

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA,)	DOC. 170	NO. 122
)		
Plaintiff,)		
)		
vs.)	SECOND VERIFIED MOTION FOR	
)	POSTCONVICTION RELIEF	
CHRISTOPHER EDWARDS)		
)		
Defendant.)		

“No man is justified in doing evil on the ground of expediency.”

Theodore Roosevelt

COMES NOW, the defendant, Christopher Edwards, by and through his undersigned attorneys of record, and pursuant to the Nebraska Postconviction Relief Act, Neb. Rev. Stat. § 29-3001. *et seq.* and hereby moves this Court for an Order vacating or setting aside Mr. Edwards’ conviction and sentence in the above-referenced matter for the reason that there was such a denial or infringement of the Mr. Edwards’ rights during the investigation, before the trial, at the trial and on the direct appeal stages of these proceedings, such as to render the prior judgment of this Court void or voidable under the Sixth and Due Process Clause of the Fourteenth Amendments to the United States Constitution and Neb. Const. Art. I, § 3 and 11. In support of said motion, Mr. Edwards alleges and states as follows:

INTRODUCTION

1. Since December 6, 1999, until March 23, 2010, Commander David KOFOED of the Douglas County Sheriff’s Office CSI Unit was a SUPERVISORY official WITHIN the law enforcement community who serially fabricated and planted evidence in order to help assure the conviction of persons (including Mr. Edwards) that KOFOED believed were guilty. KOFOED engaged in such felonious conduct not once, not twice, but repeatedly. It was only through the fortuitous actions of a New York civilian jewelry wholesaler, Mary Martino, that it was possible to prove that KOFOED planted blood evidence against two

innocent Nebraska individuals (Livers and Sampson) and prove beyond any reasonable doubt the identities of the two guilty Wisconsin murderers (Reid and Fester). It then took an extensive and thorough investigation by the FBI, United States Attorney's Office, two determined civil rights plaintiff's attorneys, and a Cass County Special Prosecutor before KOFOED's pattern of fabricating evidence was exposed, prosecuted, and his felony conviction obtained.

2. It is sad truth that very smart attorneys and public officials inside and outside of Douglas County and state government lost sight of their legal and ethical responsibilities to not only do justice, but maintain the appearance of doing justice¹. Although KOFOED's criminal activities took place primarily WITHIN Douglas County, there was never a serious, independent, unbiased, objective, and comprehensive attempt to discover those cases where forensic evidence passing through the DoCoSO CSI Unit during KOFOED's tenure was "questionable" and should not have been relied upon in supporting a conviction.
3. Justice is not served when there is strong circumstantial evidence that incriminating forensic evidence was fabricated to obtain Mr. Edwards' conviction, the jury was not given the opportunity to assess whether the forensic evidence was fabricated, and the Douglas County Attorney's Office failed to advise Mr. Edwards' trial counsel of the circumstantial evidence of fabrication based upon the DoCoSO CSI Unit's conduct in the Stock murder investigation.
4. Justice is not served when Mr. Edwards' original trial counsel had a clear conflict of interest in a) his strong personal friendship with KOFOED, b) his professional involvement in representing KOFOED during the pre-Indictment grand jury investigation while still representing Mr. Edwards, c) his professional relationship in defending KOFOED against the state and federal criminal charges of fabricating evidence while still representing Mr. Edwards, and d) his financial interests in representing KOFOED in the pending civil rights litigation when hired by the Douglas County Board at the request and with the advice of the

¹ The one notable exception has been Cass County Attorney Nathan Cox who under very difficult circumstances has recognized the importance of finding the truth and then let the chips fall where they may.

Douglas County Sheriff and the Douglas County Attorney's Office while still representing Mr. Edwards on direct appeal.

5. This is a complicated case, but necessarily so. It has required pulling together several thousands of pages discovery information from seven criminal prosecutions and two 1983 civil rights lawsuits. Just as the State's case against Mr. Edwards was based on circumstantial evidence, so too was the special prosecutor's case against KOFOED. The unique circumstance in all these cases is that, not only was KOFOED in a position to fabricate evidence under his own name, he could also set up other DoCoSO personnel to "find" evidence that didn't exist until after KOFOED planted blood on the item in the bio-hazard or property room of DoCoSO CSI. KOFOED could then assign one of the CSI technicians to "process" the evidence and, without any direct trail of evidence back to KOFOED, DoCoSO CSI would make a miraculous discovery. As the person who put together the DoCoSO CSI "team", trained them, and made assignments he would receive praise and recognition for turning the DoCoSO CSI Unit into one of the best in the State at finding evidence that other agencies could not.
6. When KOFOED's "simple fool proof plan" began to unravel, he sought the legal assistance of his good friend and attorney, Steve Lefler. Atty Lefler coincidentally just happened to have been the defense attorney in this case and Richard Cook's case. Atty Lefler was uniquely situation to have been able to "connect the dots" because of his knowledge of the forensic evidence in these KOFOED supervised cases. When the inquiry regarding the Stock investigation focused on DoCoSO CSI personnel, KOFOED turned to Atty Lefler as his personal attorney. When the state and federal charges were filed, KOFOED again turned to Atty Lefler. DoCo Sheriff Dunning and DoCo Atty Kleine perpetuated this inherent conflict-of-interest on the part of Atty Lefler by advising the DoCo Board that the federal and state criminal charges were "unfounded." A process was then developed in which Atty Lefler would be paid by DoCo through the civil cases while also representing KOFOED in the criminal cases.

INDIVIDUALS and COURT CASES NAMED IN THIS MOTION

7. **Christopher Edwards** is the Defendant in this case. (hereafter “Mr. Edwards”)
8. **Jessica O’Grady** is the deceased in this case. Her body has never been found. There is compelling evidence that she is no longer alive. (hereafter “O’Grady”)
9. **Douglas County Board of Commissioners** is the governing body of Douglas County, Nebraska and consists of seven commissioners. It is responsible for approving the budgets of both the Douglas County Attorney’s Office and Douglas County Sheriff’s Office. Generally speaking, the DoCo Board must authorize payment of any settlements or judgments entered against Douglas County or their employees, for actions committed in the scope of their employment with Douglas County. Neb. Rev. Stat. § 23-104, Neb. Rev. Stat. § 23-112. The DoCo Board must also authorize retention and payment of fees for any attorney who may be providing legal services to an employee of Douglas County in regards to pending civil litigation against the employee. (hereafter “DoCo Board”)
10. **Patrick Bloomingdale** is a former Deputy DoCo Attorney and current DoCo Deputy Administrator. He gave a deposition in *Sampson v. Schenck et. al* on March 25, 2010, in regards to the retention of Atty Lefler to represent KOFOED in the federal civil rights cases filed by Livers and Sampson. (hereafter “DoCo Dep Admin Bloomingdale”)
11. **Don Kleine** has been the Douglas County Attorney from January of 2007 to the present date. He was previously the Chief Deputy DoCo Attorney during the tenure of Jim Jansen. In 2002-3, Mr. Jansen left his position for private practice. In January of 2003, the DoCo Board appointed Stu Dornan to be DoCo County Attorney over the application of Don Kleine. On September 12, 2003, Nebraska Attorney General Jon Bruning announced that Mr. Kleine had been hired to serve as Chief of the Criminal Division for the Attorney General’s Office. Mr. Kleine remained in that position at the AG’s Office until elected to be DoCo Attorney in November, 2006. During the events described in this motion, Mr. Kleine was acting in his official capacity, either with the Nebraska Attorney

General's Office or the Douglas County Attorney. (hereafter "Chief Dep AG Kleine" or "DoCo Atty Kleine")

12. **Leah Ann Retelsdorf** is a former Chief Deputy Douglas County Attorney. She served in that position when DoCo Atty Kleine took office in January of 2007. DoCo Atty Retelsdorf was the lead prosecutor in the pre-trial, trial, and sentencing proceedings conducted in the case against Mr. Edwards. On May 5, 2009, DoCo Atty Retelsdorf was appointed to the Douglas County District Court bench by Governor Heineman with the support of DoCo Atty Kleine. (hereafter "DoCo Atty Retelsdorf") All actions by Judge Relelsdorf referenced in this motion were in her official capacity as DoCo Atty and not as a DoCo district court judge.
13. **Diane M. Carlson** is a Deputy Douglas County Attorney and has been lead counsel in both *Livers v. Schenck, et al*, and *Sampson v. Schenck et al* beginning when Douglas County and their employees, including KOFOED, were named as defendants in June of 2009. DoCo Atty Carlson provided advice to the DoCo Board and signed letters on behalf of the DoCo Board in regards to the hiring of Atty Lefler to represent KOFOED in *Livers v. Schenck et al*, and *Sampson v. Schenck, et al*. DoCo Atty Carlson has attended numerous depositions in regards to the pending *Livers* and *Sampson* civil rights cases. Specifically, DoCO Atty Carlson attended a deposition of KOFOED taken on February 11, 2009, in the *Livers v. Schenck et al*. civil case as a representative of the DoCoSO. (hereafter "DoCo Atty Carlson")
14. **Tim Dolan** is a Deputy Douglas County Attorney and has been co-counsel with DoCo Atty Carlson in both *Livers v. Schenck, et al*, and *Sampson v. Schenck et al*. (hereafter "DoCo Atty Dolan")
15. **Jane Doe** is a pseudonym for an attorney who previously worked at the Douglas County Attorney's Office, then was hired as an assistant US Attorney by USA Stecher. She has absolutely nothing to do with any of these cases. (hereafter "DoCo Atty Doe" or "Asst USA Doe")

16. **Nathan Cox** was Cass County Attorney during the *Henk, Livers, Sampson, Reid, Fester*, and *KOFOED* criminal prosecutions. He continues to hold that office at the present time. (hereafter “CCo Atty Cox”)
17. **Joe Stecher** was US Attorney for the District of Nebraska during the events alleged in this motion. He served as lead attorney in regards to the FBI investigation, grand jury indictment, and prosecution in *USA v. KOFOED*. Mr. Stecher is now in private practice and a part-time county attorney in Harrison, Sioux County, Nebraska. (hereafter “USA Stecher”)
18. **Maren Chaloupka** is an attorney in private practice from Scottsbluff, Nebraska, and lead attorney in the pending federal civil rights case, *Sampson v. Schenck et al.* (hereafter “Atty Chaloupka”)
19. **Locke Bowman** is an attorney and law professor from Chicago, Illinois and is the lead attorney in the pending federal civil rights case, *Livers v. Schenck et. al.* (hereafter “Atty Bowman”)
20. **Steve Lefler** is an attorney in private practice from Omaha, Nebraska. He was lead attorney for Mr. Edwards at trial and co-counsel on appeal in this case. He was also lead attorney for KOFOED in the criminal cases of *USA v. KOFOED*, *State v. KOFOED*, and the attorney retained by DoCo Board to represent KOFOED in the federal civil rights cases of *Livers v. Schenck et. al.*, and *Sampson v. Schenck et. al.* Atty Lefler appeared at the deposition of KOFOED on February 11, 2009, taken by Atty Bowman as KOFOED’s personal attorney. Atty Lefler’s appearance on behalf of KOFOED was before there were ANY criminal charges filed or any DoCo employees had been named as defendants in any of the civil rights cases². (hereafter “Atty Lefler”)
21. **Brian Munnelly** is an attorney in private practice in Omaha, Nebraska. He has been Mr. Edwards’ lead attorney in all the postconviction proceedings in this case, including the postconviction appeal to the Nebraska Supreme Court. (hereafter “Atty Munnelly”)

² Atty Lefler was lead attorney in another criminal case in which KOFOED’s handling of evidence is an issue, *State v. Cook*. Cook has recently sought postconviction relief based, in part, on the conduct of KOFOED and Atty Lefler.

22. **Jerry Soucie** is an attorney in private practice from Lincoln, Nebraska. He was retained in December of 2012, to serve as co-counsel for Mr. Edwards in these postconviction proceedings. Atty Soucie was previously employed at the Nebraska Commission on Public Advocacy from August 1996 until October 31, 2012. During his tenure at NCPA, Atty Soucie was lead attorney in *State v. Henk* and *State v. Sampson*. (hereafter “Atty Soucie”)
23. **Clarence Mock** is an attorney in private practice with offices in Oakland and Omaha, Nebraska. He was appointed Special Cass County Attorney and was lead attorney for the State in *State v. KOFOED*. (hereafter “Atty Mock”)
24. **Kim Sturzenegger** is an attorney in private practice from Lincoln, Nebraska. She has been the lead attorney for the Cass County defendants in the 1983 civil rights cases of *Livers v. Schenck et al*, and *Sampson v. Schenck et al*. (hereafter “Atty Sturzenegger”)
25. **John Bruning** has been the Nebraska Attorney General since he was elected in 2002. AG Bruning hired Dep AG Kleine to be Chief of the Criminal Division in September of 2003. (hereafter “AG Bruning”)
26. **Frederick J. Coffman** is a Deputy Nebraska Attorney General. He has been lead counsel for the Nebraska State Patrol defendants in the civil rights cases of *Livers v. Schenck et al*, and *Sampson v. Schenck et al*. (hereafter “Dep AG Coffman”)
27. **David KOFOED** was DoCoSO CSI Commander from December 6, 1999, until March 23, 2010 when he was fired following his conviction for tampering with evidence. (hereafter “KOFOED”) He was the criminal defendant in:
 - a. *State v. KOFOED*, Cass County District Court CR 09- 40. This is the criminal case where KOFOED was tried and convicted of tampering with evidence in violation of Neb. Rev. Stat. 28-922 in regards to blood evidence he claimed to have found as part of the Stock murder investigation and state prosecutions of Livers and Sampson.
 - b. *USA v. KOFOED*, United States District Court 8:09 CR 142. This is the federal criminal case in which KOFOED was charged with four counts of violation of federal law for intentionally, knowingly, or with a reckless

disregard for the truth falsifying the dates and contents of several official DoCo CSI reports relied on in the prosecution of Livers and Sampson.

