dear Mr. Kirby:

Please accept this correspondence as the Calumet County Sheriff's Department response to your public records request dated April 19, 2018, wherein you requested a copy of the "investigative reports" and "forensic and or laboratory result reports."

In response to your request for the investigative reports, the Calumet County Sheriff's Department will provide the complete investigative report, which consists of 1,117 pages. The Sheriff's Department will provide this document upon payment of the total sum of **$279.25 ($0.25 per page) plus shipping costs**. Please advise if you still wish to receive these documents and the address in which these documents should be mailed to. Once that information is received, we will determine shipping costs and provide you with an exact amount of payment that would need to be sent to our department prior to processing your request.

Please know that the investigative report will contain portions of redacted information. The report will be provided in redacted form pursuant to Wis. Stat. § 19.36(6), which provides that "[i]f a record contains information that is subject to disclosure under s. 19.35 (1) (a) or (am) and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release."

The record has been redacted to preserve the confidentiality of information related to a juvenile(s). Section 938.396, Wis. Stats., provides: "Law enforcement agency records of juveniles shall be kept separate from records of adults. Law enforcement agency records of juveniles may not be open to inspection or their contents disclosed except under par. (b) or (c), sub. (1j), (2m) (c) 1p., or (10), or s. 938.293 or by order of the court." There are no statutory exceptions that apply in this circumstance. Therefore, the portion of the requested record relating to information concerning a juvenile(s) will not be provided.

CALUMET COUNTY SHERIFF'S DEPARTMENT

MARK R. OTT, SHERIFF
Brett J. Bowe, Chief Deputy

Radio Station – KGL 593
WI Teletype Code – CASO

206 Court Street
Chilton, WI 53014

Chilton (920) 849-2335
Appleton (920) 989-2700 Ext. 222
FAX (920) 849-1431

February 27, 2017

James Kirby
Edward R. Kirby & Associates, Inc.
909 S. Route 83, Unit 103
Elmhurst, IL 60126-1313

Re: Public Records Request dated February 20, 2017

Dear Mr. Kirby:

Please accept this correspondence as the Calumet County Sheriff's Department response to your public records request dated February 20, 2017, wherein you requested a copy of the recording taken of a voicemail message from an answering machine at the residence of 4433 County Road B, Manitowoc, Wisconsin, 54220.

As referenced in the Sheriff's Department police report, the recording was copied by Detective Jacobs of the Manitowoc County Sheriff's Department. Any duties conducted by Detective Jacobs would be record of the Manitowoc County Sheriff's Department.

You are advised that you may challenge the Sheriff's Department's partial denial of your requests in an action for mandamus pursuant to Wis. Stat. § 19.37(1), or by application to the Calumet County District Attorney or Attorney General. If you have any further questions or concerns relating to your requests or the Sheriff's Department's response herein, please contact our counsel, Kimberly Tenerelli, at (920) 849-1443.

Sincerely,

Mark R. Ott, Sheriff
Calumet County Sheriff's Dept.

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-CF-381
	)	
STEVEN A. AVERY, SR.,	)	Honorable Judge Angela Sutkiewicz,
	)	Judge Presiding
Defendant.	)	

AFFIDAVIT OF KURT KINGLER

Now comes your affiant, Kurt Kingler, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge. The factual statements herein are true and correct to the best of my knowledge, information, and belief. I am of sound mind and I am not taking any medication, nor have I ingested any alcohol that would impair my memory of the facts stated in this affidavit

2. I have been employed as a law clerk by Kathleen T. Zellner & Associates, P.C., since July 2015. I am a law student at Loyola University Chicago School of Law.

3. On May 30, 2018, James Kirby delivered to Ms. Zellner's office one package from the Calumet County Sheriff's Department. I opened the package to examine its contents. Inside the package were 64 pages of Calumet County Sheriff's Department investigative reports with dates ranging from August 30, 2017, to April 5, 2018. There was no cover letter in the package. I scanned the 64 pages of investigative reports and filed them.

EXHIBIT B

FURTHER AFFIANT SAYETH NAUGHT

Kurt Kingler

State of Illinois
County of DuPage

Subscribed and sworn before me
this 11th day of April 2019

Notary Public

STATE OF WISCONSIN **CIRCUIT COURT** **MANITOWOC COUNTY**

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-CF-381
	)	
STEVEN A. AVERY SR.,	)	Honorable Judge Angela Sutkiewicz,
	)	Judge Presiding
Defendant.	)	

SECOND SUPPLEMENTAL AFFIDAVIT OF RICHARD F SELDEN, MD, PhD

Now comes your affiant, Richard F Selden, MD, PhD, and under oath hereby states as follows:

1. I am of legal majority and can truthfully and competently testify to the matters contained herein based upon my personal knowledge and to a reasonable degree of scientific certainty. The factual statements herein are true and correct to the best of my knowledge, information, and belief.

2. I obtained my MD from Harvard Medical School in 1989 and my PhD in Genetics from Harvard Graduate School of Arts and Sciences in 1986. In 2004, I founded ANDE, a developer and manufacturer of Rapid DNA technologies. I have served as Director of ANDE since 2004 and was its Chief Executive Officer from 2004–October 2016. Since October 2016, I have served as Chief Scientific Officer of ANDE. A copy of my CV is attached and incorporated herein as **Exhibit 1**.

EXHIBIT C

3. I have reviewed the State's Response to Mr. Avery's Motion for New Trial Based on Alleged *Youngblood* Violation and offer the following opinions in response.

4. The State's assertion that "ANDE, Rapid DNA Identification Technology is not authorized or approved for forensic use" is demonstrably incorrect. (St. Resp., Dkt. 1032, at 17). The State cherry picks outdated and incomplete information, relying primarily on the Federal Rapid DNA Act of 2017 as proof that the ANDE Rapid DNA Identification System is not authorized or approved for forensic use. This reliance is ill-placed, and I will explain the State's errors in this regard, update the incomplete statements of the Response, and expand the cherry pickings to provide a more complete view of the current, widespread use of Rapid DNA in forensic applications.

5. Introduced by Rep. Jim Sensenbrenner (R-Wis.), the goal of the Federal Rapid DNA Act of 2017 was to allow police officers to use Rapid DNA instruments to test arrestees at the police station, allowing them to be linked to unsolved crimes before being released.[1] The Rapid DNA Act of 2017 and this application are based on the Rapid DNA processing of buccal (cheek) swabs from arrestees. The topic of Rapid DNA processing of crime scene samples was not contemplated in the Act as it is focused on arrestee testing.

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[1] *Bipartisan Rapid DNA Passes in the House of Representatives*, PRESS RELEASES & STATEMENTS – CONGRESSMAN JIM SENSENBRENNER (May 16, 2017), https://sensenbrenner.house.gov/2017/5/bipartisan-rapid-dna-passes-the-house-and-senate. Attached and incorporated herein as **Exhibit 2**.