28. **Tim Dunning** has been the Sheriff of Douglas County since 1995 until the present date. (hereafter “DoCo Sheriff Dunning”)
29. **Dean Olson** was a Douglas County Sheriff’s Office Captain until he retired in April of 2008. (hereafter “Cpt (ret.) Olson”) In 2002, Cpt (ret.) Olson was placed in charge of the Criminal Investigations Bureau which had 4 divisions, 44 employees, and a \$2.8 million dollar budget. One of those divisions was the CSI unit where KOFOED was the CSI Commander.
30. **Donald Veys, C.L. Retelsdorf, Christine Gabig, Josh Connelly, Williams Kaufold, Michelle (Steele) Potter, Darnell Kush, Liz Severson, Stacy Hill, J Tinsley** were DoCoSO consulting crime scene analysts, CSI forensic scientists, CSI technicians, or DoCoSO CIB Investigators during the events set forth in this motion. They were under the direct supervision of KOFOED or KOFOED’s superior, DoCoSO Cpt (ret.) Olson. None of these DoCoSO CSI individuals are defendants in any of the pending civil rights lawsuits filed by Sampson and Livers. (hereafter “CSI Veys, CSI Retelsdorf, or CSI Gabig, etc.”)
31. **John Ferak** was a reporter with the Omaha World Herald. He reported extensively on the Sampson, Livers, Reid, Fester, and KOFOED prosecutions and had several conversations with KOFOED regarding the cases. (hereafter “OWH Rpter Ferak”)
32. **Sgt. Sandra Weyers** and **Inv. Earl Schenck** were the Cass County Sherriff Office employees involved in the Stock homicide investigations in which Sampson, Livers, Reid, and Fester were all charged at the same time with two counts of murder. They are now civil defendants in the *Livers* and *Sampson* civil right cases. (hereafter “CCoSO Sgt. Weyers” and “CCoSO Inv. Schenck”)
33. **Inv. William Lambert** and **Inv. Charles O’Callaghan** were the Nebraska State Patrol employees involved in the Stock homicide investigations in which Sampson, Livers, Reid, and Fester were all charged at the same time with two counts of murder. They are now civil defendants in the *Livers* and *Sampson* civil right cases. (hereafter “NSP Inv. Lambert” and “NSP Inv. O’Callaghan”)

34. **Matt Livers** lived in Lincoln, Nebraska and his cousin, **Nick Sampson**, lived in Palmyra, Nebraska in April 2006. They were both charged with the first degree murders of Wayne and Sharmon Stock alleged to have taken place on April 17, 2006. Both were innocent of all charges. (hereafter “Livers” and “Sampson”) There were criminal defendants and are civil plaintiffs in the following cases:
- a. *State v. Livers*, Cass County District Court Case CR06 – 56 is the criminal case where Livers was charged with two counts of first degree murder. The charges were dismissed “without prejudice” on December 5, 2006.
 - b. *Livers v. Schenck, et al.*, US Dist of Neb 08:08 CV 107 is the federal civil rights case where Livers has sued various law enforcement officials for violation of his federal constitutional rights. The claim of “qualified immunity” by several of the defendants has been rejected by the Court of Appeals for the Eighth Circuit. The case is still pending and set for trial in October 2013.
 - c. *State v. Sampson*, Cass County District Court Case CR06 – 56 is the criminal case where Livers was charged with two counts of first degree murder. The charges were dismissed “without prejudice” on December 5, 2006.
 - d. *Sampson v. Schenck, et al.*, US Dist of Neb 08:07 CV 155 is the federal civil rights case where Sampson has sued various law enforcement officials for violation of his federal constitutional rights. The claim of “qualified immunity” by several of the defendants has been rejected by the Court of Appeals for the Eighth Circuit. The case is still pending and set for trial in October 2013.
35. **Jessica Reid** and **Greg Fester** are two individuals from Beaver Dam, Wisconsin. On April 16, 2006, Jessica Reid and Greg Fester stole a pickup truck, 12 gauge shotgun, and shells from Ryan Krenz, headed south and stole another .410 shotgun from a residence in Guthrie Center, Iowa. (hereafter “Reid” and “Fester”) On April 17, 2006, they entered through the back window of the Wayne and Sharmon Stock home in rural Murdock, Nebraska. They went upstairs to the bedroom where they shot both Wayne and Sharmon in the head

with the 12 gauge 1 oz. slugs (Wayne and Sharmon by Fester) and the .410 shotgun (Wayne by Reid). The stolen Krenz pickup was recovered in Louisiana on April 19, 2006. Reid and Fester are not innocent and pled guilty to two counts of second degree murder and received consecutive life sentences. See, *State v. Reid*, Cass County District Court Case CR06 - 91, affirmed on appeal at *State v. Reid*, 274 Neb. 780 (2009) *State v. Fester*, Cass County District Court Case CR06 - 92, affirmed on appeal at *State v. Fester*, 274 Neb. 786 (2009)

36. **Ivan Henk** was charged with the first degree murder of Brandon Gonzalez committed on January 7, 2003. The Information included a 1(d) aggravator making Henk eligible for the death penalty. (hereafter “Henk”) Henk later pled guilty to first degree murder without the 1(d) aggravator and was sentenced to life in prison. *State v. Henk*, Cass County District Court # CR03 - 104. Henk subsequently filed a postconviction motion alleging that KOFOED had planted blood evidence found in a dumpster and that his guilty plea should be set aside prepared by Atty Soucie. The district court’s decision to deny an evidentiary hearing was reversed by the Nebraska Supreme Court in a memorandum opinion on July 18, 2012. See, *State v. Henk*, Neb. S.Ct. S-09-1106. Henk is now represented by Greg Pivovar and Atty Soucie is no longer attorney of record.
37. **Melissa Helligso** was a DNA analysis with UNMC DNA Lab. (Hereafter “M. Hilligso”). She was also a part-time DNA consultant with the DoCoSO CSI Unit during the times alleged in this motion.

PROCEDURAL HISTORY (Edwards case)

38. On June 12, 2006, a Complaint was filed in Douglas County Court charging Mr. Edwards with Second Degree Murder and Use of a Weapon to commit a Felony. The preliminary hearing was ultimately waived.
39. On June 14, 2006, a Two Count Information was filed in Douglas County District Court charging Mr. Edwards with Second Degree Murder and Use of a Weapon to Commit a Felony in connection with the disappearance and presumed death of Jessica O'Grady.
40. The Honorable J. Russell Derr presided over a jury trial on the dates of March 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 and 31, 2007.
41. On March 31, 2007, a jury found Mr. Edwards guilty on both counts set forth in the Information.
42. On June 15, 2007, Mr. Edwards was sentenced to a term of eighty years to life imprisonment on the charge of Second Degree Murder, and a consecutive term of twenty years to life on the charge of Use of a Weapon to Commit a Felony.
43. On June 15, 2007, a timely Notice of Appeal was filed on behalf of Mr. Edwards.
44. On July 10, 2009, Mr. Edwards' convictions and sentences were affirmed by the Nebraska Supreme Court. *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).
45. On July 21, 2009, the Nebraska Supreme Court issued its mandate.
46. On July 28, 2009, Judge Derr entered judgment on the record of the district court pursuant to the Nebraska Supreme Court mandate.
47. On July 13, 2010, Mr. Edwards filed a motion for postconviction relief with Atty Munnelly as his attorney.
48. On October 12, 2010, DoCo Atty Kuhse and Benson moved to quash Mr. Edwards' subpoena directed to the University of Nebraska Medical Center and asserted that:

“[T]here is no indication that the Defendant alleges that the State has withheld information or evidence that would allow him to seek out discovery in this matter.”

49. The facts and allegation refuting this assertion by the DoCo Attorney's Office in ¶ 48 *ante* are set forth in ¶ 223-228 *post* of this motion.
50. On November 17 2010, DoCo Atty Kuhse moved to dismiss Mr. Edwards' postconviction motion without a hearing. He alleged, in substance, that Mr. Edwards knew of the issues and could have raised them on direct appeal, or in the alternative, that Mr. Edwards was procedurally barred from raising the issues.
51. On December 13, 2010, Mr. Edwards filed a motion for leave to file an Amended Motion for Postconviction Relief. A copy of the proposed 1st Amended Motion was attached and included supporting motions and orders from the *Henk* and *KOFOED* criminal cases, as well as reports from the Edwards' investigation marked as "Exhibits A thru E, and 1 thru 9".
52. On August 2, 2011, the district court denied Mr. Edwards' postconviction motions without an evidentiary hearing.
53. On August 25, 2011, Atty Munnely filed a timely notice of appeal to the Nebraska Supreme Court on behalf of Mr. Edwards.
54. On May 4, 2012, the Nebraska Supreme Court affirmed the conviction of *KOFOED* for fabricating and planting evidence in the Stock murder investigation. See, *State v. KOFOED*, 283 Neb. 767 (2002).
55. On July 18, 2012, the Nebraska Supreme Court in a memorandum opinion reversed the denial of an evidentiary hearing in *State v. Henk*, Neb. S.Ct. S-09-1106.
56. On September 28, 2012, the Nebraska Supreme Court entered an order reversing this court's order denying an evidentiary hearing for Mr. Edwards. See, *State v. Edwards*, 284 Neb. 382 (2012).
57. On November 14, 2012, judgment was enter on the mandate in this case.
58. Mr. Edwards is presently confined to the Tecumseh State Correctional Center under the jurisdiction of the State Department of Correctional Services as the result of his conviction in this case. By reason of his custody status, this court has jurisdiction to consider this motion for postconviction relief.

MR. EDWARDS' PRE-TRIAL PROCEEDINGS

59. On June 23, 2006, Mr. Edwards filed a written not guilty plea.
60. On June 30, 2006, Atty Lefler entered his appearance and has remained the lead counsel for Mr. Edwards during all pre-trial, trial, and sentencing proceedings.
61. DoCo Atty Retelsdorf and DoCo Atty Kuhse were lead attorneys from initial charging and pre-trial proceedings.
62. On October 6, 2006, CCo Atty Cox dismissed “without prejudice” the murder charges against Sampson.
63. On December 6, 2006, CCo Atty Cox dismissed “without prejudice” the murder charges against Livers.
64. These events involving Sampson and Livers were widely reported in the Omaha World Herald and the various Douglas County area TV news stations. The news media had also reported that DoCoSO CSI had found blood in Will Sampson’s vehicle during the Stock murder investigation.
65. Atty Lefler knew or should have known from the police reports received as part of Mr. Edwards’ pre-trial discovery that:
 - a. On May 17, 2006, at 0005 hrs, CSI Gabig notified KOFOED (off-duty) of an apparent homicide crime scene at 2546 N 130th St., Omaha, NE. This location was the home of Edwards aunt, Jane Edwards, and Christopher Edwards had a bedroom in the basement. (hereafter “Edwards’ residence.”) KOFOED advised CSI Gabig and CSI Connelly to conduct the forensic exam at the crime scene. KOFOED advised CSI Retelsdorf (off-duty) to report to the Edwards’ residence to assist. (Disc 111568-70³).
 - b. The timeline of events for the DoCoSO CSI Unit on May 17, 2006, relating to the Edwards’ residence was as follows:
 - i. At 0040 hrs, CSI Connelly arrived at the Edwards’ residence where his initial forensic services were confined to videotaping the

³ All discovery documents provided by the DoCo Atty’s Office were bate stamped. To assist the parties and the court, the specific bate stamp number have been included in this motion.

scene, taking photographs of the location and vehicles, and diagramming the location. (Disc 111547-549; 111549)

- ii. At 0042 hrs, KOFOED had arrived at the Edwards' residence and along with the other DoCoSO CSI personnel were briefed by DoCoSO Homicide Lt Hayes. CSI Gabig and KOFOED made the initial observations of the suspected crime scene in the basement bedroom. KOFOED made all of the assignments regarding crime scene processing. (Disc 111550-9, 111568-70)
- iii. KOFOED, CSI Gabig, and CSI Retelsdorf found blood on the headboard, nightstand, clock radio and ceiling above the bed in Mr. Edwards' bedroom. There were multiple swabs and cuttings from the walls, ceiling, and other locations in the bedroom. (Disc 111552-4)
- iv. CSI Connelly and CSI Gabig took videos and photographs of the bedroom and closet area, but did not report finding any sword. (Disc 111553)
- v. KOFOED and CSI Gabig found a large bloodstain on the underside of the mattress (S551-36⁴) (Disc 111552)
- vi. KOFOED searched the garage and did not find any blood trail. He did find a blue towel (S551-11) and green towel (S551-13) with apparent blood in a trash bag (S551-3) in the garage. (Disc 111569-70)
- vii. CSI Gabig opened and searched the trunk of the Honda automobile and collected dark debris from the tire⁵ (S551-21). (Disc 111556)

⁴ The procedure followed by DoCoSO CSI unit in identifying evidence seized from a suspected crime scene was to use the DoCo SO # of the particular CSI who found or seized the item and then a dash following by the number of the item seized. For example, the mattress from the bedroom (S551-36) was seized by CSI Gabig (551) and logged in as item # 36. Hence the identification number is 551-36. If swabs or swatches were collected from a larger item, such as the mattress, then the swab or swatch would be identified by the CSI tech processing the larger item with a new number. These DoCoSO evidence numbers are included in the allegations in this motion for the purposes of clarity and to assist the parties and the court.

⁵ There is some indication that this tire was damaged or flat at the time of the search.

- viii. The mattress (S551-36) was transported to DoCoSO CSI where it was placed in the biohazard room. (Disc 111721, 111716)
 - ix. At 1100 hrs, CSI Hill transported S549-1 (swatch from mattress - S551-36), S551-25 (paint cutting from west wall), S551-26 (paint cutting from south wall, S551-27 (paint cutting from ceiling) to UNMC DNA Lab for DNA testing. (Disc 111579, 111724) CSI Hill arrived at 1150 hrs at UNMC DNA Lab and these items were then identified by UNMC as # 799-A, 799-B, 799-C, and 799-D. (UNMC book p. 26, 36-45)
 - x. At approximately 1100hrs, all DoCoSO CSI personnel had left the scene at the Edwards' residence and went to DoCoSO CSI Hq.
- c. At 2100 hrs on May 22, 2006, there was a second search at the Edwards residence pursuant to a search warrant. KOFOED, CSI Kaufold, CSI Williams, and DoCoSO Inv. Tinsley were present and assisted in the search. (Disc 112393-5, 112396-7, 111650-2) DoCoSO Inv. Rinn logged in as evidence several knives and a set of swords (S363-18) reportedly found by Dep. Walter (S297) at 2345 hrs in the NE bedroom closet. (Disc 111761) The subsequent timeline for processing of the sword is as follows:
- i. At 0000 hrs on May 31, 2006, CSI Gabig processed various items that might be possible weapons that were all included in S363-18. This included smaller knives and two 18 ½ inch swords. On one of the swords, CSI Gabig reported a positive presumptive blood reaction. This sword from S363-18 was marked with an "X" on the blade and renumbered as S551-68. The sheath to S551-68 was renumbered as S551-69.
 - ii. At 900 hrs on May 31, 2006, Inv. Tinsley met with KOFOED and was directed to take the sword (S551-68) and sheath (S551-69) to the UNMC DNA Lab. Inv. Tinsley left DoCoSO and went to OPD

- to pick up other items⁶ that had been collected during the investigation that would also be taken to UNMC DNA Lab. (Disc 112445-6)
- iii. At 1140 hrs, M. Helligso signed for receipt of these items at UNMC DNA Lab. (UNMC book p. 31)
 - iv. At 1325 hrs on June 6, 2006, M. Helligso released S551-68 and S551-69 to CSI Kaufold. (UNMC book p. 31)
 - v. At 900 hrs on June 8, 2006, KOFOED requested that CSI Retelsdorf process the sword (S551-68) a second time. (Disc 111693-4)
- d. On May 17, 2006 at approximately a Honda automobile (lic #PNT663) used by Christopher Edwards was seized from the Edwards' residence and transported to DoCoSO CSI. (hereafter "Honda automobile⁷"). DoCoSO CSI personnel were solely responsible for the search and evidence collection of the Honda automobile.
- e. The timeline of events on May 17, 2006, relating to the Honda automobile and its contents was as follows:
- i. At 1050 hrs DoCoSO CSI Connelly and CSI Retelsdorf began a five hour and forty minute search of the Honda automobile. (Disc 111727-8, 111575-8) The items relevant to this motion seized by CSI Connelly⁸ were as follows:
 - 1. S005-6 (Truper Shovel, yellow handled, recovered from back seat of suspect's vehicle) (Disc 11575-8)
 - 2. S005-7 (Hedge shears recovered from back seat of suspect's vehicle) (Disc 111575-8)

⁶ Inv. Tinsley also submitted DoCo EV 1 thru 10. These items were not significant at time of trial nor in the resolution of this motion for postconviction relief. (UNMC book p. 32-3)

⁷ There was a second Honda Accord automobile (lic # PLG 985) used by Jane Edwards that was seized and processed by the DoCoSO CSI Unit. Nothing was found. This Honda Accord (PLG 985) was not an issue in the original trial nor is it in this postconviction motion.

⁸ Additional items seized that are not an issue in this motion were S005-1 (White box – rear seat with bottles, receipts, etc); S005-2 (Wilson tennis racket); S005-3 (White box – contents of front seat compartment); S005-4 (Clear blue box w/ Pringles containers); S005-6; S005-8 (Petri dish containing dirt from back seat of vehicle); S005-9 (One pair LARGE blue slippers); S005-10 (Misc items from trash can in garage at suspect's residence)

- ii. At 1630 hrs, CSI Connelly and Retelsdorf's search of the Honda automobile ended. (Disc 111578)
 - iii. From late afternoon of May 17, 2006, the mattress (S551-36) with a very large blood stain, the Honda automobile, and Truper shovel (S005-6) and hedge shears (S005-7) remained at the DoCoSO CSI Unit where KOFOED had unrestricted access from the time of seizure by CSI Connelly and Retelsdorf until KOFOED made the processing assignment to CSI Steele on May 24, 2006 as describe in ¶ 65 (j) *post*.
- f. The timeline for events on May 18, 2006, regarding the Honda automobile was as follows:
- i. At 700 hrs, CSI Gabig examined for more than three hours the debris she had collected from the tire in the trunk of the Honda automobile (S551-21) and the Truper shovel (S005-6) recovered by CSI Connelly the previous afternoon⁹. CSI Gabig observed that the handle the Truper shovel (S005-6) appeared to have been recently broken off. There was dirt and grass adhering to the entire length of the shovel. The debris from the damaged tire in the trunk (S551-21) was checked for blood and was presumptively “negative.” (Disc 111598-600)
 - ii. At 730 hrs KOFOED directed CSI Kaufold to “complete the processing” of the Honda automobile. KOFOED SPECIFICALLY told CSI Kaufold to “concentrate on the trunk and rear exterior of the suspect’s vehicle.” CSI Kaufold then located “what appeared to be blood on the black colored, upper rubber trunk gasket” and on the vehicle’s metal frame inside the trunk. The examination took two and one half hours. The items seized by CSI Kaufold¹⁰ were as follows:

⁹ CSI Gabig also examined a pair of scissors and some dirt in a petri dish during this examination. Nothing of interest was found on either item and they are not at issue in the postconviction motion.