6. As opposed to the suggestion of the State, the Rapid DNA Act *simply does not contain any language that states that "at present, Rapid DNA technology can only be used for identification purposes, not crime scene analysis."* Rapid DNA Act of 2017, Pub. L. No. 115-50, 131 Stat. 1001 (2017). This quote is not from the law but instead from a House Report, a statement that simply makes clear that the focus of the Law in the testing of arrestee samples. (St. Resp., Dkt. 1032, at 17).

7. The fact that a groundbreaking Federal Law allows Rapid DNA testing of arrestees in police stations across the country cannot be interpreted to mean that "ANDE, Rapid DNA Identification Technology is not authorized or approved for forensic use." Before dealing with specific authorizations and approvals, I'd like to update events since the 2017 House Report and related position statements.

8. Having performed yeoman work on Rapid DNA testing of buccal swabs, the FBI is now working on developing guidelines for Rapid DNA testing of forensic samples. Specifically, ANDE Corporation has now worked with the FBI on a variety of forensic samples, including bone, and the FBI has formed a Crime Scene Rapid DNA Task Force. I had the honor of presenting to that Task Force three weeks ago, and the FBI has clearly stated in public meetings their interest in Rapid DNA of Forensic Samples. This interest makes perfect sense—the Rapid DNA Act was first introduced in 2015 (Rapid DNA Act of 2016, H.R. 320, 114th Cong. (2d Sess. 2016)), and Rapid DNA technology has advanced dramatically over the past four years.

9. Similarly, the American Society of Crime Lab Directors ("ASCLD") has also taken note of technology advancements in Rapid DNA processing of forensic samples, and particularly in Rapid DNA processing of degraded samples such as those found following mass casualty events. Next month at their national meeting, ASCLD will be hosting a full-day Disaster Victim Identification Workshop. Conducted by ASCLD's DVI Rapid DNA Subcommittee in partnership with The Department of Homeland Security Science and Technology Directorate, and The National Institute of Justice Forensic Technology Center of Excellence. The rationale for the workshop is:

> Since crime laboratories are often the DNA experts for a state or local government, it is important that forensic laboratories are prepared for a mass fatality DNA response. Rapid DNA is becoming an important tool in DVI operations and the workshop is designed to give laboratory directors and supervisors the opportunity to experience how Rapid DNA instruments are used in identification efforts during a mass fatality response.[2]

Once again, it makes sense that ASCLD's interest in Rapid DNA technology for forensic samples is evolving based on significant technical developments over the past several years.

10. But let us move beyond groups that are now becoming interested in Rapid DNA processing of forensic samples and turn to agencies that are successfully using the technology today.

11. On April 10, 2019, the Governor of Kentucky announced that, following months of careful evaluation, the Commonwealth is using the ANDE Rapid DNA

[2] *Event: Disaster Victim Identification Workshop at ASCLD – May 19, 2019*, FORENSIC TECHNOLOGY CENTER OF EXCELLENCE, https://forensiccoe.org/event/disaster-victim-identification-workshop-dvi-ascld-2019/ (last visited Apr. 11, 2019).

Identification system for sexual assault investigations. Sexual Assault Evidence Kits (SAEKs) contain among the most difficult of forensic samples—vaginal swabs that contain a mixture of female vaginal epithelial cells and male sperm cells. These complex forensic samples can be processed on the ANDE system. Governor Matt Bevin stated:

> We have taken a bold step in order to reduce the incidence of this heinous crime. We have evaluated a powerful new technology, Rapid DNA, and determined that it can help us to identify an assailant in a matter of hours – allowing us to focus the investigations of sexual crimes more quickly than ever before.[3]

12. In Fall 2018, the Utah Attorney General announced that the State of Utah has implemented the ANDE Rapid DNA Identification system for the processing of forensic samples. Following two months of evaluation, Attorney General Sean Reyes announced the first cases was solved one week of the technology's release. In particular, a burglary was solved by using the ANDE System to test blood and other forensic samples. The Attorney General included a video describing the use of the technology in a November 2014 press release.[4]

13. On February 11, 2019, at the American Academy of Forensic Sciences, the New York State Office of the Chief Medical Examiner presented their work on the ANDE Rapid DNA Identification system. They concluded that Rapid DNA processing of bone was comparable to conventional laboratory methods. In fact, they

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[3] *Kentucky First in Nation to Adopt Rapid DNA for Sexual Assault Investigations*, KENTUCKY STATE POLICE (Apr. 10, 2019), https://www.datocms-assets.com/1606/1554842653-ande-ky-press-announcement-1.pdf. Attached and incorporated herein as **Exhibit 3**.

[4] *First Case Using Rapid DNA Testing a Success*, UTAH OFFICE OF THE ATTORNEY GENERAL (Nov. 14, 2018), https://attorneygeneral.utah.gov/rapid-dna-first-case/; *Rapid DNA a Game Changer in Fighting Crime*, UTAH OFFICE OF THE ATTORNEY GENERAL (Nov. 14, 2018), https://attorneygeneral.utah.gov/rapid-dna/. Attached and incorporated herein as **Group Exhibit 4**.

reported two cases in which the ANDE system generated DNA IDs on bones from 9/11 World Trade Center samples that had given no useful results using conventional methods.[5]

14. In my previous affidavit, I discussed the success of the ANDE Rapid DNA Identification System in generating identifications following the November 2018 Camp Fire, the deadliest wild fire in California history. In March 2019, the Sacramento County Coroner, Kim Gin, published a paper on her experiences running the identification effort:

> From the very beginning of accepting the request for aid, I had dreaded having to wait months or years to receive identifications on the fire victims. Instead, in the first week, we began making DNA-based identifications. Three months later, 87% of the families touched by this horrendous event had closure instead of being told they had to be patient and wait longer for testing to be completed and the death certificate issued.
>
> When your loved one is missing and may be deceased, telling someone to wait patiently is akin to torture.
>
> ANDE had shortened the time for DNA testing and in doing so changed the way we now look at mass fatality identification.
>
> As a Coroner, I cannot imagine handling any future incident, one that obliterates human identities as did the *Camp Fire*, without using Rapid DNA technology.[6]

15. Also, in my previous affidavit, I listed a number of US and International agencies that are using the ANDE system for forensic samples.

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[5] Andrew J. Schweighardt et al., *Rapid DNA Analysis for Disaster Victim Identification in New York City*, *in* PROCEEDINGS AMERICAN ACADEMY OF FORENSICS 241 (Feb. 2019), https://www.aafs.org/wp-content/uploads/2019Proceedings.pdf; *Results: WTC Samples Previous Testing – No Profile*, CITY OF NEW YORK OFFICE OF CHIEF MEDICAL EXAMINER (2019). Attached and incorporated herein as **Group Exhibit 5**.