¹⁰ Additional items seized by law enforcement that are not at issue in this postconviction motion were S805-3; S805-4; S805-5 (Disc 111737); S805-6 thru S805-11 (Disc 111739); and S805-12 (Disc 111740)

1. Black colored rubber trunk gasket from Honda (PNT663) (S805-1)
 2. Cut grey colored section of metal from upper interior trunk frame of Honda (PNT663) (S805-2)¹¹
 3. License plate PNT663 containing suspected blood¹². (Disc 111601-3, 111624-6, 111735)
- iii. At 1035 hrs KOFOED told CSI Severson to vacuum for trace evidence from the Edwards' Honda automobile. (Disc 111610-1)
 - iv. At 1300 hrs, KOFOED signed out the trunk gasket (S805-1), cut grey section of trunk metal (S805-2), and license plate PNT663 from property. (Disc 111735)
 - v. At 1400 hrs (one hour later) KOFOED PERSONALLY took the rubber gasket (S805-1), metal cutting from trunk (S805-2), and license plate PNT663 removed from the Edwards' vehicle and transported them to the UNMC DNA Laboratory for swabbing and DNA testing.
 - vi. At 1430 hrs, M. Helligso swabbed items S805-1 and S805-2. These swabs were identified by UNMC # 799-E and 799- F. (UNMC book p. 28, 49) The UNMC Book indicates that a photo was taken of 799-F, but there is no photo in the UNMC book of this item.
 - vii. At 1440 hrs, M. Helligso returned S805-1 and S805-2 to KOFOED. (UNMC book p. 28)
 - viii. At 1615 hrs KOFOED signed items S805-1, S805-2, and license plate PNT663 back into DoCoSO property. (Disc 111612-3, 111735)
- g. At 800 hrs on May 19, 2006, KOFOED told CSI Kaufold to complete processing of the Honda automobile. CSI Kaufold collected items S805-6

¹¹ There was a dramatic picture of KOFOED laying in the trunk of the Honda automobile photographing the location of this stain admitted at Mr. Edwards trial and cited by DoCo Atty Kleine during closing argument.

¹² This item was apparently NOT given a property number.

thru 11 and took latent print impressions from the vehicle¹³. (Disc 111624-6)

- h. On May 22, 2006, the timeline of events is as follows:
- i. At 1300 hrs, KOFOED checked the hedge shears (S005-7) out of property for the purposed of taking them to UNMC DNA Lab. (Disc 111386-7)
 - ii. At 1410 hrs, M. Helligso collected a swab from right handle of S005-7 that was hgb + spot which was identified at UNMC # 799-G. KOFOED was present during the processing. (UNMC book p. 29, 50)
 - iii. At 1412 hrs, M. Helligso returned the hedge shears (S005-7) back to KOFOED. (UNMC book p. 29)
 - iv. At some point, KOFOED returned S005-7 to DoCoSO property. (Disc 111643-4)
- i. At 300 hrs on May 23, 2006, CSI Gabig conducted an examination of suspected paint transfer from a section of the rear plastic bumper (S805-5) of the Honda automobile¹⁴. (Disc 111656-9)
- j. At 800 hrs on May 24, 2006, KOFOED assigned CSI Steele to process the hedge shears (S005-6) and shovel (S005-7)¹⁵. CSI Steele took photographs of both S005-6 and S005-7. In her two and a half hour examination, Steele collected the following:
- i. Swab from right handle of shovel (S005-7) marked as (S020-1)
 - ii. Swab from right handle of shovel (S005-7) marked as (S020-2)
 - iii. Swab from yellow handle section of hedge shears (S005-6) marke as (S020-3)
 - iv. Swab from metal handle of hedge shears (S005-60 marked as (S020-4) (Disc 111662-4)

- k. On May 30, 2006, the timeline of events was as follows:

¹³ None of this evidence was at issue at trial, nor is it an issue in this postconviction motion.

¹⁴ None of this evidence was at issue at trial, nor is it an issue in this postconviction motion

¹⁵ NOTE: KOFOED was instructed CSI Steele to examine the hedge shears AFTER he had checked them out of property, AFTER they had been inspected and swabbed by M. Helligso, and AFTER he had custody of the hedge shears on the trip from UNMC to DoCoSO CSI.

- i. At 830 hrs, KOFOED transported items the swabs collected by CSI Steele on May 24, 2006 from the shovel and hedge shears (S020-1 thru 4), blue towel seized by KOFOED on May 17, 2006 (S551-11), lime green towel seized by KOFOED on May 17, 2006 (S551-13), to the UNMC DNA Lab.(Disc 111679-9)
 - ii. At 910 hrs, M. Helligso signed for receipt of these times. (UNMC book p. 30)
- l. At some point between May 26, 2006, and June 20, 2006, KOFOED became aware that UNMC DNA Lab had only developed a “partial” profile from the metal frame from inside of the trunk that KOFOED had transported to UNMC on May 18, 2006 and was swabbed by M. Helligso (S805-2). See, ¶ 65(f)(v-vii) *ante*.
- m. At 900 hrs on June 20, 2006, the timeline of events was as follows:
 - i. KOFOED transported the cut metal from trunk of Honda automobile item (S805-2) to UNMC DNA Lab where M. Helligso swabbed for suspected blood. (Disc 111700-3)
 - ii. The UNMC DNA book reflects that at 926 hrs, M. Helligso received from KOFOED items (S020-2H thru 13H, and 15H – blood lifts from headboard, and S020-1C thru 10C – swabs from the headboard). (UNMC book at p. 34) There is not a typical initial receipt of evidence in the UNMC book, however at p. 46 it does indicate that on “062006 A second swab was obtained due to partial profile obtained from first swab.” (UNMC # 799 - E¹⁶ (& E2)) UNMC book p. 46)
 - iii. KOFOED then transported the cut metal piece (S805-2) back to the DoCoSO property room for storage. In addition, KOFOED transported swabs from the ceiling at the Edwards’ residence (S020-1C thru 10C) and swabs from the headboard of the bed (S020-2H thru 13H, S020-15H) to UNMC DNA Lab for testing.

¹⁶ NOTE: The UNMC book does not include the results for the “partial” profile obtained from the 1st swabbing on 5/18/06 by M. Helligso. The results reported out by UNMC DNA Lab are for the second swabbing on 6/20/06 where item S805-2 had been in KOFOED’s sole possession on several occasions.

66. PCR-STR DNA testing at the UNMC DNA Lab of items of which KOFOED had direct access as set forth above that were found to contain blood matching the DNA profile of O'Grady were UNMC Lab # 799-E#2 (swab from metal cutting from trunk (S805-2)), 799-F (swab from gasket on trunk (S805-1)), 799-G (swab of handle on hedge shears (S005-7)) 799-H (blue/teal towel (S551-11)), 799 – I#2 (lime green towel (S551-13)) 799-L (swabs of shovel handle (S020-1 and S-020-2)), 799-M (blade of knife/sword (S551-68)), 799-M (handle of knife/sword (S551-69)), 799-Q thru 799-CC (swabs from the ceiling at the Edwards' residence (S020-1C thru 10C)), 799-DD thru 799-NN (swabs from the headboard of the bed (S020-2H thru 13H, S020-15H)). See, UNMC DNA rpt dtd September 11, 2006 by M. Helligso and Dr. Wisecarver.
67. On or about October 30, 2006, Atty Lefler took the deposition of KOFOED in Mr. Edwards' case. Atty Lefler knew, or should have known, about the timeline of events and DNA testing results as set forth in ¶¶ 65-66 *ante*.
- a. In addition, Atty Lefler knew, or should have known generally, about DoCoSO CSI Unit's involvement in the discovery of blood in Will Sampson's vehicle, the charges filed against Livers, Sampson, Reid, and Fester, and then the recent dismissal of the charges against Livers and Sampson¹⁷.
 - b. In the deposition taken in Mr. Edwards' case, Atty Lefler stated and/or questioned KOFOED as follows (emphasis added):
 - i. Q: Dave, I **always feel awkward interviewing you**, cross-examining you, because **we've become friends**. I've used you. I'm a special prosecutor, but we both have a job to do and I'm sure you understand that. A: Yes. (4:12-6)
 - ii. Q: While **I'm positive that the answer is no**, I will ask you: Are you under the influence of any drugs or medication that would prevent you from understanding what's going on her today? A: No. (5:16-20)

¹⁷ It is unknown at this time if Atty Lefler had specific direct knowledge regarding the Stock investigation in either a non-privileged communication with KOFOED as his good friend, , or a privileged attorney-client communication with KOFOED as a client.

- iii. Q: And I'm **embarrassed to ask this question because we are friends**, but this is a murder investigation: Have you before been reprimanded by either the OPD or the sheriff's department while you've been in their employ? A: Yes." (5:21-25) KOFOED then testified that he received a written reprimand for using DoCoSO email to publicly support DoCo Atty Kleine in 2002-3 for appointment as DoCo Attorney in a letter to the Omaha World Herald. (6:1-11)
- iv. KOFOED describe the protocol for collection of evidence from a crime scene, particularly noting when processing a car, and stated that protective clothing would be worn, gloves would be changed often because of a worry about "cross-contamination" issues. (10:8-11:3) KOFOED and the other DoCoSO CSIs left the scene at about 9:30 in the morning. (11:10-12)
- v. Atty Lefler asked about DoCoSO CSI looking through the closets during the first search and whether KOFOED ever saw a sword. (12:3-21) KOFOED denied looking in the bedroom closet, but claimed that CSI Connelly did. (13:2-12)
- vi. KOFOED described the protocol when leaving the crime scene and that the CSI personnel would make sure all of the biological evidence and gloves have been packed up. (14:1-15:7)
- vii. Q: And, again, **I think I asked you this and I apologize if I did, my memory is failing me here**, but did you conduct the presumptive blood test on any items in the garage? A: There's a couple of areas, I believe on the floor, that we did use phenolphthalein on and I got no reaction whatsoever." (16:24-17:5)
- viii. Atty Lefler asked whether police officers that had been at the scene before CSI might have contaminated or "cross-contaminated" the scene. KOFOED noted that officers Deshler, Arndt, and Norby

weren't wearing gloves, but that after CSI arrived, they just became observers. (17:19-19:8)

- ix. Atty Lefler told KOFOED he was “**not trying to be tricky or cute with**” KOFOED about two of the other officers (Deshler and Nordby) having moved sheets or bedding before the search warrant was issued. (19:10:20)
- x. Atty Lefler stated that, “**I know you to be an experienced individual in this area**” and asked about any concerns when bedding was moved by someone not wearing gloves. KOFOED testified that the problem with not wearing gloves because of the sensitivity of DNA testing that a person could leave your own DNA and deposit it into a scene. (20:1-8)
- xi. Atty Lefler told KOFOED, “**Thank you, especially for bearing with me as I jump from topic to topic, . . .**” (20:9-12)
- xii. KOFOED volunteered that when bagging evidence the CSI personnel would change gloves regularly because of the danger of “cross-contamination” issues. (23:8-22)
- xiii. KOFOED confirmed that evidence seized from the suspected crime scene went from Mr. Edwards’ bedroom to their van to the CSI lab and remained in the possession of CSI. (24:5-8)
- xiv. KOFOED testified that during his search process at a suspected crime scene he would note what he did NOT find because, “I was doing that to both look to see if I could find something, but also taking note that I didn’t find things, and that’s significant, you know, we’re trying to find the truth and find facts, and I want to identify or document not only what I do locate and find of significance, but what also is not there¹⁸.” (25:1-12)

¹⁸See allegations at ¶ 141-70 *post*, regarding KOFOED’s conduct in the Stock murder investigation in which he failed to note in his report that after he swabbed under the dash with the filter paper, CSI Retelsdorf swabbed repeatedly with a cotton swab and had negative results for the presumptive presence of blood.

- xv. KOFOED testified that after the search at the suspected crime scene, DoCoSO CSI had developed, in the words of Atty Lefler, a “working hypotheses or theories” regarding the blood in the bedroom being evidence of a murder. (25:13-26:15)
- xvi. Q: Okay. **I don’t remember, I should, so I’m a little embarrassed,** but did you take the mattress that first time? A: Yes. (27:3-50)
- xvii. In regards to the volume of blood necessary to leave a stain of the size found on the mattress, Atty Lefler asked, “**Is there a book that a scientifically challenged individual like myself could go to to find what that recipe is?**” (27:21-23) KOFOED cited to a paper by Henry Lee.
- xviii. KOFOED acknowledged that things, such as cleaners, can destroy or degrade DNA. However, he testified that when there is a visible stain, you would ordinarily get a DNA profile. (30:17-31:3)
- xix. Q: . . . **Anything of significance concerning the blood on the mattress that I haven’t been smart enough to ask you about** that you think I should know about? A: No, not that you haven’t asked me about. Q: Anything else about the execution of the first search warrant **they you feel is significant,** before I move on to the second search warrant? A: No, I think you’ve asked me everything I thought was probably significant. Q: All right. **Are you okay to keep going?** A: Sure. (31:5-15)
- xx. KOFOED described how the Honda vehicle was towed to the secure sally port at the DoCoSO and DoCoSO CSI protocol followed to conduct testing and evidence processing. (31:16-32:20)
- xxi. KOFOED described the meeting with Cpt Olson and detectives regarding going back for a second search. (33:1-34:12)
- xxii. KOFOED testified, “. . . This is an unusual case. I’d done one other case where we never recovered a body, and that was Brendan Gonzales, and I learned a lot from that, from experience. You

learn things you would have rather done, and so I said, we need to go back and get that section [of ceiling from the Edwards' bedroom]" (34:12-16)

- xxiii. KOFOED testified he wanted to go back a second time and look at the garage because, "I hadn't found anything and I - - as I said before, I thought it was significant that we had not found anything and, you know, it's not just to prove the positive, its to prove the negative, you know, or to show - - I want to positively know that something doesn't exist, so I want to go back and, again, just process that garage floor again." (34:19-24)
- xxiv. When asked, KOFOED testified he was not concerned about contamination or degradation of evidence between 1st search and the planned 2nd search. (35:3-25)
- xxv. During 2nd search the CSI personnel were Bill Kaufold and Mark Williams. (36:1-8) Kaufold and KOFOED would look at the ceiling. (36:15-17) KOFOED processed the garage floor and assisted with the bannister and removal of the carpeting. (36:19:24) KOFOED found nothing in the garage. (37:2-12)
- xxvi. KOFOED was made aware that other detectives had found a sword in bedroom closet. (38:2-8) This sword was not significant to him at that time. (38:11-23)
- xxvii. KOFOED testified that DoCoSO Inv. Tinsley was working closely with them during this 2nd search and she was wearing gloves. (39:24-40:10)
- xxviii. KOFOED testified regarding his DNA from the ceiling and tore his glove. DoCoAtty Retelsdorf clarified that the torn glove was during the 2nd search [on May 24, 2006]. (40:11-43:14)
- xxix. Atty Lefler admitted that he "didn't bring my DNA stuff" to KOFOED's deposition. (41:10-15)

- xxx. KOFOED testifies that they had his DNA regarding paternity questions about his daughter. Lefler said he could tell, “If you’re not embarrassed.” (43:16-25)
- xxxi. KOFOED described how things in the lab were DoCoSO CSI’s responsibility to preserve. (45:1-14)
- xxxii. KOFOED described how DoCoSO CSI Gabig found a Walgreen’s receipt at the Edwards’ residence and then compared the White-out pen on that receipt to white stuff on the ceiling. (45:19-26:9)
- xxxiii. KOFOED stated that DoCo SO CSI tried to do soil and grass analysis, but didn’t get much. (46:12-20)
- xxxiv. KOFOED testified that they do written notes in the field and they are turned into the records division. The notes could still be around, maybe not. (47:9-48:7)
- xxxv. Atty Lefler asked for and got KOFOED’s theory that O’Grady killed in the bedroom, then transported out of the bedroom in a way that didn’t leave a blood trail. Her body was wrapped in something and towels were used to wipe up the blood. There was more blood on the mattress than he’d seen before. (48:15-49:13)
- xxxvi. A: . . . “[W]e found blood in the trunk of Chris’s car on the gasket in the underside right where the garage - - I mean, the trunk door hinges right underneath where you can’t see it visibly, that we found bloodstain there that I would characterize it as a wipe or transfer stain is - - that was all identified to Jessica, that she was transported or items with her blood on them were transported in the trunk of that car, . . .” (49:15-21)
- xxxvii. KOFOED opined that the blood on the sword was significant, but didn’t know if it was the murder weapon. (50:4-10)
- xxxviii. KOFOED testified that Gabig did a “presumptive” test on all the five swords and that one was positive¹⁹. (50:20-24)

¹⁹ NOTE: KOFOED was in error since CSI Gabig was not involved in the search on May 22, 2006. He is probably referring to the “presumptive” testing conducted by CSI Gabig on May 31, 2006.