[6] Kim Gin, *California Wild Fires Rapid DNA Analysis and the Future of Mass Fatality Identification*, FORENSIC SCIENCE EXECUTIVE 14 (Winter 2019), http://www.forensicscienceexecutive.org/uploads/8/4/0/7/84070136/2019_winter.pdf. Attached and incorporated herein as **Exhibit 6**.

Without going through each of them in detail as in the above four applications, it is clear that the ANDE System is well-suited for the analysis of forensic samples in general and the bone fragments of the instant case in particular. I will not reiterate my grave reservations about the destruction of probative value resulting from the transfer of certain evidence in this case as that was also covered in my previous affidavit.

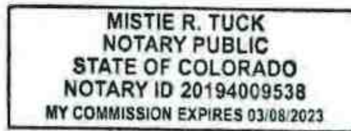
16. In conclusion, the State's claim that "Simply stated, Rapid DNA analysis is not approved for crime scene analysis" is incorrect. Many agencies have approved the use of the system for crime scene analysis of forensic samples and are having spectacular success. The State's cherry-picking of older FBI statements is inapposite. The State's claim that "experts in the field have determined that Rapid DNS is not ready for crime scenes" is also incorrect. Misleading extracts from earlier FBI policy statements do not change the fact that technical advances over the past several years have rendered the State's position inaccurate and stale. But I can agree with one of the State's positions: it is certainly true that "There is a huge difference between fresh buccal samples and 14-year-old charred and calcined bone fragments." (St. Resp., Dkt. 1032, at 18–19). There are several huge differences, I have studied those differences, and based on my personal experience and those of others, it is clear that the ANDE Rapid DNA Identification System is well-suited for the analysis of the fragments in question.

FURTHER AFFIANT SAYETH NAUGHT

Richard F Selden, MD, PhD

State of Colorado
County of Boulder

Subscribed and sworn before me
this 11 day of April, 2019



Notary Public

CURRICULUM VITAE

RICHARD F SELDEN

ANDE Corporation
266 Second Avenue
Waltham, MA 02154

EDUCATION:

Harvard College
1976-1980, A.B. in Biology, Cambridge, Massachusetts

Harvard University Graduate School of Arts and Sciences
1980-1981, A.M. in Biology, Cambridge, Massachusetts
1981-1986, Ph.D. in Genetics, Cambridge, Massachusetts

Harvard Medical School
1981-1989, M.D.

Massachusetts General Hospital
1981-1986, M.D.-Ph.D. student, Department of Molecular Biology
1986-1988, Research fellow in the Department of Molecular Biology
1989-1992, Resident in Pediatrics

ACADEMIC APPOINTMENTS:

Harvard Medical School
Instructor in Pediatrics, January, 1989-1992

INDUSTRIAL POSITIONS:

ANDE
Founder and Director, 2004—present
Chairman of the Board of Directors, 2004—present
Chief Executive Officer, 2004—October, 2016
Chief Scientific Officer, 2004—present

Transkaryotic Therapies Inc.
Founder and Chairman, Board of Scientific Advisors, Director 1988--2003
Chief Scientific Officer, 1988--2003
President and Chief Executive Officer, 1994—2003

AWARDS AND HONORS:

1976 National Merit Scholar
1980 Magna cum laude degree in biology, Harvard College

SELDEN
EXHIBIT 1

1980 Summa cum laude thesis in biology, Harvard College
1986 Soma Weiss Assembly Speaker, Harvard Medical School
1986 Diabetes Research and Education Foundation Award
1989 Cum laude degree in medicine, Harvard Medical School
2002 Ernst & Young New England Entrepreneur of the Year in the category Biotechnology/Pharmaceuticals
2017 R&D 100 Award for the development of the ANDE Rapid DNA system
2018 Not Impossible Award for ANDE Rapid DNA Identification Technology

MAJOR COMMITTEE ASSIGNMENTS:

1981-1985 Harvard-M.I.T. Department of Health Sciences and Technology, Curriculum Committee
1987-1990 American Diabetes Association, Committee on Research Review
1998-2003 Conservation Commissioner, Town of Truro, MA
2014- Conservation Commissioner, Town of Lincoln, MA
2015- Member, Community Preservation Commission, Town of Lincoln, MA

MAJOR RESEARCH INTERESTS:

1. Forensic human identification

2. Point-of-care DNA-based clinical diagnostics

3. Microfluidics

4. Highly multiplexed amplification and sequencing

TEACHING EXPERIENCE:

1977-1982 Conference leader and lecturer on biochemistry, biology, and cell biology, Harvard College
1983 Conference leader on molecular genetics, Harvard Medical School
1985-1986 Director of courses on cell biology, Northeastern University
1986-1987 Instructor in biology (Endocrinology), Harvard College

TEACHING AWARDS:

1981 Cited as outstanding conference leader in biology, Harvard College

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Treco DA, Heartlein MW, Selden RF, inventors; Transkaryotic Therapies, Inc., assignee. Protein production and protein delivery. US patent 6 565 844. May 20, 2003.

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Treco DA, Heartlein MW, Selden RF, inventors; Transkaryotic Therapies, Inc., assignee. In vivo production and delivery of insulinotropin for gene therapy. US patent 6 531 124. March 11, 2003.

Selden RF, Borowski M, Kinoshita CM, Treco DA, Williams MD, Schuetz TJ, Daniel PF, inventors; Transkaryotic Therapies, Inc., assignee. Treatment of alpha-galactosidase A deficiency. US patent 6 458 574 B1. October 1, 2002.

Selden RF, Borowski M, Gillispie FP, Kinoshita CM, Treco DA, Williams MD, inventors; Transkaryotic Therapies, Inc., assignee. Therapy for α-galactosidase A deficiency. US patent 6 395 884 B1. May 28, 2002.

Selden RF, Treco DA, Heartlein MW, inventors; Transkaryotic Therapies, Inc., assignee. In vivo production and delivery of erythropoietin. US patent 6 355 241 B1. March 12, 2002.

Selden RF, Treco DA, Heartlein MW, inventors; Transkaryotic Therapies, Inc., assignee. Vivo protein production and delivery system for gene therapy. US patent 6 303 379 B1. October 16, 2001.

Treco DA, Heartlein MW, Hauge BM, Selden RF, inventors; Transkaryotic Therapies, Inc., assignee. Protein production and delivery. US patent 6 270 989 B1. August 7, 2001.

Treco DA, Heartlein MW, Selden RF, investors; Transkaryotic Therapies, Inc., assignee. Genomic sequences for protein production and delivery. US patent 6 242 218 B1. June 5, 2001.

Treco DA, Heartlein MW, Selden RF, inventors; Transkaryotic Therapies, Inc., assignee. Targeted introduction of DNA into primary or secondary cells and their use for gene therapy. US patent 6 214 622 B1. April 10, 2001.

Treco DA, Heartlein MW, Selden RF, inventors; Transkaryotic Therapies, Inc., assignee. Genomic sequences for protein production and delivery. US patent 6 200 778 B1. March 13, 2001.

Treco DA, Heartlein MW, Selden RF, inventors; Transkaryotic Therapies, Inc., assignee. Targeted introduction of DNA into primary or secondary cells and their use for gene therapy and protein production. US patent 6 187 305 B1. February 13, 2001.

Selden RF, Borowski M, Gillespie FP, Kinoshita CM, Treco DA, Williams MD, inventors; Transkaryotic Therapies, Inc., assignee. Transfected human cells expressing human lpha galactosidase A protein. US patent 6 083 725. July 4, 2000.

Treco DA, Heartlein MW, Selden RF, inventors; Transkaryotic Therapies, Inc., assignee. Targeted introduction of DNA into primary or secondary cells and their use for gene therapy. US patent 6 063 630. May 16, 2000.

Selden RF, Treco DA, Heartlein MW, inventors; Transkaryotic Therapies, Inc., assignee. In vivo protein production and delivery system for gene therapy. US patent 6 054 288. April 25, 2000.

Selden RF, Treco DA, Heartlein MW, inventors; Transkaryotic Therapies, Inc., assignee. Method of producing clonal cell strains which express exogenous DNA encoding glucagon-like peptide 1. US patent 6 048 724. April 11, 2000.

Selden RF, Treco DA, Heartlein MW, inventors; Transkaryotic Therapies, Inc., assignee. In vivo production and delivery of erythropoietin for gene therapy. US patent 6 048 524. April 11, 2000.

Selden RF, Treco DA, Heartlein MW, inventors; Transkaryotic Therapies, Inc., assignee. In vivo protein production and delivery system for gene therapy. US patent 6 048 729. April 11, 2000.

Selden RF, Goodman H, inventors; The General Hospital Corporation, assignee. Transgenic mice expressing human insulin. US patent 6 018 097. January 25, 2000.

Selden RF, Treco DA, Heartlein MW, inventors; Transkaryotic Therapies, Inc., assignee. In vivo production and delivery of erythropoietin or insulinotropin for gene therapy. US patent 5 994 127. November 30, 1999.

Treco DA, Heartlein MW, Selden RF, inventors; Transkaryotic Therapies, Inc., assignee. Protein production and protein delivery. US patent 5 968 502. October 19, 1999.

Treco DA, Heartlein MW, Selden RF, inventors; Transkaryotic Therapies, Inc., assignee. Protein production and protein delivery. US patent 5 733 761. March 31, 1998.

Treco DA, Heartlein MW, Selden RF, inventors; Transkaryotic Therapies, Inc., assignee. Protein production and protein delivery. US patent 5 641 670. June 24, 1997

SELECTED RESEARCH GRANTS:

H92222-14-D-0012-0007 Selden (PI) 01/28/16 – 07/28/17
Advanced Expert System

5R01AI098843 Dean, Read, Selden (MPI) 6/6/2012 - 5/31/2017
Multiplex diagnostic for biothreat C. psittaci & non-threat respiratory Chlamydia

D16PC00120 Selden (PI) 09/12/16 – 02/12/17
Rapid SNPs

Dept of Defense Research and Engineering Selden (PI) 09/30/09 – 07/09/14 Field-deployable Accelerated Nuclear DNA Equipment Program

HSHQDC-09-C-00082 Selden (PI) 07/15/09 – 03/31/12
Rapid Biothreat Identification by Sequencing

N10PC20105 Selden (PI) 04/21/10 – 04/20/12
Customized STR Typing Systems for Kinship Analysis

U01AI082050-01 Selden (PI) 08/15/09 – 07/31/11
Rapid Biothreat Identification in Clinical Samples by Multilocus Sequencing

R43AI084206 Dean, Read, Selden (MPI) 07/15/09 – 06/30/11
A Rapid Point-of-care Diagnostic for C. trachomatis STDs

HSHQDC-09-00082 Selden (PI) 04/01/10 – 03/31/11
Rapid Biothreat Identification by Sequencing

Bipartisan Rapid DNA Passes in the House of Representatives

May 16, 2017

WASHINGTON, D.C. – Today, the bipartisan *Rapid DNA Act,* introduced by Rep. Jim Sensenbrenner (R-Wis.) passed in the House of Representatives.

The *Rapid DNA Act* would establish a system for the integration of Rapid DNA instruments for use by law enforcement to help reduce the DNA backlog. Unlike traditional DNA analysis, which can take weeks, Rapid DNA analysis permits processing of DNA samples in approximately 90 minutes or less.

This technology has the potential to revolutionize the way in which arrested individuals are enrolled in the criminal justice system, shorten the time required for their DNA to be linked to unsolved crimes, and expedite the exoneration of innocent suspects by giving law enforcement officials a new system that meets FBI quality assurance standards to compare DNA samples collected at the time of an arrest to profiles in the Combined DNA Index System (CODIS).

Congressman Sensenbrenner: "Rapid DNA is a promising new technology and an effective tool for law enforcement. It will help quickly identify arrestees and offenders, reduce the overwhelming backlog in forensic DNA analysis, and make crime fighting efforts more efficient while helping to prevent future crimes from occurring. It will also save time and taxpayer dollars. Today's passage of the *Rapid DNA Act* is a victory and I look forward to it being signed into law."

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EXHIBIT 2

FOR IMMEDIATE RELEASE

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Kentucky first in nation to adopt Rapid DNA for sexual assault investigations
Rapid DNA testing of sexual assault evidence kits leads to identification of suspects within hours

FRANKFORT, Ky. (April 10, 2019) – Governor Matt Bevin has announced that Kentucky has become the first state to utilize Rapid DNA for sexual assault investigations. For the last several months, the Commonwealth of Kentucky has implemented and piloted the use of the ANDE Rapid DNA™ system to test samples from Sexual Assault Evidence Kits (SAEKs), also known as Sexual Assault Kits (SAKs). The approach has proven successful, with DNA IDs made and suspects identified within hours of samples being sent to the Kentucky State Police Forensics Laboratories. This dramatic decrease in time to process the kits, which can take months or years using conventional DNA technologies, has led the state to continue and expand Rapid DNA rape kit testing.

"Today, I am especially proud to announce that Kentucky is leading the nation in addressing one of the most horrible, violent crimes in our country: the crime of rape," said Governor Matt Bevin. "We have taken a bold step in order to reduce the incidence of this heinous crime. We have evaluated a powerful new technology, Rapid DNA, and determined that it can help us to identify an assailant in a matter of hours – allowing us to focus the investigations of sexual crimes more quickly than ever before."