- xxxix. KOFOED testified the mixture of Mr. Edwards and O’Grady’s blood on the sword handle was significant. (51:1-6)
- xl. Atty Lefler repeated he didn’t bring his DNA stuff, but that the HemaTrace and HT test had different results – one positive and one negative. (52:2-24)
- xli. KOFOED testified that Gabig went to a seminar to see if blood at a crime scene could be determined to be menstrual blood. (54:13-20)
- xlii. Atty Lefler’s last question was, “Q: . . . Is there anything that you’ve learned in the last couple of months, just generally, because **I know you to be a man that’s always striving to become better at what you do**, is there anything that you’ve learn in the last couple of months that you wish you would have done in the execution of the search warrants, either the first or the second?” (54:21-55:2)
- xliii. KOFOED’s response was about keeping the crime scene longer and that, “Once in a while - - we were working a case down in Murdoch were we had the house for as long as we wanted it, you know, we spent three days down there, . . .” (55:6-9)
68. During KOFOED’s deposition in this case, Atty Lefler did NOT ask a single question or make any inquiry whatsoever regarding:
- a. How the Honda automobile could have been searched for five and a half hours without finding any blood it the trunk,
 - b. Why KOFOED pointed to the spot where he wanted CSI Kaufold to look for blood in the trunk, and blood was then found,
 - c. Why KOFOED checked out evidence a second time for testing when the results didn’t yield a full profile,
 - d. Why KOFOED took twenty to thirty minutes longer to get from DoCoSO CSI than other CSI employees and what was going on in the additional twenty to thirty minutes, and
 - e. How and why blood had been found in Will Sampson’s vehicle by KOFOED, when it was located, and whether that blood was the result of

“cross-contamination” or had been planted by someone in law enforcement.

69. Atty Lefler and DoCo Atty Kleine knew, or should have been known, from Douglas County media reports that:
 - a. On January 21, 2007, Fester pled guilty to two counts of second degree murder and one count of use of a firearm to commit a felony as part of a plea agreement.
 - b. On January 23, 2007, Reid pled guilty to two counts of second degree murder as part of a plea agreement, including that she would testify truthfully for the State against any accomplices to the murders.
70. On March 16, 2007, DoCo Atty Kleine appeared on behalf of the State at a hearing on various pre-trial motions in Mr. Edwards’ case.
71. On March 19, 2007, Reid was sentenced to “life” to “life” on both counts of second degree murder, the sentences to be consecutive. Fester was sentenced to “life” to “life” on both counts of second degree murder, ten to twenty years for use of a firearm, all sentences to be consecutive.
72. On March 19, 2007, the voir dire began in Mr. Edwards’ jury trial. DoCo Atty Kleine, Retelsdorf and Kuhse appeared on behalf of the State during the trial.

MR. EDWARDS' TRIAL AND DIRECT APPEAL²⁰

73. At the time of her disappearance, O'Grady lived in an apartment with Holly Stumme and Tracy Christianson. O'Grady had relationships with two individuals, Chayse Bates and Chris McClanathan. O'Grady also had a short relationship with Mr. Edwards. O'Grady told friends she was pregnant and that she hoped Chris Edwards was the father. At least two witnesses would say that O'Grady, to their knowledge, had a prior miscarriage. Stumme and Christianson last saw O'Grady on the evening of May 10, 2006. Stumme believed O'Grady was going over to Mr. Edward's house. (Edwards BoE 1168-1239)
74. The State's theory at trial and argued to the jury was that Edwards may have been motivated to kill O'Grady because she was pregnant with his child. (Edwards BoE 1084:16-1085:14)
75. At the time of O'Grady's disappearance on May 10, 2006, Mr. Edwards resided at the home of his Aunt, Jane Edwards at 2546 North 130th Street in Omaha, Douglas County Nebraska.
76. On Tuesday May 16, 2006, Omaha Police interviewed Mr. Edwards and Jane Edwards at Omaha Police Headquarters downtown.
77. The State presented extensive forensic evidence at trial regarding the search of the Edwards' residence on May 17, 2006 (1st search) and May 24, 2006 (2nd search). The Honda automobile used by and registered as co-owner of Mr. Edwards was seized on May 17, 2006 and processed by the DoCoSO CSI unit. Evidence seized from the residence, garage, and automobile were processed over the next several days and weeks. Swabs and items of evidence were submitted to the UNMC Human DNA Identification Laboratory for PCR-STR DNA testing. (Edwards BoE 1488-1506, 1506-1714, 1785-1874, 2325-2381, 2407-2450) At trial, the State used KOFOED as the "foundational" witness for several of the evidence relevant to this motion for postconviction relief. These include the following:

²⁰ The Bill of Exceptions from Edwards' trial is part of the files and records that may be reviewed by this court in consideration of Edwards motion for postconviction relief.

- a. KOFOED claimed that CSI Connelly was only directed to do a preliminary examination on May 17, 2006, like a “walk around” of the vehicle and then his most senior person, CSI Kaufold would do a detailed search. (Edwards BoE 1597:12-1598:19)
- b. KOFOED testified he “assisted” CSI Kaufold on May 18, 2006. (Edwards BoE 1598:20-24)
- c. KOFOED “saw a red blood stain on one of the wooden handles” to the hedge shears, not one of the other CSI personnel. (Edwards BoE 1608:15-14)
- d. KOFOED claimed the “we [he and CSI Kaufold]” observed a dark colored stain when they opened the trunk [on May 18, 2006]. (1608:23-1609:23)
- e. KOFOED testified that they removed the gasket with a stain from the trunk. (Edwards BoE E188, 1611:1-20)
- f. KOFOED identified the hedge shears from the Honda automobile and that the read circle was placed there by M. Helligso. (Edwards BoE E189, 1613:4-1614:11)
- g. KOFOED testified that the blood on the metal underneath the trunk wasn’t visible until he got in the trunk and “looked up.” Once inside there were photos taken, both of what he claimed was a stain and the process of removing the stain. (Edwards BoE 1614:20-1617:16) The metal removed was offered and received as evidence. (Edwards BoE E190:1617:20-1618:17)
- h. KOFOED testified that the E188, 189, and 190 were stored in a “secure area.” (Edwards BoE 1619:20-25)
- i. KOFOED testified regarding the seizure of the Truper shovel from the Honda automobile. (Edwards BoE E191, 1620:7-22)
- j. KOFOED took the metal piece from the trunk (E188, 190) to the UNMC DNA Lab on May 18, 2006. (Edwards BoE 1621:16-1623:2)
- k. KOFOED then testified he took the hedge shears (E189) where he detected blood to the UNMC DNA Lab on May 22, 2006. (Edwards BoE 1623:3-15)

- l. KOFOED transported the swabs from the mattress (S048-1 thru S048-5) to the UNMC DNA Lab on May 31, 2006. (Edwards BoE 1906:7-1907:16)
 - m. KOFOED testified that swabs from the ceiling at the Edwards' residence (S020-1C thru 10C) and swabs from the headboard of the bed (S020-2H thru 13H, S020-15H) were in his custody and transported by him to the UNMC DNA Lab on June 20, 2006. (Edwards BoE 1638:23-1644:22)
 - n. The mattress removed from the Edwards residence was stored in the bio-hazard room and would periodically be uncovered for examination by various personnel. (Edwards BoE 1646:22-1650:13)
78. Atty Lefler's examination and cross examination of the DoCoSO CSI personal was noteworthy in failing to challenge the procedures regarding the collection and testing of blood from the trunk gasket of Honda automobile (E188), the hedge shears (E189), Truper shovel (E191), cut metal from the trunk (E191), or ceremonial sword, e.g., testimony by CSI Gabig (Edwards BoE 1852-1874), CSI Connelly (Edwards BoE 2375-2382) Atty Lefler's objections to the items from the automobile E188, E189, E190, and E191, were limited to the reasons set forth in a pre-trial motion to suppress related to the search warrant, not the fact that the evidence was fabricated or contaminated. (Edwards BoE at 1600:11-3, 1601:13, 1611:1-14 ("same repetitive objection, sir, . . ."), 1614:13-14, 1618:18, 1620:24). Atty Lefler's cross-examination of KOFOED was particularly noteworthy as follows:
- a. "*Q: . . . You and I know each other and have become friends through the years; is that correct? A: that is correct.*" (Edwards BoE 1663:10-12)
 - b. Atty Lefler failed to ask a SINGLE QUESTION during cross-examination regarding:
 - i. The absurdity of KOFOED testifying that CSI Connelly had just done a "walk around" of the Honda automobile on May 17, 2006, when CSI Connelly and CSI Retelsdorf conducted a search that took five hours and forty minutes. See, ¶ 65(e)(i) *ante*.

- ii. The blatant contradiction in KOFOED’s testimony suggesting that the trunk was NOT searched until May 18, 2006, when CSI Gabig had already removed debris from the trunk on May 17, 2006, that she was processing at 7:00 am on May 18, 2006. See ¶ 65(f)(i)
 - iii. KOFOED’s testimony at trial that he couldn’t see up into the trunk, when CSI Kaufold’s report stated that KOFOED had pointed to a spot in the trunk of the Honda automobile where KOFOED had directed CSI Kaufold to look for blood. See, ¶ 65(f)(ii).
- c. Atty Lefler failed to pursue any line of questioning with KOFOED regarding ANY aspect of the evidence collected from the Honda automobile, the potential for “accidental or intentional” cross-contamination, or actions in the chain of custody regarding swabs from the ceiling at the Edwards’ residence (S020-1C thru 10C) and swabs from the headboard of the bed (S020-2H thru 13H, S020-15H), or swabs from the mattress (S048-1 thru S048-5; S048-29 thru S048-32). These items were identified and testified to by Dr. Wisecarver and M. Helligso as UNMC DNA Lab # 799-A thru 799-N, 799-Q thru 799-NN, 799.1-OO thru 799.1 – SS, and UNMC DNA Lab # 799.2-YY thru 799.2-AAA. (Edwards BoE 1663:6-1706:23)
- d. Atty Lefler failed to ask a single question showing that KOFOED’s collection, supervision, custody, and transportation was the common link between ALL of the incriminating DNA results from the Edward’s residence and the Honda automobile BEFORE the items as identified in ¶ 66 arrived at the UNMC DNA Laboratory.
- e. Atty Lefler failed to ask KOFOED a single question regarding how KOFOED could have found blood in the car of an innocent person in the Stock murder investigation on May 8, 2006, **nine** days before the search of the Honda automobile in the O’Grady investigation, whether the discovery of the blood was result of “accidental or intentional” cross-contamination, and whether the blood found on E188, 189, 190, 191 could also have been the result of the same “accidental or intentional” cross-contamination.

(Edwards BoE 1663:6-1706:23) At the time of KOFOED's testimony on March 23 and 26, 2006, the problem of "accidental or intentional" contamination had been reported in the media on March 20, 2006. See, ¶ 85 *post*.

79. Atty Lefler's examination and cross examination of the DoCoSO CSI personal was noteworthy in failing to challenge ANY of the procedures regarding the collection and testing of blood from the Honda automobile, the hedge shears, shovel, ceremonial sword, swabs from the mattress, swabs from the ceiling at the Edwards' residence, and swabs from the headboard of the bed that would have suggested "accidental or intentional" contamination. If the blood evidence had been the result of "accidental or intentional contamination" while under the control or possession of KOFOED, then the testimony of Dr. Wisecarver, M. Helligso (UNMC DNA Lab sample # 799-A thru 799-AAA), and Stuart James was meaningless and should have been excluded. (BoE 1922:5-21; 1982:9-24; 1988:16-1991:16; 1897:6 - 1899:20; 1900:13-19; 1901:4-17; 1906:17-21; 1906:24 - 1907:10; 1907:23 - 1908:10; 1921:12-25)
80. Atty Lefler focused in his closing argument exclusively on a "no body – no murder" theory of defense, no proof of a cause of death, and that DNA science didn't make sense. However, he said absolutely nothing regarding whether the evidence testified to by his good friend, KOFOED, could have been the result of "accidental or intentional" contamination. Not one word. (Edwards BoE 2799:23-25; 2800:17-23; 2814:22-2860:2; 2863:8-24)
81. The State relied SPECIFICALLY upon the validity and reliability of the forensic DNA evidence showing O'Grady's DNA was found on the items as identified in ¶ 65-66, 77-79 *ante* as coming from the bedroom, mattress, headboard, Honda automobile, hedge shears, shovel, towels, and the sword during opening and closing arguments to the jury. Both Atty Retelsdorf and DoCo Atty Kleine emphasized the competence, professionalism, and exceptional job performed by DoCoSO CSI Unit. Just some of these arguments were as follows:
 - a. DoCo Atty Retelsdorf began her closing as follows:

Ladies and gentlemen, over the last couple weeks you've heard from some of the finest CSI investigators, well-trained professionals, . . . You have heard from Mr. James, a nationally and internationally recognized blood spatter expert. And you've heard from - - about Jessica's murder from the most reliable witness, the crime scene. (Edwards BoE 2785:14-2786:1)

- b. DoCo Atty Retelsdorf emphasized the importance of “circumstantial evidence” to establish Mr. Edwards guilt at time of trial, EXACTLY as Mr. Edwards is doing in this motion for postconviction relief to show that the circumstantial at trial was under the direction of a felon who serially planted evidence in other cases and did so in Mr. Edwards' case. (Edwards BoE 2795:11-2796:3)
- c. During rebuttal for the State, DoCoAtty Kleine repeatedly emphasized to the jury the role of CSI and the blood in the trunk and items in the Honda automobile:

The Criminal Investigations Bureau, the CSI Division of the Douglas County Sheriff's Office, did an exceptionally - - exceptional job to preserve the evidence at the scene for you. They did everything that could possibly be done. . . . And they did a tremendous job. . . . They did a fantastic job. (Edwards BoE 2863:25-2864:12)

*You know, I think – I believe that **the most significant blood evidence in this case**, when we talk about the death of Jessica O'Grady, certainly there's this blood in the room is tremendous evidence. You know, as I said, blood on the ceiling, blood on the laundry basket, all those different areas. And, again, you'll have photographs of it. But **I think it's very significant when we talk about the blood that appeared in the defendant's car. Remember that?***

*You see there's a picture of Dave Kofoed from the Douglas County Sheriff's Office. He's inside the trunk of that vehicle and he's looking up underneath the trunk – on the inside portion. That's where this metal comes from, this piece of metal right here (indicating), taken out of the trunk of that car, on the inside, underneath part of the trunk, what did it have on it? And what did the gasket between those two red rubber bands have on it? **It was Jessica O'Grady's blood in the trunk of Christopher Edwards' motor vehicle.***

*How do you think – how did that get there? **And did the doctor – did Stuart James say this was the only way that could transfer on there was if it was wet blood²¹?** That was his testimony.*

²¹ Mr. James testimony in the Edwards trial and as argued to the jury would refute the claim by KOFOED that blood under the dash of Will Sampson's automobile was the result of cross-contamination from dried

*Uncontroverted testimony. What does that tell you? Significant bloodshed event in that house, in his bedroom. **And then blood in his – the trunk of his vehicle. What sort of – what does that lead you to conclude logically?** What can you infer from that kind of evidence?* (Edwards BoE 2868:17-2869:24)

If you think that, as jurors in this case, that the Douglas County Sheriff's Office and their Criminal Investigation Bureau, the Omaha police officers involved, Dr. Wisecarver and Mellissa Helligso and Stuart James are somehow conspiring and working together to come up to the conclusions they have to get Christopher Edwards, then you let him go. But that's what you have to decide to let him go. (Edwards BoE 2874:9-17)

They [James, Wisecarver] came up to their conclusions about this case separately and individually based on their education, their expertise, their knowledge. That's the same as at the CSI Unit of the Douglas County Sheriff's Office and the work they did in this case. (Edwards BoE 2874:22-1875:3)

The blood in the trunk, blood on the gasket of the trunk, blood on the handle of the shears, the blue teal towel, the lime green towel, . . . Is that consistent with the other testimony that you have heard? Is it consistent with Stuart James? (Edwards BoE 2877:20-25)

Is there blood all over her car because she's bleeding all over the place in that room? Well, no. . . . But her blood was in the trunk of his car, shovel, blood on the shears - - there's so many pieces of evidence in this case. (Edwards BoE 2879:17-24)

And she [Jessica O'Grady] testified to you here today by, maybe not her body being found, but her very lifeblood being at that particular scene, Christopher Edwards' bedroom, and the trunk of her car, on the tip of that sword, on the gasket in the trunk, . . . Think about it. This is all Jessica O'Grady. And we know that from the DNA evidence. (Edwards BoE 2881:23-2882:7)

*You've seen the feeble attempts by the defendant to clean up. You've seen not only the blood that appeared in this trunk but, you know, the blood on these towels. . . . And, again, **the most important place, I believe, is the trunk of that car (indicating).*** (Emphasis added) (Edwards BoE 2883:1-9)

blood, since the contamination event theorized by KOFOED could not have happened until at least two days AFTER the Stock homicides (at the earliest). It could have only been deposited in the Will Sampson vehicle while a) still wet within an hour or two of the murders or b) artificially hydrated and planted in the Sampson vehicle by someone else, such as KOFOED.