The ANDE Rapid DNA Identification System is a new technology that generates a DNA identification from forensic samples in less than two hours. Although the processing steps and data interpretation in the Rapid DNA system are essentially identical to those utilized conventionally, the samples are processed, and the resulting data interpreted automatically. Until now, the lengthy time required to test rape kits has led to laboratory testing backlogs. With this new approach, the lab can generate results quickly, informing investigations by identifying suspects and exonerating the innocent in real time.

"In Kentucky, we believe in justice. Regardless of where you live, or work or play in the state, you should expect to be safe from crimes of sexual assault," said Justice and Public Safety Cabinet Secretary John Tilley. "Rapid DNA allows us to use DNA immediately for investigating sexual assault cases. It gives us the most powerful witness of all: scientifically proven identity. Kentucky is proud to pioneer this use of Rapid DNA technology. Our goal is to identify suspects and exonerate the innocent to provide justice as soon as possible. Testing sexual assault cases quickly is critical as many rapists are serial offenders — and this can prevent them from committing more crimes."

Rapid DNA is a scientifically-proven technology that generates a DNA ID (also referred to as a DNA fingerprint). The DNA ID is based on the size of approximately 20 fragments of "junk DNA" and does not reveal information about an individual's appearance or medical or behavioral conditions. This level of privacy removes human bias, delivering objective information to inform investigations. ANDE is the first

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EXHIBIT 3

and only Rapid DNA system to be granted FBI approval, received for the automated testing and interpretation of cheek swabs.

"Every year, Kentuckians report almost 2,000 sexual assaults – it's estimated that nearly twice that amount go unreported," commented Kentucky State Police Commissioner Richard Sanders. "The Commonwealth of Kentucky has evaluated the ANDE Rapid DNA Identification System and we are confident that it will improve our ability to reduce sexual violence in our state. The Kentucky State Police Forensic Laboratories have done a rigorous evaluation of Rapid DNA as a way to accurately identify the rapists without infringing on the privacy of Kentuckians. And, our recent results have proved to us that this will improve safety all over our state."

About the Kentucky State Police

Kentucky State Police has defined itself as a professional, detailed and efficient law enforcement agency dedicated to preserving law and order for the protection of its citizens. The Kentucky State Police strives to maintain the highest standards of excellence utilizing training and technology to create a safe environment for citizens and to continue as a national leader in law enforcement. The Kentucky State Police promotes public safety through service, integrity and professionalism utilizing partnerships to prevent, reduce and deter crime and the fear of crime; enhance highway safety through education and enforcement; and safeguard property and protect individual rights.

About ANDE Corporation

ANDE is the global leader in Rapid DNA. With a mission to use Rapid DNA to create a safer world, ANDE's pioneering work is having major impacts in a wide range of law enforcement, military, and disaster victim identification applications in the U.S. and internationally. ANDE was founded in 2004 and has offices in Waltham, Massachusetts, Longmont, Colorado, and Washington, D.C. For more information about the ANDE Rapid DNA Identification System, please visit ANDE.com. ANDE® and ANDE RAPID DNA™ are registered trademarks of ANDE Corporation.

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Attorney General

SEAN D. REYES

UTAH OFFICE OF THE ATTORNEY GENERAL

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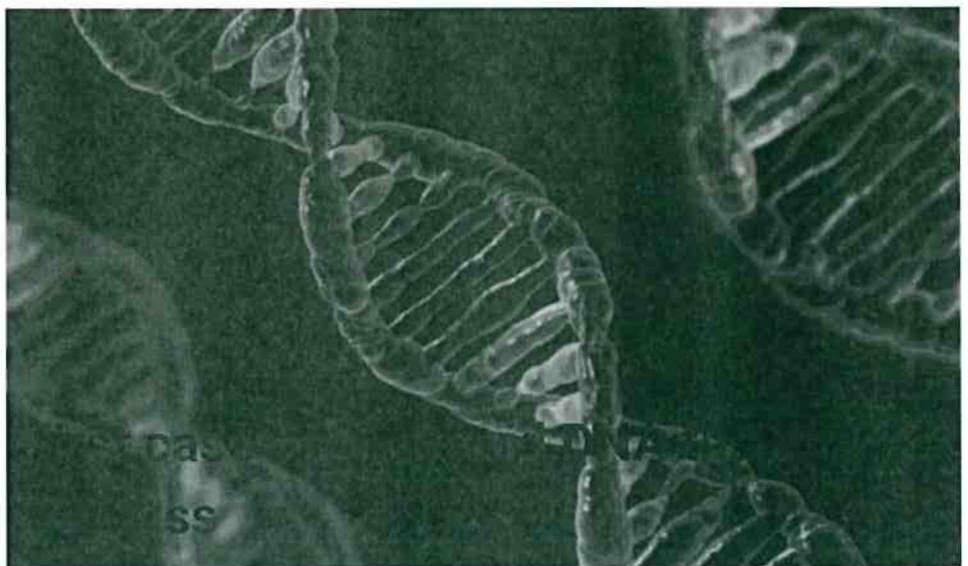

November 14, 2018

SELDEN GROUP
EXHIBIT 4

(https://attorneygeneral.utah.gov/ags secure strike force busts salt lake drug ring/)

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March 28, 2019

(https://attorneygeneral.utah.gov/gold king lawsuit to proceed against mine owners for environmental damages/)

Rapid DNA (https://attorneygeneral.utah.gov/rapid dna/), a new technology available to law enforcement agencies by the Attorney General's Office, solved its first case within weeks of its release.

Earlier this fall, Cache County Sheriff's Office contacted the AG's Office about using the portable Rapid DNA machines for assistance with a case.

In late September, a burglary was reported in a cabin up in Cache County. Someone had broken in through a bathroom window and had cut themselves in the process, leaving traces of blood behind. The burglary suspect also ate food and drank several cans of soda while in the cabin.

Deputies from the Sheriff's Office were able to take several blood samples and other items to process from the crime scene. They then served a search warrant on the suspect's home and the suspect was arrested.

After gathering the evidence, Special Agents from the AG's Office were able to test the samples and receive results on the same day. The DNA profile of the suspect matched the DNA profiles of the samples gathered at the crime scene. When presented with the evidence of the DNA test the suspect, Albert Hernandez of Hyrum, pled guilty.

Below is the link to the coverage on the case.

> KUTV: Utah's first guilty plea with Rapid DNA technology took just weeks to close (https://kutv.com/news/local/utahs first guilty plea with rapid dna technology took just weeks to close case)

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An Update from the Utah Op o d Task Force (https //attorneygenera utah gov/utah-op o d-task-force-update/)
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Th s entry was posted n Recent Posts (https //attorneygenera utah gov/category/featured content/) and tagged Cache County (https //attorneygenera utah gov/tag/cache county/) Cache County Sher ff s Office (https //attorneygenera utah gov/tag/cache county sher ffs office/) Rap d DNA (https //attorneygenera utah gov/tag/rap d dna/) Utah Attorney Genera (https //attorneygenera utah gov/tag/utah attorney genera /) on November 14 2018 (https //attorneygenera utah gov/rap d dna first case/)

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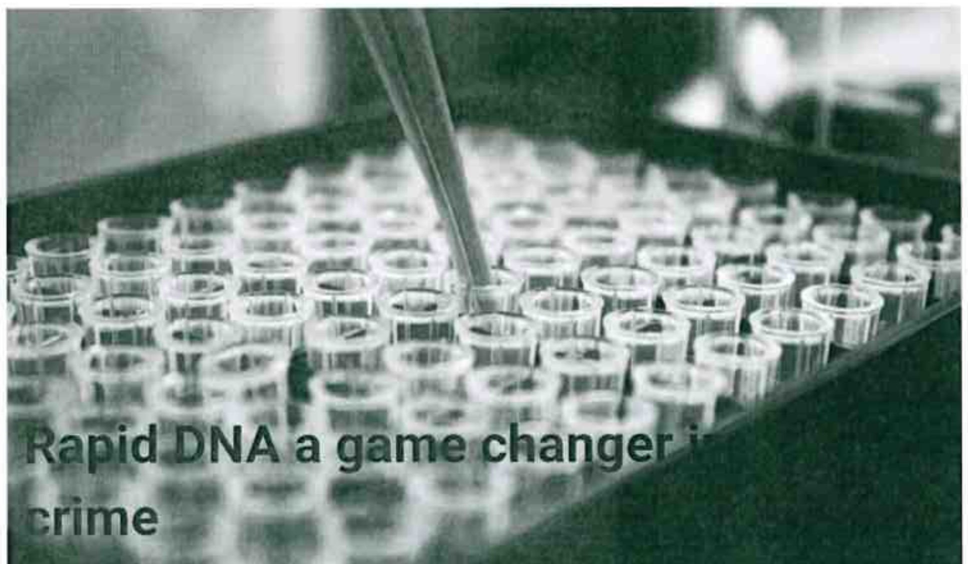

November 14, 2018

The Utah Attorney General's office can now help Utah law enforcement agencies catch criminals faster than ever.

(https://attorneygeneral.utah.gov/

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AG's SECURE Str ke Force busts Sa t Lake drug r ng
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Man conv cted us ng brother's name
(https //attorneygenera utah gov/man-conv cted-us ng-brothers-name/)

March 28, 2019

(https://attorneygeneral.utah.gov/gold king lawsuit to proceed against mine owners for environmental damages/)

How? With Rapid DNA testing:

Rapid DNA testing is a new technology that allows law enforcement to analyze evidence on the crime scene and deliver results within a couple of hours. This timing is significantly shorter than the typical turnaround time often needed for DNA analysis.

The AG's Office has been testing and analyzing the reliability of Rapid DNA for the last two months. The testing has found the new technology to be effective, efficient, and even able to test DNA from a gun.

> KUTV: New technology could catch criminals before crime scene tape comes down (https://kutv.com/news/local/new technology could catch criminals before crime scene tape comes down)

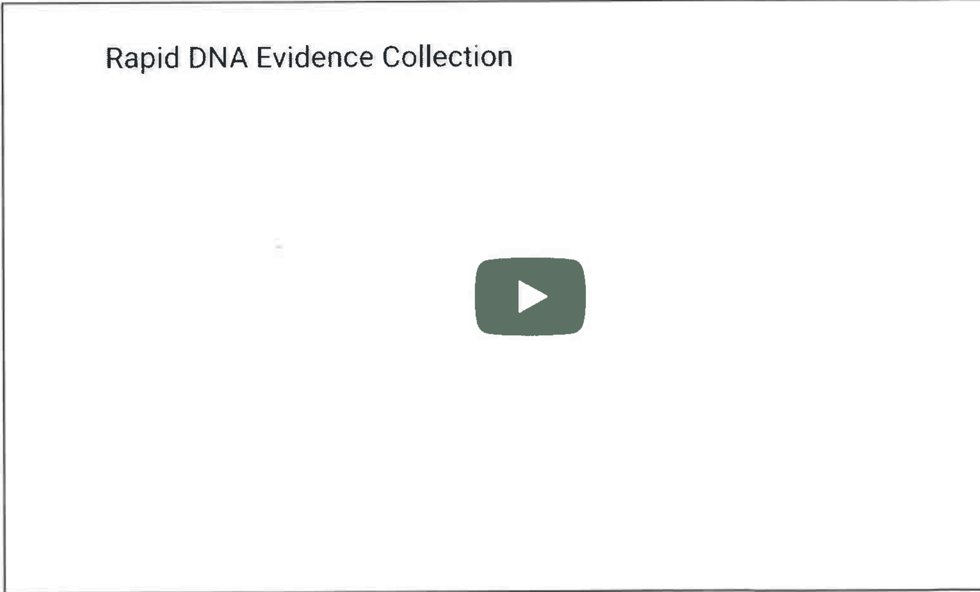
Rapid DNA is a game changer in the fight against crime. Often, agencies have had to release suspects back into the community as they wait for the evidence they need to press charges. With Rapid DNA, those suspects are usually already in custody and give officials a greater ability to know what next steps can be taken in the pursuit of justice.

> KUTV: Utah one of first with new tech to analyze criminal DNA in less than 2 hours (https://kutv.com/news/local/utah one of first with new tech to analyze criminal dna in less than 2 hours)

In fact, one week after Rapid DNA was given the green light, law enforcement solved its first case utilizing the new technology.

> Attorneygeneral.gov: https://attorneygeneral.utah.gov/rapid dna first case (https://attorneygeneral.utah.gov/rapid dna first case)/

The AG's Office currently owns and operates two Rapid DNA analyzers. This technology is available to any law enforcement agency in the state at no cost to their local taxpayers. Below is Utah Attorney General Sean D. Reyes to law enforcement agencies explaining the process and inviting agencies to reach out if they are in need of assistance.



To utilize Rapid DNA in your agency, please call our AG Investigations Division at 801 281 1200.