82. On March 31, 2007, the jury returned a guilty verdict on both counts.
83. On June 15, 2007, Atty Lefler filed a notice of appeal on behalf of Mr. Edwards.
84. On February 19, 2008, Mr. Edwards' appellate opening brief was filed in the Nebraska Supreme Court at S-07-0678. Atty Lefler remained as one of Mr. Edwards' attorneys of record on direct appeal.

**THE UNRAVELING OF KOFOED’S FALSIFICATION OF REPORTS,
FABRICATION OF EVIDENCE, THE COVERUP, AND THE CREATION OF
AN ADDITIONAL CONFLICT OF INTEREST BY DOUGLAS COUNTY
HIRING ATTY LEFLER TO REPRESENT KOFOED**

85. On March 20, 2007, various media outlets reported on the Reid and Fester sentencing hearings and statements by CCo Atty Cox regarding the “blood” reportedly found in Will Sampson vehicle. These included:

- a. The Lincoln Journal Star (3/20/07) in a story “**Still some questions over blood**” filed by reporter Cara Pesek stated:

Investigators have ruled out contamination [regarding the blood in Will Sampson’s vehicle], Cox said. And for the DNA to belong to someone else is about one chance in a quintillion, Cox said. The matter remains under investigation.

- b. The Omaha World Herald (3/20/07) am edition ran a story, “**Victims picked at random, prosecutor says**” in which OWH Rpt Ferak reported (emphasis added):

. . . Initially, they [DoCoCSI Unit] did not locate any blood or DNA in the car [of Will Sampson].

Then May 8, the crime lab [KOFOED] swabbed the dashboard on the driver’s side, according to reports. That test found a small particle of Wayne Stock’s blood.

Cox said he has spoken to investigators from Cass County and the Nebraska State Patrol and does not think the blood got there as a result of accidental contamination on their part.

*Cox also said **he had no information to suggest that one of the investigators engaged in misconduct by placing the blood there.***

“If there were true, somebody would be subject to criminal prosecution,” Cox said. “Who knows how this blood got there? Law enforcement is still trying to go through that process.” . . .

- c. The Omaha World Herald (3/20/07) evening edition ran a shortened version of the same story in which OWH Rpt Ferak reported:

. . . Cox said he has spoken to investigators from Cass County and the Nebraska State Patrol and does not think the blood got there as a result of accidental contamination on their part.

“Who knows how this blood got there? Law enforcement is still trying to go through that process.” . . .

86. On April 11, 2007, KOFOED spoke with CCo Atty Cox and for the very first time advised Cox that the blood had to be the result of cross-contamination. (KOFOED BoE 1984:6-1985:16)
87. Shortly after his conversation with CCO Atty Cox, KOFOED made a statement to the press reference the blood. (KOFOED depo (2/11/09) at 200:4 – 201:7)
88. Following these statements to the press, Inv. Lambert called KOFOED and was extremely angry. He stated that it was still an “open investigation” and that the “rats were abandoning the ship.” (KOFOED stmt IA Invest (6/30/08) p. 23); (KOFOED depo (2/11/09) 201:8-202:17);
89. On April 25, 2007, Atty Chaloupka filed a federal 1983 civil rights complaint on behalf Sampson against State and Cass County law enforcement officials and unnamed “1-10 DOES”. See, *Sampson v. Livers, et al.*, The initial complaint at ¶ 43 (emphasis added) alleged:

*The Defendants, together with **unnamed coconspirators**, committed the overt acts set forth above. This involved the wrongful arrest, prosecution, and detention of SAMPSON. It also included **the manufacture of knowingly false and knowingly unreliable evidence** which was intended to convict SAMPSON of a crime Defendants knew or reasonably should have known SAMPSON did not commit; and it included the suppression of exculpatory evidence, the failure to investigate evidence which would exculpate SAMPSON, and **the filing of false, misleading and unreliable reports** and sworn affidavit testimony as part of their investigation of the Stock murders, in a manner designed to prove a case against SAMPSON despite his actual innocence – actual innocence which was known or which reasonably should have been known to Defendants.*

90. Both Atty Soucie (Sampson’s criminal defense attorney) and Atty Chaloupka suspected that there was something “wrong” about the blood evidence reportedly found by KOFOED on May 8, 2006, and that there was a strong likelihood it had been planted and not the result of accidental cross-contamination. However, at the time of filing the federal 1983 law suit, neither Atty Chaloupka nor Atty Soucie had any knowledge or information disclosing or suggesting from ANY source inside or outside of official law enforcement²² that:

²² It further appears that even when KOFOED told CCo Atty Cox that the blood was “cross-contamination” on April 11, 2007, KOFOED never disclosed the false date on his report, additional swabbing by CSI

- a. Both KOFOED and CSI Retelsdorf had participated in the swabbing of Will Sampson's vehicle between 1:30 and 2:30 pm on April 27, 2007;
- b. CSI Retelsdorf made multiple attempts to find blood at the direction of KOFOED, but all attempts by CSI Retelsdorf were "negative";
- c. KOFOED instructed CSI Retelsdorf to just put in his official report what Retelsdorf did by taking photos of the vehicle's backseat;
- d. KOFOED falsified information in his official CSI report and DoCoSO property report as to date, time, activity, and persons present;
- e. KOFOED had advanced the theory within DoCoSO CSI Unit that the DNA results were the result of "cross-contamination";
- f. Cpt (ret.) Olson told KOFOED to NOT prepare a corrected report or tell the prosecuting attorney what happened, but wait and see if the case would ever go to trial;
- g. KOFOED and Inv. Lambert had a phone conversation at approximately 4:30 pm on April 27, 2006, in which Inv. Lambert was advised of KOFOED finding "presumptive" blood under the dash of the Will Sampson vehicle;
- h. KOFOED and Inv. Lambert met for over three hours on the evening of April 27, 2006, discussing the forensic evidence and KOFOED was "satisfied" and "excited" about the presumptive blood found under the dash;
- i. KOFOED claimed that he simply forgot about the filter paper with the presumptive swab while it sat on a shelf in the bio-hazard room at DoCoSO CSI until he remembered it on May 8, 2006, and prepared the reports and directed the filter paper's submission to the UNMC DNA Lab; and
- j. KOFOED had, in fact, planted the blood on the filter paper that he claimed he used to swab under the dash of Will Sampson's vehicle,

Retelsdorf had produced negative results, and KOFOED's conversations and meetings with Inv. Lambert or Cpt (ret) Olson.

k. KOFOED had been unsuccessfully in his attempt to implicate CSI Retelsdorf in his scheme; or

l. Any of the details related to KOFOED's misconduct set forth ¶ 141-170 *post*.

91. The filing of Sampson's civil rights suit was widely reported in the Douglas County print and TV media.

92. On October 10, 2007, Inv. Lambert interviewed CSI Kush regarding allegations of misconduct by KOFOED related to "finding" evidence that others could not at crime scenes.

93. On March 11, 2008, Atty Bowman filed a federal 1983 civil rights complaint on behalf Livers against State and Cass County law enforcement, but did NOT name any specific DoCo law enforcement officials as defendants. See., *Livers v. Schenck, et al.* However, the Livers lawsuit made specific allegations of misconduct (emphasis added) regarding the fabrication and planting of evidence as follows:

. . . *[The investigation of the Stock murders was a]n egregious example of police misconduct, featuring improper coercion of Plaintiff and of witnesses, **fabrication of evidence**, and concealment of exculpatory evidence. See, Livers' orig complaint at ¶ 1.*

*On or about April 20, 2006, the Will Sampson automobile was thoroughly swabbed inside and out by investigators for the Douglas County CSI (Crime Scene Investigation) Division of the Douglas County Sheriff's Office. **That examination yielded no blood evidence, no trace evidence and no other evidence whatsoever to connect the automobile to the Stock murders.** Following the examination the Will Sampson automobile remained impounded at the City Of Omaha Vehicle Impound Facility in Omaha, Nebraska." See, Livers' orig complaint at ¶ 17.*

*Following Plaintiff's confession and recantation, one or more of the Cass County and Nebraska State Patrol defendants **communicated to Douglas County crime scene investigator David KOFOED that the Will Sampson automobile had to have been involved in the Stock murders.** After this communication, KOFOED (who had not been involved in the original examination) personally examined the automobile." See, Livers' orig complaint at ¶ 33.*

*Investigator **KOFOED prepared a report, dated May 8, 2006, in which he stated that a swab taken from under the steering column at the***

bottom edge of the driver's compartment dashboard tested positive for blood. Laboratory examination of the swab later determined that the blood from the swab was consistent with that of Wayne Stock. This "evidence" was provided to the Cass County Attorney and to Plaintiff's criminal counsel in furtherance of the prosecution of Plaintiff for the Stock murders. See, Livers' orig complaint at ¶ 34.

Prior to the defendants' assuming control of the Will Sampson automobile, Wayne Stock's blood was not present in the car. Will Sampson, Nicholas Sampson and Plaintiff had no involvement in the Stock murders and the Will Sampson automobile was not used in any way in the course of the commission of those murders. Cass County prosecutor Nathan Cox has stated that he does not believe the blood was found in the Will Sampson automobile as a result of accidental contamination. Therefore, on information and belief, blood from the crime scene was planted in the Will Sampson automobile by one or more persons whose identity is not now known to Plaintiff." See, Livers' orig complaint at ¶ 17.

94. Atty Bowman was also unaware at the time of filing the Complaint on behalf of Lives the true facts as set forth ¶ 90 *ante* and KOFOED's misconduct as set forth ¶ 141-170 *post*.
95. It is a fact capable of judicial notice under Neb. Rev. Stat. § 27-201 that Wayne Stock's blood didn't cause itself to appear in Will Sampson's automobile. It had to have been put there by human intervention. The only question was the nature of that human action and the person or persons responsible.
96. The filing of the Livers civil rights lawsuit was reported in the Nebraska print and TV media²³, including:
 - a. The Lincoln Journal Star reported on March 11, 2008, that:

In addition, blood matching Wayne Stock's turned up in the car investigators initially suspected Sampson and Livers of driving the night of the killings. The lawsuit alleges an initial investigation of the car revealed no physical evidence, suggesting to Drizin and Bowman the blood might have been planted.
 - b. The Omaha World Herald ran a similar story and the complaint was available for download on-line.

²³ A copy of the civil rights complaint was circulated within the DoCoSO CSI Unit in March/April of 2008, even though no one was served with a copy as a defendant. See, CSI Connelly statement IA investigation at p. 6-7.

97. In response to reading the news article alleging planted evidence in the Stock murder investigation, KOFOED stated that he went to his supervisor, Cpt (ret.) Olson²⁴. See ¶ 98-99, 101(c), 104 (l) *post*.

98. Within a few days of the March 11, 2008, news articles, Cpt. (ret.) Olson requested a meeting with DoCo Sheriff Dunning and Chief Bilek. According to DoCo Sheriff Dunning at his deposition on January 21, 2010:

A: [Cpt. (ret.) Olson] said that since the article had come out in the paper, Dave was rechecking everything to see what was – see what they were talking about and had noticed on one of his reports that the -- I've got to think of how this goes now -- that the -- that date he put on the report was the actual day that he made the report, not the – not the date that he found the evidence and...

Q. This is -- this is a report about the blood evidence from the suspected homicide vehicle?

A. Yeah. Yes.

Q. The very evidence that was talked about in the -- in the case?

A. Yes.

Q. All right. What else did Dean Olson say?

A. He said that Dave had asked him whether he should make another report and that Dean had instructed him no, don't -- don't do that. That's going to make it look like you're trying to cover something up. In the event that we go to trial on something, we'll explain it there. (Dunning depo (1/21/10) 195:25-196:25)

99. After DoCo Sheriff Dunning's meeting with Cpt (ret.) Olson in late March 2008, DoCo Sheriff Dunning did not initiate ANY investigation. He shared the opinion of Olson that for the DoCoSO and KOFOED to issue a new corrected report would just look like a "coverup"²⁵. (Dunning depo (1/21/10) 199:23-203:10)

²⁴ It should be noted that KOFOED told the FBI on 6/5/08, that he checked his reports when the news articles starting reporting the civil rights lawsuits. However, KOFOED did nothing in the way of going to his superiors when the Sampson civil right suit was filed in April 2007.

²⁵ How DoCo Sheriff Dunning and the other DoCo SO law enforcement officials could think that NOT directing KOFOED and Retelsdorf to IMMEDIATELY correct the official reports when the information was presented to DoCo Sheriff Dunning was not itself a "cover-up" is just bizarre.