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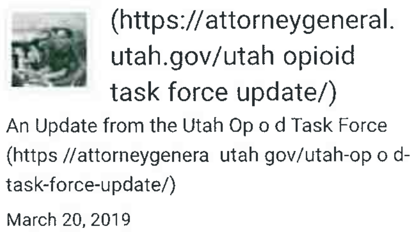

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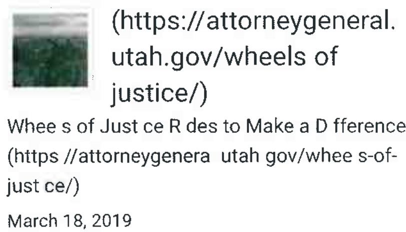

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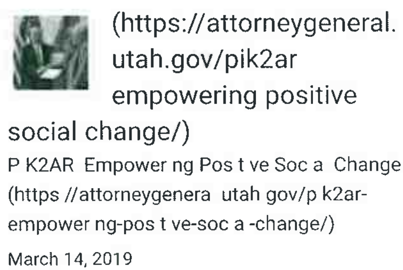

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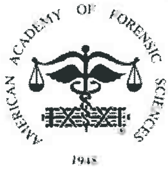

B39 Rapid DNA Analysis for Disaster Victim Identification in New York City

Andrew J. Schweighardt, PhD, Northport, NY 11768; Veronica N. Cano, BS, Office of the Chief Medical Examiner, New York, NY 10016; Yasser D. Hernandez, BA, Office of the Chief Medical Examiner, New York, NY 10016; Arianna Lionetti, Westwood, NJ 07675; Brad Greenstein, MS, Office of the Chief Medical Examiner, New York, NY 10016; April V Kwong, MSc, Office of the Chief Medical Examiner, New York, NY 10016; Kaleel Wainwright, MPH, Office of the Chief Medical Examiner, New York, NY 10016; Carl Gajewski, MS, Office of the Chief Medical Examiner, New York, NY 10016; Mark A. Desire, MS, JD, Office of the Chief Medical Examiner, New York, NY 10016*

Learning Overview: Mass disasters that result in human casualties require the need for swift and accurate victim identification. Visual identification, fingerprinting, and dental comparisons are often precluded by the poor condition of human remains recovered at a disaster site. DNA testing, although historically expensive and time-consuming, may sometimes be the only pathway to identification. For example, DNA testing played a role in almost 90% of identifications made from the World Trade Center attack in 2001. After attending this presentation, attendees will gain insight into the ability of Rapid DNA to enhance identification capabilities in the event of a mass fatality.

Impact on the Forensic Science Community: This presentation will impact the forensic science community by improving the way victim identification is handled by the forensic science community.

Rapid DNA systems encompass the stages of DNA testing such as extraction, amplification, electrophoresis, and analysis. All phases of testing are carried out in the self-contained unit. These systems are designed to be field deployable by military and law enforcement personnel and are therefore often rugged and easily transported. Instrument operation is fully automated and requires no user intervention after sample input. Typical processing time is less than two hours from the time the sample is loaded. Legislation enacted within the past two years has enabled NDIS-accredited laboratories to process DNA samples and search the resulting profiles in a database. A rapid DNA system would be ideally suited for a mass disaster because of its ability to function outside the typical laboratory setting and because of the speed with which results are obtained.

Postmortem bone samples from non-casework autopsies were tested using the ANDE™ Rapid DNA Analysis System. These bones had been previously extracted using the bone protocol routinely performed by the New York City Office of the Chief Medical Examiner (OCME) and amplified with the Identifiler™ kit. Bones were divided into groups and prepared using either the manufacturer's instructions or the OCME's bone protocol. Samples prepared and extracted using both methods were tested by Rapid DNA analysis. The results obtained using the conventional methods were compared to those obtained by Rapid DNA analysis.

Severely damaged bones collected from the site of the Twin Towers collapse that have yet to be identified still exist. Successful DNA typing of these samples has been prevented by the damage caused by exposure of the bones to fire, heat, and jet fuel at the site of the disaster. A select group of bones collected from the site of the collapse which have previously yielded no DNA profiles were tested using Rapid DNA analysis to determine if the results displayed any improvement over conventional protocols.

The success of any DNA identification effort relies upon the submission of reference samples. Many of the reference samples submitted for the World Trade Center disaster were tested with an amplification kit that is no longer used by the OCME because it does not contain enough loci to generate CODIS-eligible profiles. The OCME has recently converted to a newer kit with more loci to comply with FBI requirements for CODIS participation. Many of the reference samples collected have yet to be re-tested with the newer kit to facilitate better comparisons. A group of reference samples submitted for the World Trade Center identification effort was selected for Rapid DNA analysis to demonstrate that this technology can provide DNA profiles that more closely align with current amplification kits. Rapid DNA analysis may eventually be used to re-test all 9/11 reference samples to enable better comparisons.

Rapid DNA can significantly reduce the time commitment needed for processing postmortem samples and analyzing the resulting DNA profiles. Simultaneous typing of reference samples enables fast comparisons to occur so that results can be reported with utmost speed and without compromising reliability. Rapid DNA analysis has the capability to drastically improve the overall success of disaster victim identification.

Rapid DNA, Disaster, Bone

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EXHIBIT 5

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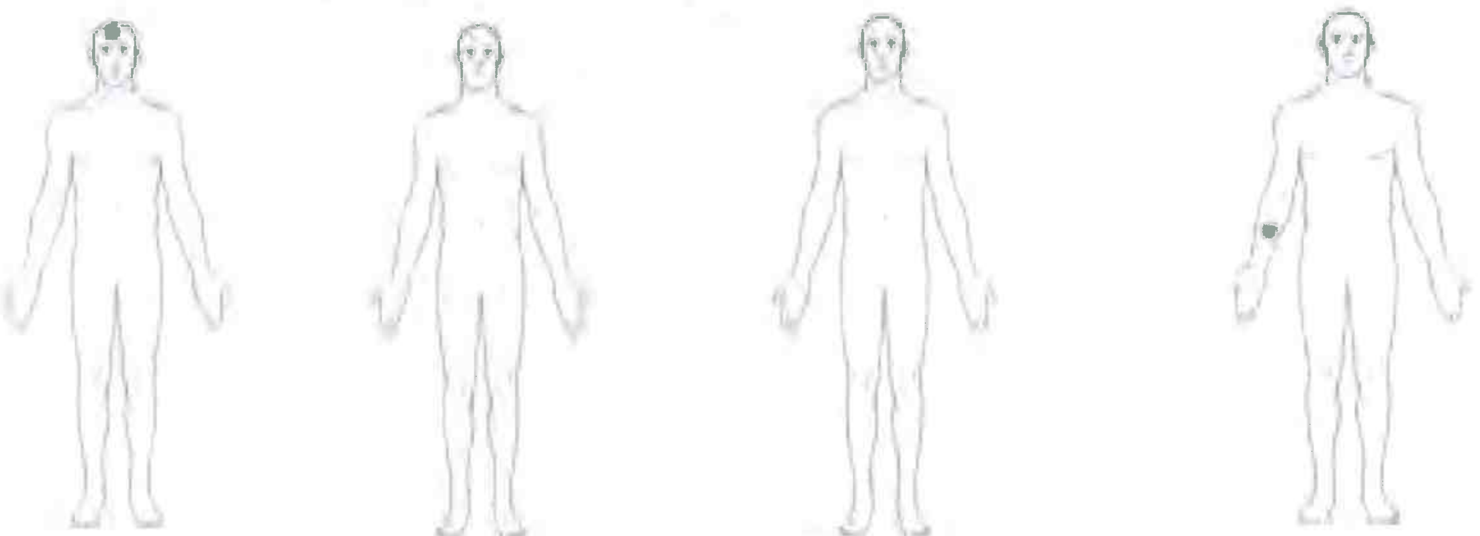
Results: WTC Samples Previous Testing – No Profile



Sample:	Skull fragment	Indet. bone fragment	Indet. long bone shaft fragment	Proximal radius fragment
Prior success:	0 loci	0 loci	0 loci	0 loci
Rapid DNA:	15 loci	0 loci	0 loci	8 loci

Office of Chief Medical Examiner

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On the morning of November 8, 2018, a wild fire, quickly dubbed the *Camp Fire*, started in Butte County near the town of Paradise, California.