100. In May of 2008, FBI agents interviewed CSI Retelsdorf and learned that CSI Retelsdorf had been with KOFOED on April 27, 2006, when KOFOED claimed to have found the blood under the dash of Will Sampson's vehicle. In addition, the FBI agent learned that CSI Retelsdorf had used cotton swabs several times over the location identified by KOFOED and came up with negative results. The May 8, 2006 date on KOFOED's official report and property report were incorrect and the report omitted the any reference to the actions and activities of CSI Retelsdorf. (Retelesdorf depo (3/24/10) 6:17-114:11)
101. On June 5, 2008, FBI agents Kelleher and Palokangas met with and interviewed KOFOED. During this interview KOFOED claimed:
- a. Before conducting the search of the Will Sampson vehicle on April 27, 2006, he had either spoken with CSI Gabig or reviewed her report. He decided to look in areas that were NOT swabbed by CSI Gabig or cleaned by the detailer²⁶. (FBI 302 at p. 7)
 - b. KOFOED first realized he had made a mistake on the date of his May 8, 2006, report a couple months earlier when the civil rights law suit became public [*Livers* (filed 3/11/08)]. (FBI 302 at p. 8)
 - c. KOFOED brought his mistake to the attention of Cpt (ret.) Olson upon discovery of the mistake. (FBI 302 at p. 8)
 - d. KOFOED specifically remembered being in the bio-hazard room later [after the 4/27/06 search of Will Sampson's vehicle] and seeing the filter paper swab on the shelf. He realized the report had not been written, so that is why he wrote the report. (FBI 302 at p. 8)
 - e. KOFOED didn't think much of the evidence at the time [4/27/06] and that was why he put it in the bio-hazard room. (FBI 302 at p. 8)
 - f. KOFOED didn't remember if he logged the evidence into the bio-hazard room or not. The FBI SA advised KOFOED that he had NOT logged in

²⁶ It should be noted that KOFOED was physically present and supervised CSI Gabig during this April 19, 2006 search.

the evidence and this was contrary to DoCoSO CSI policy. KOFOED admitted that he probably didn't log the evidence. (FBI 302 at p. 8)

- g. KOFOED was advised that there were three options of how the blood got in the car. One, Livers and Sampson participated in the murders. Two, there was cross-contamination. Three, someone planted the evidence. (FBI 302 at p. 9)
- h. KOFOED was advised that all other evidence up to that point had been submitted right away and by May 4, 2006, had "come back negative²⁷." He was further advised that cross-contamination didn't seem possible because no one from the original Stock crime scene got into the vehicle. (FBI 302 at p. 9)
- i. KOFOED denied putting evidence into the car, could not explain why he misdated the reports, and said he would "take a hit" but hoped the lab's reputation remained intact. (FBI 302 at p. 9)
- j. KOFOED was asked about taking a polygraph and said he wanted to talk to a lawyer. (FBI 302 at p. 10)
- k. KOFOED e speculated that the blood was not in the vehicle but already on the filter paper when he did the test. (FBI 302 at p. 10)
- l. KOFOED said he wanted to talk to a lawyer and it was clear that he was the target of an investigation. He has spoken with an attorney prior to the interview and was told that if he was a target, to stop the interview. (FBI 302 at p. 10)
- m. KOFOED related that he had been previously arrested by OPD and fingerprinted while at DoCoSO CSI, but did not discuss the reason for his arrest. (FBI 302 at p. 10-11)
- n. KOFOED said the two locals [Samson and Livers] had nothing to do with the murders. (FBI 302 at p. 11)

²⁷ The DNA results were only "negative" in terms of being incriminating as Livers and Sampson. However, it was IMMEDIATELY apparent that the DNA results were EXCULPATORY and that the person's involved were a male and female based upon the April 24, 2006 DNA results from the marijuana pipe (See, UNMC DNA Lab book p. 259-264) and April 26, 2006 DNA results from the ring (UNMC DNA Lab book p. 283-288) and that BOTH Livers and Sampson were excluded as donors. These DNA results were put into a DNA summary by DoCoSO CSI Unit on May 12, 2006.

102. On June 10, 2008, DoCo Sheriff Dunning, Chief Bilek, and Cpt Glantz went to the FBI regarding KOFOED actions, the misdated report, and the blood found in the Will Sampson vehicle. After this meeting, KOFOED was placed on administrative leave with full pay. DoCo Sheriff Dunning has testified that the reason for KOFOED receiving full pay was “innocent until proven guilty.” (Dunning depo (1/21/10) 204:3-5)
103. On June 17, 2008, DoCo Sheriff Dunning directed there be an internal affairs investigation in regards to KOFOED’s conduct in the Stock murder investigation.
104. On June 30, 2008, KOFOED gave a recorded statement²⁸ to the DoCo SO IA Investigators with his personal attorney, Atty Lefler, present. During that IA statement:
- a. KOFOED was told:

“We are not conducting a criminal investigation. Anything that you say in here that could be uhrn, construed as being criminal cannot be used against you. Okay?” . . . I am not questioning you for the purpose of instituting a criminal prosecution against you. During the course of this questioning even if you do disclose information which indicates that you may be guilty of criminal conduct, neither your self-incriminating statements, nor the fruits of any self-incriminating statements you make, will be used against you in any criminal legal proceedings.” (p. 2)
 - b. KOFOED said he found the presumptive sample in the Honda automobile and sent it in for testing and the FBI said it “*didn’t pass the smell test*”. At that point he told the FBI he needed to “protect” himself and that ended it with the FBI. (p. 4-5)
 - c. KOFOED claimed the Ford Contour was processed at least five times, once by CSI Gabig before he conducted his search. He claimed CCo Atty Cox was present when they went through all the evidence. (p. 8)
 - d. KOFOED claimed, “*So we looked at contamination issues including the floor of the vans, because we drove, you know, even though that's, I mean*

²⁸ See, *Livers v. Sampson, et al.*, Index of Evidence by Plaintiff Exhibit 32 filed 8/30/10 available through PACER

we've got stuff in bags it still, sometimes it actually saturates through the bags, we're talking gloves.” (p. 9)

- e. KOFOED said that when they went through the evidence with Cass County, *“Melissa Helligso was there because it was DNA in nature. I wanted her there. And we went through each piece.” (p. 10)*
- f. When asked whether *“swabs or filter papers”* were used at the Stock murder scene investigation (the idea being that could be the source of cross-contamination), KOFOED said *“one or the other.” (p. 12-13)*
- g. KOFOED described what he did on April 27, 2006 as follows:

“Investigator Lambert called, I, I think it was him. And you know, I didn't write down notes or anything but the, the, the because of the confession, the gun was thrown in the back seat of the Ford Contour. So I said CL why, I want you to come out and take photographs see what you can, look at the backseat. You know, I'm gonna go through the areas, the more specific areas, the driver's area, uhm, I knew Chris, what Christine had generally done because I was there observing her and I actually looked at the gas pedal and brake pedal and things like that (unclear) and I just wanted to go, and this is very typical for me to go through things again, you know, just one more time, so I went through the more maybe not obvious areas of the vehicle, and processed those, but those were done on the 27th. Both, we were both up there together on the 27th.” (p. 14)

- h. KOFOED stated:

“I said [to CSI Retelsdorf], I'm gonna go through the driver's area again. Just to make sure we didn't miss anything. Uhm, there was no, no request to do that, but since we were going up there, you know, I wanted to have one more look.” (p. 14)

- i. KOFOED claimed:

“I don't know why that didn't happen [CSI Retelsdorf doing the entire 4/27/06 report.]. Uhm, that was, that was typical of me, if you see, if you see reports in this case, and there's numerous reports in this case, there's very few from me at all, and I was there, and I was around almost all the time. Uhm, so, you know I guess, in that case, when I found that this, that this particular piece of evidence was still in the biohazard room, I just, I got, I got an event number and just generated a report to get it done.” (p. 15)

- j. KOFOED confirmed that CSI Retelsdorf swabbed after he used the filter paper and that when Retelsdorf didn't get a reaction,

"[I]t kind of concerned me, but at the same time I wasn't all that concerned about it. You know? I just said okay, you know, I, I said well maybe I got it all. You know?". It didn't seem like "all that big a deal." (p. 15)

- k. KOFOED stated that all persons within the CSI Division had access to the biohazard room. (p. 16)

- l. He said that in regards to misdating the report,

"And I didn't look at it after I did the report, and when we got down, when this civil suit came out and it was in the paper, and I actually, I went to my Captain, it was Captain Olson at the time, it's the first time I looked at that report in probably two years. And I said, Captain it looks like this report's just got the wrong date. You know, and he told me, and I said should I do an amended report? Should I, you know, should I put something in? He said, just, no you can just explain it. I said okay. I said, I just never really thought about it, you know, from that time I did it, on, I never really paid any attention to it, until then." (p. 18)

- m. The majority of the questioning that followed related to who could have possibly been the source of the contamination.

- n. KOFOED said he spoke with the press in June or July [2007] and that:

"I said that I would actually have to testify in court that this was contamination if those two were actually, I believed, I would testify that that one single stain from the Ford Contour was clearly contamination and could not be, was not a link to them, to the local people²⁹." (p. 23)

- o. KOFOED proposed as a theory of why he wouldn't have planted evidence and then been the same person to find it, said:

"I mean if I wanted to do this, and I would never do this in the first place, I would put it on Nick Sampson's shoes, I would put it somewhere where it would link him, lock him down on it. To put it

²⁹ The reason for KOFOED's claim of "contamination" in the Will Sampson vehicle was because there was so much evidence developed AGAINST Reid and Fester. This is an absurd statement and meaningless as to the issue of whether the blood was planted by KOFOED on April 27, 2006, BEFORE anyone knew about Reid and Fester as the true guilty parties. If Reid and Fester had NOT been identified, KOFOED would have DENIED that the blood was cross-contamination and that it was evidence of guilt as to Livers and Sampson.

in his brother's car, makes absolutely no sense whatsoever, and for me to be the one that found it even makes less sense. I'm the boss. I don't have to do that stuff. I can assign somebody to do it³⁰, so it's fricking crazy, you know? Sorry I'm getting mad.” (p. 26)

105. On July 2, 2008, DoCoSO Chief Dep Bilek sent KOFOED a memo advising him that a hearing to determine the truth of the allegations against him would be held on July 7, 2008.
106. On July 3, 2008, DoCo Sheriff Dunning received the IA investigation report. He then consulted with DoCo Atty Kleine regarding that investigation and appropriate punishment. (Dunning depo (1/21/10) 265:2-8) The very same day, a media release was issued by DoCo SO claiming that an internal investigation was conducted, NSP had not cooperated by providing their reports, and KOFOED had been “truthful” on a polygraph³¹.
107. On July 7, 2008, KOFOED suffered no demotion, suspension of duties, nor any punishment except for the loss of two vacation days. (Dunning depo at 265:2-6)
108. On July 7, 2008, DoCoSO released a public statement regarding the IA investigation and the punishment given to KOFOED.
109. As later events demonstrated, the FBI and US Attorney’s Office were not impressed with the quality of the DoCo SO IA investigation and continued their inquiry into the circumstances of the blood found in Will Sampson’s vehicle by KOFOED.
110. On February 11, 2009, Atty Lefler participated in a civil deposition as KOFOED’s “personal attorney” taken by Atty Bowman in *Livers v. Schenck et al.* Atty Chaloupka was not in attendance and did not participate on behalf of Sampson.

³⁰ This was EXACTLY what KOFOED did on May 18, 2006, in Mr. Edwards case where he directed CSI Kaufold to look SPECIFICALLY at one location in the trunk of a vehicle where blood was found. See ¶ 65 (f) (ii) *ante*. In this way KOFOED could “link him [Mr. Edwards]”, “lock him [Mr. Edwards] down” and assign the discovery to another CSI [Kaufold]. It is what KOFOED attempted to do on April 27, 2006, at the Will Sampson vehicle to “link him [Livers]”, “lock him down [to the specifics of his confession]”, and assign the discovery to another CSI [Retelsdorf].

³¹ It should be noted that this press release was issued BEFORE the IA hearing set for July 7, 2008. In addition, the IA investigation included not one single consultation with ANY forensic expert OUTSIDE of the DoCoSO. In regards to the expertise regarding when and how “cross-contamination” can take place the IA investigators relied on KOFOED and persons under his direct supervision within the DoCoSO CSI Unit.

111. Atty Lefler had been representing KOFOED with the knowledge of DoCo Atty Carlson for some period of time BEFORE the scheduled civil deposition. DoCo Atty Carlson and Atty Lefler jointly participated in drafting a “stipulated protection order” in regards to certain documents obtained in discovery³² from the DoCoSO. (KOFOED depo (2/11/09) 41:8-45:16). Neither DoCo nor any DoCo employees were defendants in any of the federal 1983 civil rights lawsuits filed by Livers or Sampson in February of 2009. DoCo Atty Carlson attended as a representative of DoCo. There were several noteworthy comments by Atty Lefler and KOFOED during the deposition:

- a. Atty Lefler clearly was aware of the language in the confidentiality agreement before the deposition commenced. (43:11-22)
- b. Atty Lefler wanted to make objections pursuant to state and local rules, but was told this was a deposition in a federal case covered by federal rules. (45:17-46:20)
- c. KOFOED was asked whether it would be important to defense counsel to know that CSI Retelsdorf swabbed the same location and Atty Lefler interposed an objection on foundation. (169:22-170:9)
- d. KOFOED was asked what he thought was the most likely “culprit” for the blood getting into the Ford Contour and Atty Lefler objected. (175:1-11)
- e. KOFOED was asked if he had a “history prior to the Murdock murder case” of problems with cross-contamination with blood evidence because of these filters and Atty Lefler objected. (177:8-13)
- f. KOFOED testified that on the Stock murder case, “[I]t was the best work I’ve ever seen by a crime scene unit.” (193:1-2)

³²On June 1, 2010, DoCo Atty Dolan submitted a portion of KOFOED’s deposition in support of the DoCo Sheriff Dunning’s motion for summary judgment based on “qualified immunity.” See, *Livers v. Sampson, et al.* (filing 282) Index of Evidence – Ex 13. On August 30, 2010, Atty Bowman submitted the entire KOFOED deposition (2/11/08) in opposition to DoCo Atty Carlson’s motion for summary judgment. See, *Livers v. Sampson, et al* (filing 306) Index of Evidence – Ex 11. KOFOED’s deposition (2/11/09) is now publically available for download on PACER. The DoCo Atty’s Office was present at the deposition and was obviously aware of KOFOED’s testimony. These documents have proved to be an invaluable resource in the preparation of this amended motion for postconviction relief.

112. On April 6, 2009, the FBI investigation became public when OWH Rpter Ferak wrote a story in which DoCo Sheriff Dunning confirmed that KOFOED had testified before a federal grand jury during the previous months.
113. Atty Lefler had represented KOFOED in regards to the FBI investigation and KOFOED's testimony before the grand jury. *KOFOED BoE*, Atty Lefler's cross-exam of Retelsdorf at 217:9-11, re-direct of KOFOED at 817:15-19.
114. On April 10, 2009, Atty Soucie gave a deposition in *Sampson v. Schenck et al.* During that deposition, Atty Soucie was asked questions about his knowledge of the Stock murder investigation, the Brendon Gonzalez murder investigation, and the involvement of KOFOED in those cases.
115. On April 13, 2009, Atty Soucie sent a letter to FBI SA Kelleher detailing the manner in which it appeared that KOFOED may also have fabricated evidence in the *Henk* case.
116. On April 22, 2009, the federal Indictment and the state charges in Cass County against KOFOED were publicly released. Atty Lefler entered his appearance on behalf of KOFOED in both the federal and state criminal prosecutions.
117. On April 26, 2009, Atty Chaloupka requested leave to file a 1st Amended Complaint on behalf of Sampson naming Douglas County Sheriff's Office and KOFOED as additional defendants. The allegations regarding the conduct of both DoCo SO and KOFOED were specific, detailed, and later shown to be true beyond a reasonable doubt in *State v. KOFOED*. See, *Sampson v. Schenck et al.* 1st Amended Complaint at ¶ 6, 7, 52-72. Atty Chaloupka SPECIFICALLY alleged that at all times, KOFOED was acting in the "course and scope of his employment with DoCo SO". *Id.* at ¶ 7.
118. On April 27, 2009, Atty Soucie sent a letter to DoCo Atty Kleine, Atty Mock, and USA Stecher detailing how KOFOED had planted evidence in BOTH the Stock (Livers/Sampson) and Brendon Gonzalez (Henk) murder investigations³³. The facts as set forth by Atty Soucie in regards to the Stock

³³ On May 15, 2009, AUSA Mickle filed notice with the Federal District Court of compliance with Fed. R. Civ. Proc. 16 that discovery had had been served on Atty Lefler. Edwards does not know at this point if

investigation were found to be true beyond a reasonable doubt and by clear and convincing evidence in regards to the *Henk* prosecution by the district court. Both finding by the district court were later affirmed by the Nebraska Supreme Court in *State v. KOFOED*, 283 Neb. 767 (2010).