The state was already reeling from the Thousand Oaks mass shooting in Ventura County the night before, and as the morning unfolded, the horror intensified.

A fast-moving fire swiftly destroyed much of the Paradise community and surrounding area, resulting in fatalities higher than any other incident in California's recorded history.

With the fire only minimally contained, the Butte County Sheriff and other first responders, many of whom were working despite losing so much in the fires, scrambled to rescue residents and recover decedents that had lost their lives in this horrific blaze.

The Response

As a Coroner, the possibility of a mass fatality is always on my mind. I was two months shy of my twentieth year working for Sacramento County, first as a deputy coroner and now as the Coroner, when the fire started. I had trained for mass fatalities but had never been involved in one.

Not surprisingly, the state mutual aid system was quickly overwhelmed and it became apparent that there was no way Butte County could handle such a large incident without help. The request was made for assistance and Sacramento County answered their call by taking on the examination and identification of fire victims at our coroner facility in Sacramento.

We quickly mobilized, and on the night of Saturday, November 10, 2018, we accepted the first twenty-one victims; each day during the next week brought more victims. Autopsies began two days later. Each victim was assessed, and the steps for identification began when each exam concluded.

The process was slow going. Butte County's Odontologist made some identifications following an urgent request to area dentists for records. Some decedents were identified through fingerprints, but these identifications were only for a small percentage of the victims that perished in the fire.

Butte County, with the help of the staff from the California Department of Justice (DOJ) and various volunteers, had started taking samples from the families of the missing - allowing for comparison using DNA testing.

It was inevitable, based on the nature of the incident, that the identification process for the majority of the fire victims would come to depend on conventional DNA testing, which would be a lengthy, time-consuming affair.

I had resigned myself to this fact until I learned that a company called ANDE, which specialized in Rapid DNA Identification, had contacted the Butte County Sheriff.

ANDE had offered to deploy a team to help with DNA identification. I was intrigued with the concept and hopeful they might be able to help speed up the process a little. We met, and the decision was made for ANDE to set up shop in the Sacramento County morgue in the hope that being onsite would make the identifications occur more quickly.

It soon became apparent that ANDE held the key to not only identifying the victims with the most degraded samples possible, but doing it much faster than I ever could have imagined.

DNA testing for victims of fires can take months or years to run at a traditional crime laboratory simply because the testing process requires many steps and sometimes the results do not produce an identification, requiring more samples to be gathered and tested.

This process takes time; time that ANDE had figured out how to reduce to a 90-minute test that was only hindered in most cases by the lack of family samples to make the comparison. Our team was galvanized by the results and scurried to get the family samples needed.

The Butte County Sheriff's team worked on outstanding family samples, the California DOJ MUPS Unit searched for records or samples that could aid us, and the California DOJ DNA Lab sent results for any family samples they had already acquired to be compared to victim samples run by ANDE.

The process that I can only describe as a whirling dervish of activity resulted in fast identifications and our unlikely team made history.

The Rapid DNA process had never been tried before in an event such as this.

A Rapid DNA Team working in a Coroner's morgue with support from a variety of sources had actually succeeded beyond my wildest expectations. The ANDE team seamlessly incorporated itself into the morgue operation

Wild Fires, continued on page 14

SELDEN EXHIBIT 6

Cynicism, continued from page 13

appropriateness of current policies and practices, as well as potential solutions to emerging problems.

If you are witnessing a lack of participation in your meetings, a lack of questions being asked, or an over-all disinterest in the topics being discussed, you have a problem that requires immediate attention.

Continuing Education

The importance of continuing education has always been recognized as an essential part of developing competent, thoughtful forensic scientists. The benefits of continuing education are easy to understand but harder to leverage.

Laboratory budget negotiations often slash funding for continuing education to the point of irrelevance. Over time, the practice comes to feel normal as employees acclimate themselves by never expecting continuing education opportunities and, therefore, not making learning an important part of their professional lives.

When employees are not motivated to seek out external learning opportunities because the associated bureaucratic requirements make it not worth the effort, a destructive cycle becomes entrenched.

Laboratory directors and supervisors should emphasize clearly-stated objectives regarding continuing education and aggressively defend its importance during budget negotiations. Set goals. Measure learning outcomes. Track progress. If continuing education is hard to come by in your organization, try being a bit more strategic about how you go about securing it for you and your employees.

Final Thought

Everyone looks for the bottom line. So, for starters, be honest.

If, for example, training is a low priority, then say so. Instead of cutting the budget and saying *there is no money*, just come out and tell your staff that training is a low priority *because* there is no money for it.

And, if you are uncomfortable meeting face-to-face with your staff, close the door and say *I am always too busy for you.* That would be honest; it would also be horrible.

If isolation and aloofness sound horrible, then don't do horrible. Fix the problem.

As managers, we tend to be both the problem and the solution. Once that is accepted, we can begin to break the cynicism cycle that plagues so many organizations today.

I happen to think that's a good thing, and it pays off in the long run.

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and took samples at the end of each autopsy to start DNA testing immediately. They worked outside the proverbial box, listening to my team, and working with DOJ and Butte County to hone the process.

From the very beginning of accepting the request for aid, I had dreaded having to wait months or years to receive identifications on the fire victims. Instead, in the first week, we began making DNA-based identifications. Three months later, 87% of the families touched by this horrendous event had closure instead of being told they had to be patient and wait longer for testing to be completed and the death certificate issued.

When your loved one is missing and may be deceased, telling someone to wait patiently is akin to torture.

ANDE had shortened the time for DNA testing and in doing so changed the way we now look at mass fatality identification.

As a Coroner, I cannot imagine handling any future incident, one that obliterates human identities as did the *Camp Fire*, without using Rapid DNA technology.

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WANTED

Publication Coordinator
Forensic Science Executive

Volunteer Position with Annual Stipend

Forensic Science Executive is seeking an enthusiastic forensic science professional to serve as our publication coordinator. Current or past experience as a forensic laboratory director or supervisor is preferred but not necessary. Strong writing skills are desired.

The incumbent may work remotely and will serve as a volunteer. An annual stipend of $500 will be paid. This individual will be responsible for planning and scheduling our publication, assisting with copy editing, coordinating the manuscripts from our writers, and other duties that become necessary as the position grows.

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