119. On April 27, 2009, Atty Bowman sought leave to file an amended complaint which joined DoCo employees, including KOFOED, as defendants in *Livers v. Schenck et al.* Leave was granted on June 2, 2009.
120. Although DoCo Atty Kleine was aware of the pending federal and state criminal charges, had received the detailed factual summary of the evidence from Atty Soucie, and was personally aware of the evidence in the Mr. Edwards' trial, DoCo Atty Kleine went with DoCo Sheriff Dunning to the DoCo Board in late June or early July of 2009, and advised the DoCo Board that the charges against KOFOED were "unfounded". (Dunning depo (1/10/10) 306:19-308:2)
121. DoCo Sheriff Dunning has admitted that he was also aware in 2009 of allegations that KOFOED had planted evidence in the *Henk* case. However, he did not conduct any investigation because the *Henk* allegations were in his opinion also "unfounded." (Dunning depo (1/10/10) 309: 5- 310:14)
122. Even though there were pending state and federal charges and the April 27, 2009 letter from Atty Soucie, Atty Carlson responded in the Answer filed on behalf of Douglas County in both *Livers v. Schenck et al* and *Sampson v Schenck et al* that KOFOED had at all times been acting within the scope and authority of his employment with Douglas County Sheriff's Office.
123. On July 8, 2009, following the representation to the DoCo Board by DoCo Atty Kleine and DoCo Sheriff Dunning³⁴, the DoCo Board sent a letter of retention to Atty Lefler in regards to the two pending civil rights cases to provide representation for KOFOED at the rate of \$200/hr. The letter was signed by DoCo Atty Carlson.

Atty Soucie's letter was provided to Atty Lefler at this time, but has reason to believe this to be true based upon subsequent comments by Atty Lefler.

³⁴ DoCo Sheriff Dunning had wanted to use seized "drug money" to pay for KOFOED's criminal defense because the charges were "unfounded". (Dunning depo (1/21/10) 303:23-305:8) Apparently cooler heads prevailed and these funds were not diverted for this purpose and the defense for KOFOED in the civil rights cases came from DoCo general or "Risk Management" funds.

124. In both *Livers v. Schenck et al* and *Sampson v Schenck et al*, Atty Lefler filed an essentially identical Answer to that filed on behalf of Douglas County. Atty Lefler alleged that KOFOED was an agent and employee of Douglas County and was acting within the scope and authority of his employment with Douglas County. See, KOFOED's Answer in *Sampson v. Schenck et al* at ¶ 6-7.
125. During all of the events described in ¶ 102-124 *ante*, Atty Lefler was still representing Mr. Edwards in regards to his appeal to the Nebraska Supreme Court.
126. During the period when Atty Lefler was representing both Mr. Edwards and KOFOED, he never advised Mr. Edwards that allegations were being made that KOFOED had falsified reports and fabricated evidence in the Stock investigation at approximately the same time that KOFOED had been involved in the investigation and collection of evidence in Mr. Edwards case.
127. During this period of joint representation on Mr. Edwards' direct appeal, Atty Lefler never requested leave of the Nebraska Supreme Court to amend the brief, file a supplemental brief, or file a motion for new trial based on newly discovered evidence with the district court³⁵, alleging that KOFOED has serially fabricated evidence in two homicide cases.
128. Atty Lefler had until July 20, 2009, to file a motion for rehearing before the Nebraska Supreme Court in Mr. Edwards direct appeal based on the pending criminal charges against KOFOED. He did not do so.
129. At some point in mid-summer of 2009, Atty Lefler placed a phone call to Atty Soucie. Atty Soucie shared with Atty Lefler his understanding of the evidence against KOFOED as it related to both the Stock and Henk murder investigations. At Atty Lefler's request, Atty Soucie sent him a copy of the deposition Atty Soucie had given in *Sampson v. Schenck et. al.* on April 10, 2009.
130. On October 19, 2009, Atty Lefler submitted a bill to Douglas County for the expense of representation provided to KOFOED in the federal criminal prosecution at *USA v. KOFOED*, 8:09, CR 142.

³⁵ *State v. Smith*, 167 Neb. 492 (1958).

131. On October 22, 2009, after consultation with the DoCo Attorney's Office, Mr. Lefler's claim was placed on the agenda for the DoCo Board and was referred to the DoCo Attorney's Office for consideration and recommendation.

132. On December 14, 2009, more than four months AFTER the filing of state and federal charges, DoCo Attys Carlson and Dolan filed Answers to the Interrogatories and Requests for Admissions in *Sampson v. Schenk, et. al*, 8:07 CV 155 as follows:

INTERROGATORY NO. 11: As to all persons, organizations or other entities whose negligent or intentional acts you claim were a proximate cause of the incarceration of Nick Sampson from April through October 2006, state their names, addresses, and explain the facts upon which you base your claim.

ANSWER: Defendant objects on the basis that the question is vague and overbroad. All persons involved in the investigation of the Stock murders performed their respective roles with the intent to perform their assigned tasks. For example Defendant CSI investigators performed forensic investigative services at the scene of the Stock murders, and each person intended to perform the forensic investigative services that they actually performed. Similarly, all other persons intended to fulfill their given role in the various aspects of the Stock murder investigation. If Plaintiff is asking whether or not Defendant contends that the negligent or intentional, wrongful acts of any persons, organizations or other entities were the proximate cause of Plaintiff's incarceration the answer is no. . . .

REQUEST FOR ADMISSION NO. 1: Admit that Nick Sampson did not participate in the murders of Wayne and Sharmon Stock in any way.

RESPONSE: The Defendant is not in a position to either admit or deny the above statement so therefore it must deny said statement.

. . . .

REQUEST FOR ADMISSION NO. 2: Admit that Matt Livers did not participate in the murders of Wayne and Sharmon Stock in any way.

RESPONSE: The Defendant is not in a position to either admit or deny the above statement so therefore it must deny.

133. On January 21, 2010, Atty Lefler participated in the deposition of DoCo Sheriff Dunning in *Livers v. Schenck et al*. At that deposition after having received all the information regarding KOFOED's action in the Stock murder investigation, Atty Lefler chose the interest of his civil client, KOFOED, over that of his previous criminal defense client, Mr. Edwards, by implicitly suggesting that he found nothing wrong with the forensic evidence in the

Edwards case. The exchange between Atty Lefler and DoCo Sheriff Dunning is particularly telling and was as follows:

Q: In re- -- with regard to the - any request to investigate the Edwards case, who is the repository of the information that -- and the evidence that was collected in the Edwards case, sir?

A. We are.

Q. Okay. Has anybody from FBI contacted you to investigate anything, to test anything, things of that nature, sir?

A. No.

Q. And you know, because you and I saw each other during the course of that trial, I was Chris Edwards' attorney; correct?

A. Yes, sir.

Q. And I haven't come forward and asked you to test anything?

A. No.

Q. And I think Denise Frost who works for Clarence Mock, ironically, Clarence Mock being the prosecutor, Denise Frost was my co-counsel during the Edwards case, and she has never come forward and asked you to test anything, has she?

A. Correct.

...

Q. (By Mr. Lefler) Do you ever instruct your employees -- I know you want to get out of here, and so does everybody else. Do you ever instruct your employees to hide reports, hide the ball so that defense attorneys can't get them, sir?

A. No.

Q. Has anybody ever come forward to you, any defense attorney ever come to you in all the years you've been working and said, hey, Sheriff, we think that your -- the men and women that work for you aren't playing by the rules?

A. That's never occurred. (Dunning depo (1/20/10) 341:20-243:5)

134. Although KOFOED was still receiving full pay while on administrative leave from DoCoSO, he was found to be indigent by the Cass County district court. Atty Lefler was appointed as his attorney in the Cass County criminal prosecution. Atty Lefler then obtained authorization in *State v. KOFOED*, to take the deposition of Nick Sampson and Atty Soucie (among many others).

135. On February 8, 2010, Atty Soucie sent a letter to Atty Lefler, Atty Mock, Atty Chaloupka, Atty Bowman, Atty Carlson, Atty Dolan and other counsel of record reference Atty Soucie's continued representation of Nick Sampson as his criminal defense attorney at any potential depositions or trial testimony. Atty

Soucie advised the parties of his concerns regarding any attempt by Atty Lefler to accuse Sampson of having been involved in the Stock murders as a theory of how blood got in Will Sampson's automobile³⁶. In addition, Atty Soucie expressed in detail his concerns regarding Atty Lefler's conflict of interest related to his retention by DoCo Board to represent KOFOED in the civil proceeding and Atty Lefler's claims and conduct in the criminal proceedings.

136. On March, 23, 2010, KOFOED was found guilty in the Cass County district court. One hour AFTER the guilty verdict, the Douglas County Board faxed to Atty Lefler a letter terminating his employment contract to represent KOFOED.

137. Douglas County paid all of Atty Lefler's fees for defense in the civil case up to March 23, 2010 (the date of KOFOED's conviction in Cass County).

138. On March 25, 2010, Patrick Bloomingdale gave a deposition on behalf of Douglas County in *Livers v. Schenck et al*, and described the interests of KOFOED and Douglas County BEFORE and AFTER his conviction on March 23, 2010 as follows (emphasis added):

Q. In the civil litigation, do Douglas County and Mr. KOFOED have the same interests?

MR. DOLAN: I will object, asks for speculation and a legal conclusion. You may answer if you know, unless -- well, she is not asking for any particular communication, so go ahead and answer.

A. Well - - do they have the same interests? I would say no at this poi

Q. (BY MS. CHALOUPKA) Okay. How about before Mr. KOFOED was convicted? Did they have the same interests?

MR. DOLAN: Same objection.

A. I would have to say yes, they did.

Q. (BY MS. CHALOUPKA) What -- why did their interests -- why were their interests the same before the conviction different after the conviction?

A. Well, I think it' s - - it was the belief that he was acting within the scope of his employment, that, if anything, it was carelessness or negligence, and therefore the county had an obligation to represent him as we would do any other employee under similar circumstances. (Bloomingdale depo (3/25/10) at 44:19-45:18)

³⁶ See, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

139. On March 30, 2010, seven days AFTER conviction in *State v. KOFOED*, Atty Lefler's claim for fees in defense of the federal criminal prosecution were DENIED by the DoCo Board.

140. On March 18, 2011, DoCo Atty Carlson and Dolan in their FOURTH supplement to their answers to Interrogatories and Requehtests for Admissions in *Sampson v. Schenk, et. al*, stated as follows:

INTERROGATOR NO. 11: . . .

ANSWER: David KOFOED fabricated evidence during Mr. Sampson's incarceration. It is the Defendant's position that the fabricated evidence was not the proximate cause of Mr. Sampson's incarceration.

INTERROGATORY NO. 19: Relative to the investigation of the Stock homicide case, do you criticize any act of omission or commission of any agent or employee of:

. . . .

c. David KOFOED?

. . .

e. Donald Kleine?

ANSWER:

. . . .

c. Defendant is critical of KOFOED's failure to follow DCSO policy regarding honest and truthfulness in his report writing and the proper collection, documentation and preservation of evidence, and his misconduct in fabricating evidence as demonstrated by his conviction of March 23, 2010, in the District Court of Cass County.

. . .

e. No.

**KOFOED'S FABRICATION OF EVIDENCE IN THE STOCK DOUBLE
HOMICIDE INVESTIGATION THREE WEEKS BEFORE THE START
OF THE EDWARDS INVESTIGATION³⁷**

141. At approximately 9:00 am on April 17, 2006, Andrew Stock found his father, Wayne Stock, murdered in the upstairs bedroom of his parent's home approximately three miles west of Murdock, Nebraska. Law enforcement would soon learn that his mother, Sharmon Stock, had also been murdered. Cass County law enforcement contacted the Nebraska State Patrol assist in the investigation and the DoCo CSI Unit to process the crime scene. (KOFOED BoE, Testimony CSIs Veys, (Steel) Potter, and Retelsdorf, NSP Inv. Lambert, CCo Atty Cox, CCoSO Inv. Schenck)
142. KOFOED, CSI Veys, and CSI Retelsdorf arrived at approximately noon on April 17, 2006. CSI Steele arrived at approximately 3:00 pm. Once KOFOED arrived, they were in control of the crime scene and took steps to prevent contamination and limit access by other investigators. (KOFOED BoE, Testimony of CSIs Veys, (Steel) Potter, Retelsdorf)
143. The upstairs bedroom, hallway, office area, and stairs at Stock crime scene were saturated with Wayne Stock's blood. There was one "live" 12 gauge shotgun shell on the stairs leading upstairs and three spent 12 gauge shell casings in bedroom. One 12 shotgun blast missed everyone and went through the mattress into the bedroom wall. There were shotgun pellets in the floor which corresponded to a non-fatal shotgun injury to Wayne Stock's knee, lower leg, and ankle. Sharmon Stock was jammed between the bed frame and the wall with the phone. A 12 gauge 1 oz. slug had been fired from close contact range into her head. Wayne Stock was in the doorway to the bedroom still wrapped in a blanket. A 12 gauge blast from contact or close contact range to the back of his head basically cause the left side to explode throwing blood, tissue, and brain matter for several feet in the hallway. (KOFOED BoE, Testimony CSIs Veys and Retelsdorf)

³⁷ It is not simply the fact that KOFOED planted evidence in the Stock case that is important in Mr. Edwards' postconviction motion. It is HOW the evidence was planted and the similarity to the actions in Mr. Edwards' case that is so striking.

144. Two newspaper carriers later reported seeing a tan 4 door sedan parked at a cemetery 1 mile south of the crime scene at approximately 3:30 am on April 17, 2006. Law enforcement attempted to follow-up on any family member, friend, or associates of the Stock's who might have a similar vehicle. The family members identified William Sampson, a nephew of Sharmon Stock, as one person who owned a tan Ford Contour. However, the license plate of the Sampson vehicle did not contain the same letters as the vehicle identified by the letter carriers.
145. On April 19, 2006, law enforcement officers contacted Will Sampson and obtained permission to seize and search his Ford Contour automobile. The vehicle was transported by tow truck from Will Sampson's residence in Lincoln to the DoCoSO CSI facility in Omaha. None of the law enforcement officers entered or attempted any search of Will Sampson vehicle. It was placed on a tow truck, sealed, and transported to DoCoSO CSI for processing. (KOFOED BoE, Testimony NSP T. Jones, NSP Rathe, W. Sampson, A. Sampson, NSP E. Jones, NSP Ward, NSP Inv. Lambert)
146. On April 19 and 20, 2006, an extensive six (6) hours forensics search by DoCoSO CSI Gabig and others, failed to find any evidence of blood or other forensic evidence in the Sampson vehicle associated with the Stock murders. The- DoCoSO CSI Unit maintained custody of the Will Sampson's vehicle until it was later moved to the Douglas County CSI impound lot. (KOFOED BoE, Testimony CSIs Gabig, Retelsdorf, and Kaufold)
147. On April 25, 2006, Livers was questioned by law enforcement for more than ten hours. After more than 100 denials of responsibility and repeated threats by law enforcement, Livers made a series of contradictory and inconsistent confessions. Matt Livers is a mentally challenged individual with a reported I.Q. of below 70.
148. Law enforcement suggested to Livers that he could not have used his own vehicle, and led Livers to the idea that he would have used Will Sampson's Ford Contour to commit the murders. They also lead him to the idea that Nick Sampson had been involved.

149. Livers knew from other family members that Will Sampson's vehicle had been seized by law enforcement and had been told there was "biological evidence" in that vehicle. Livers various confessions were the basis for his arrest and the arrest of his cousin, Nick Sampson.
150. After the arrests of Sampson and Livers on April 25, 2006, Livers recanted his confession on April 26, 2006.
151. On the morning of April 27, 2006, NSP Inv. Lambert contacted DoCoSO CSI and requested that DoCoSO CSI return to Will Sampson's car to check whether there was forensic evidence that a shotgun was placed in the backseat. KOFOED testified before a federal grand jury that NSP Inv. Lambert told him during this conversation that Livers had confessed (KOFOED BoE 1936:1-1937:2, 1601:7)
152. At approximately 1:45 p.m., KOFOED directed C.L. Retelsdorf to go with him to the Douglas County impound lot to process a Ford Contour. (KOFOED BoE at 1644:4-24) KOFOED told CSI Retelsdorf he had received a request to examine the back seat of the Ford Contour for evidence that a gun had been placed at that location. (KOFOED BoE 1647:4-15)
153. At approximately 2:00 pm, CSI Retelsdorf was assigned by KOFOED to examine the back seat of Will Sampson's vehicle and he took pictures. CSI Retelsdorf found nothing of forensic or evidentiary value to show that there was a shotgun placed in the backseat. He was aware that CSI Gabig had conducted an extensive search of the vehicle on April 19, 2006. While CSI Retelesdorf was at the backseat on the passenger's side, KOFOED was at the front door on the driver's side. CSI Retelesdorf could not see exactly what KOFOED was doing, but he appeared to be examining and searching the driver's compartment. KOFOED then told CSI Retelsforf that he had a "positive" presumptive test for blood on a circular filter paper swab. This swab was shown to CSI Retelsdorf and there was the distinctive pink color consisted with blood. CSI Retelsdorf was then instructed by KOFOED to attempt to collect samples from the locations identified by KOFOED using cotton swabs. CSI Retelsdorf did so four or five

times, but with negative results³⁸. (KOFOED BoE 1598:16-1625:18; 1646:3-1681:4)

154. At approximately 3:00 pm, CSI Retelsdorf returned from the impound garage. He had a discussion with KOFOED about the preparation of reports regarding the processing of Will Sampson's vehicle. They would each do a report stating what the reporter writer did – not the actions of the other CSI present at Will Sampson's vehicle on April 27, 2006. (KOFOED BoE 1680:2-16)

155. CSI Retelsdorf prepared a report which accurately reflected his actions of taking photos of the rear backseat area of Will Sampson's vehicle on April 27, 2006. He provided the correct date and time for his actions. However, CSI Retelsdorf did NOT include any information regarding KOFOED having been present, or that CSI Retelsdorf had made several attempts at swabbing the same area and had negative results. (KOFOED BoE 1681:23-1686:13)

156. Pursuant to DoCoSO CSI policy, CSI Kaufold reviewed the report of April 27, 2006 prepared by CSI Retelsdorf. CSI Kaufold was never told and was not aware that KOFOED was present, or that he had claimed to have found presumptive blood under the dash. CSI Kaufold was not aware that KOFOED had told CSI Retelsdorf to only put in his report what CSI Retelsdorf had done and the KOFOED would make out his own report. (KOFOED BoE 1742:9-1745:10)

157. At approximately 4:30 p.m., KOFOED had a phone conversation with NSP Inv. Lambert. KOFOED told Inv. Lambert that on his own initiative KOFOED had done an additional search of the vehicle and found presumptive blood under the dash board in Will Sampson's vehicle. (KOFOED BoE 1937:18-1938:13)

158. At approximately 8:00 pm, NSP Inv. Lambert arrived at DoCoSO CSI and met with KOFOED for approximately three and a half to four hours. They went over the forensic evidence in the case. During this meeting, there was discussion

³⁸ Had CSI Retelsdorf "found" blood as requested by KOFOED, then he might well have been the defendant in the two criminal prosecutions. It's better to be lucky than good.

of much of the forensic evidence and status of the arrest and investigation. NSP Inv. Lambert testified at trial that KOFOED was “satisfied” regarding the presumptive test results and, at an earlier deposition he described KOFOED as “excited”. (KOFOED BoE 1940:17-37:18-1942:10)

159. KOFOED did NOT log this filter paper into evidence or prepare a property or investigation report on April 27, 2006, nor for ten days after. His conduct was in violation of DoCoCSI policies and procedures. (KOFOED BoE, Testimony of CSIs Veys, (Steel) Potter, Retelsdorf, KOFOED’s testimony at 404 hearing)
160. On May 8, 2006, KOFOED falsified official documents claiming that he obtained the filter paper swab and logged the filter paper into evidence on that date. KOFOED omitted from his report the exculpatory information that, when CSI Retelsdorf attempted to swab the same location with a cotton swab, it was shown to be “negative” for the presence of blood.
161. CSI Kaufold reviewed and signed off on KOFOED’s false report. CSI Kaufold was never told by KOFOED that the date and content of the report was wrong. (KOFOED BoE 1742:9-1743:10)
162. On May 9, 2006, the filter paper collected by KOFOED was taken to the UNMC DNA Laboratory where subsequent DNA testing identified a full strong PCR-STR DNA profile that was identical with that of Wayne Stock.
163. A few days after preparation of the May 8, 2006, report, Cpt (ret.) Olson claimed in emails, letters, and at his deposition in 2009 that he told KOFOED back in the summer of 2006 to NOT tell the Cass County Attorney about the false report information unless the case actually went to trial. See, ¶ 215(f)(i) *post*.
164. KOFOED does not claim that any such that any such conversation with Cpt (ret.) Olson took place in the summer of 2006. Rather, KOFOED claim this conversation would have happened in March of 2008. See, ¶ 104(l) *ante*.
165. CSI Gabig claims that “about the time” that the DNA results came back to DoCoSO CSI (approx. May 12, 2006) that KOFOED discussed with her the possibility that the results from Will Sampson’s vehicle could be “cross-

contamination.” (KOFOED BoE 1551:6-1452:2, 1474:9-1477:11) No one else confirms such a conversation.

166. At the time of Wayne Stock’s autopsy on April 18, 2006, CSI Connelly took possession of a bloody shirt worn at the time of the murder (S005-7). It was place in a bag, sealed, and stored in the bio-hazard room to which KOFOED had unlimited access. The FBI later found that the bag containing S005-7 had been unsealed, then resealed with tape with KOFOED’s initials on the tape, but NO DATE. (Kofoed BoE 1333:25-1340:4-1836:4-1838:11)
167. The persons who were solely responsible for the Stock murders were Jessica Reid and Greg Fester from Beaver Dam, WI. Neither Reid nor Fester had any connection with Matt Livers, Nick Sampson, or Will Sampson’s Ford Contour automobile. Both Reid and Fester pled guilty in January 2007. See, *State v. Reid*, 274 Neb. 780 (2008), *State v. Fester*, 274 Neb. 786 (2008).
168. At absolutely no time during the pendency of the charges against Livers, Sampson, Reid, or Fester did KOFOED, CSI Retelsdorf, CSI Gabig, or Cpt (ret.) Olson advise CCo Atty Cox that:
- a. KOFOED’s official CSI report of May 8, 2006, was wrong;
 - b. CSI Retelsdorf had been present on April 27, 2006, and did not find blood under the dash of the vehicle after multiple swabbing;
 - c. The results might be the result of “cross-contamination” and invalid; or
 - d. That KOFOED had planted the blood located on the filter paper that he then caused to be submitted to UNMC DNA Laboratory for DNA testing.
169. Based upon the evidence presented at his trial, KOFOED was convicted of planting blood evidence on March 23, 2010. The conviction was affirmed by unanimous decision by the Nebraska Supreme Court on May 4, 2012 at *State v. KOFOED*, 283 Neb. 767 (2012).
170. The FACT that KOFOED was guilty of planting evidence in the Stock murder investigation has been judicially determined, affirmed on appeal in *State v. KOFOED*, 283 Neb. 767 (2012), and is not subject to review or challenge by the State in the *Edwards* case under principles of collateral estoppel.

ASST AG KLEINE'S INVOLVMENT IN THE STOCK MURDER INVESTIGATION

171. DoCo Atty Kleine, DoCo Atty Retelsdorf, and other attorneys in the Douglas County Attorney's Office a long relationship with DoCoSO CSU Unit³⁹. While KOFOED was under investigation and charges were pending, DoCo Attorneys have been scheduled to participate in training programs sponsored by the Douglas County Sheriff's Office⁴⁰, NEIAI, and Nebraska Wesleyan University others organizations⁴¹.

172. On or about September 12, 2003, Mr. Kleine was hired by Jon Bruning, Nebraska Attorney General, to be chief of the Criminal Division. In the press release, AG Bruning stated:

"Kleine leads the field in his knowledge of DNA and forensics, and he is a top-notch prosecutor⁴². His experience includes over 125 district court jury trials in state and federal court and over 20 cases before the Nebraska Supreme Court and the Federal Court of Appeals 8th Circuit."

173. On June 2, 2006, Asst AG Kleine met with CCo Atty Cox to discuss the status of the Stock murder investigation. Asst AG Kleine's advice was sought because, as stated by AG Bruning, he is one of the most experienced criminal prosecutor's in the state. It is alleged upon information and belief that at this meeting Asst AG Kleine would have been aware at a minimum that:

- a. On April 19, 2006, a five to six hour search of Will Sampson's vehicle was conducted by CSI Gabig and nothing was found.
- b. Will Sampson vehicle then remained in locked storage at DoCoSO.
- c. On April 25, 2006, Livers had confessed to the Stock murders and implicated his cousin, Sampson, as being involved. Asst AG Kleine would have known from his experience that Matt Livers "confession" implicating Nick Sampson would not have been admissible at Sampson's

³⁹Atty Retelsdorf is the sister of CSI Retelsdorf.

⁴⁰ FORENSIC INVESTIGATION: CRIME SCENE TO THE COURTROOM (Aug 21-22, 2008) co-sponsored by the DoCo County Attorney's Office and DoCo Sheriff's Office. DoCo Atty Kleine was the keynote speaker. Scheduled presenters included DoCo Atty Kleine, and KOFOED.

⁴¹DNA IN THE COURTROOM sponsored by Neb Wesleyan University from 4/7/10 to 5/1/10 Instructors: DoCo Atty Kleine and David KOFOED.

⁴²Mr. Edwards does not dispute this characterization of DoCo Atty Kleine's experience and qualifications.

trial because it was hearsay and would violate Sampson's 6th Amendment right of confrontation⁴³.

- d. On April 26, 2006, Sampson gave a statement and denied involvement in or knowledge of who might have killed Wayne and Sharmon Stock.
- e. On May 8, 2006, KOFOED had reported collecting a swab from beneath the dash of Will Sampson's vehicle. The UNMC DNA Lab found this blood was a full and complete match to the blood of Wayne Stock.
- f. On or about May 12, 2006, DoCoSO CSI prepared a summary DNA report that the swab from Will Sampson's vehicle was a match for Wayne Stock. However, DNA testing on a ring and hash pipe from the crime scene found a mixed sample that did NOT come from Livers, Sampson, or anyone else who had provided a known sample to law enforcement. A Garrity flashlight found in proximity to the hash pipe had blood that matched Wayne Stock.
- g. All DNA and luminal testing of the persons, clothing, vehicles, and residences of Nick Sampson and Matt Livers were negative for any blood from the Stock crime scene.
- h. All ballistics tests of Nick Sampson's shotgun and all other shotguns collected by law enforcement from any source were negative when compared to the spent shells at the crime scene.
- i. The existence of blood in Will Sampson's car was the only forensic evidence in existence that tended to corroborate Livers' confession and, if true, made any claim of a "false" confession by Livers untenable.
- j. On May 17, 2006, Attorney Soucie had sent an email to Nathan Cox which stated:

"Doesn't this DNA report [May 12, 2006 DoCoSO CSI summary] establish that there were two contributors to the DNA on and inside the pipe? In addition, doesn't the report indicate that the same two people were the persons who contributed DNA to the ring found at the crime scene? More importantly doesn't it show that NS [Nick

⁴³ *Lilly v. Virginia*, 527 U.S. 116 (1999), *State v. Sheets*, 260 Neb. 325 (2000).

Sampson] and ML [Matt Livers] could NOT have been one of the contributors of the DNA on either the mj pipe or the ring?"

- k. There were recent developments from Wisconsin regarding the identification of Reid and Fester as suspects based on DNA evidence found on crime scene evidence (hash pipe and ring). The investigation had connected the ring to Cory Zastrow and a pickup stolen from Ryan Krenz in Beaver Dam, WI on April 16, 2006. The pickup had then been recovered in Louisiana on April 19, 2006. Reid and Fester stole the pickup truck.
 - l. Dep. Schenck and Inv. Lambert were on their way to Wisconsin and would attempt to interrogate Reid and Fester.
174. On June 14, 2006, Asst AG Kleine attended a meeting at Cass County with various law enforcement officers regarding the status of the investigation, including the arrests of Reid and Fester and their statements to law enforcement. Upon information and belief, Mr. Edwards alleges that Asst AG Kleine would have been advised that:
- a. Arrest warrants had been issued for Reid and Fester following their interrogations on June 4 and 5, 2006.
 - b. There was still no physical evidence connecting Sampson to the Stock murders.
 - c. Law enforcement was still relying on the blood evidence found in Will Sampson's car by KOFOED to corroborate Livers' confession.
 - d. Livers confession didn't match anything said by Reid or Fester.
 - e. On June 13, 2006, Atty Soucie sent an email to CCo Atty Cox advising him that the blood evidence in Will Sampson's car was the result of either "inadvertent or otherwise" contamination. See also, KOFOED BoE 1489:21 – 1490:6 (Cox testimony).
 - f. Asst AG Kleine was faxed a copy of the UNMC "draft" DNA report on the same date.
175. On June 23, 2006, Asst AG Kleine again met with CCo Atty Cox. Upon information and belief, Mr. Edwards alleges that at that time he would have been

made aware of the fact that Reid was consistently telling law enforcement that only she and Fester were involved in the Stock homicides.

176. On June 29, 2006, Asst AG Kleine was faxed a copy of the final UNMC DNA report which confirmed that no DNA from the Stock victims had been found on the persons or property of Sampson and Livers. This report stated that Reid and Fester's DNA was found on the ring and hash pipe left at the crime scene, and that Wayne Stock's DNA was on the "5/8/06" swab submitted to UNMC by KOFOED.

177. During the period from June 2 to October 2, 2006, Mr. Edwards upon information and belief alleges that Asst AG Kleine knew, or should have known that:

- a. No one associated with the Stock crime scene entered or had access to this vehicle before it was seized by law enforcement, driven onto the tow truck by Will Sampson, sealed, and transported to DoCoSO CSI.
- b. CCo Atty Cox had been told that the blood found in Will Sampson's car was a large quantity of DNA⁴⁴. See also, KOFOED BoE at 1490:16 – 1491:16, 1505:23-1506:15, 1506:21-1507:1508:8 (CCo Atty Cox).
- c. On July 10, 2006, at a bond hearing for Sampson, Nathan Cox repeatedly represented to Judge Rehmeier that:

*"There was one individual [Matt Livers] who had implicated the defendant as being involved and participating in this double homicide. And that theory and that information is partially corroborated by the fact that one portion of the information that we're provided indicates that a Will Sampson vehicle, brother of the defendant, is found to have **blood evidence in that particular vehicle that corroborates the initial indications from the witness that ties this defendant to the crime.**"*
(33:13)

Mr. Cox repeated:

⁴⁴ It is unclear where CCo Atty Cox got this information. He testified that he thought it was from a phone call to DoCoSO CSI where he spoke with a male individual. However, KOFOED has testified that M. Helligso of the UNMC DNA Lab was present when he would go over the forensic evidence with CCo Atty Cox. The evidence sample was a very strong and had to be diluted 8:1 before conducting the STR DNA analysis. See, UNMC bench notes p. 791. In addition to being employed by UNMC DNA Lab, M. Helligso had been hired by DoCoSO as a DNA consultant. (Kofloed BoE 1692:10-18)

“The reference to the vehicle deals with the first witness [Matt Livers] indicating that the defendant was involved in supplying the vehicle to be used and also supplying the gun, that this defendant supplied the gun for the murder, and that he was also present, and that was the corroboration then with there being blood DNA in the vehicle for purposes of corroborating the first story that the defendant was involved in providing that vehicle and involved intimately in the murder of Wayne and Sharmon Stock.” (36:08.) (Emphasis added)

- d. On July 19, 2006, CCo Atty Cox met with KOFOED for over three hours at DoCoSO CSI.
 - e. On July 21, 2006, CCo Atty Cox met with DoCoSO CSI from 1:00 to 2:00 pm.
178. On October 2, 2006, Asst AG Kleine met with CCo Atty Cox to discuss the status of the investigation. Upon information and belief, Mr. Edwards alleges that at this meeting, Asst AG Kleine knew or should have known the facts set forth in ¶ 173-177 *ante*.
179. On October 6, 2006, CCo Atty Cox dismissed the case against Sampson “without prejudice”. However, Livers remained in custody under charges of two counts of first degree murder and two counts of use of a weapon.
180. On December 13, 2006, DoCo Sheriff Dunning presented KOFOED with a letter of commendation in recognition of being “civilian employee of the month” for November. The citation was prepared by Cpt (ret.) Olson. (Dunning depo (1/21/10) 117:5-15; 172:9-25)
181. In January of 2007, DoCo Atty Kleine took office as the Douglas County Attorney. He was aware of the pending trial of Mr. Edwards and did, in fact, participate in the trial.
182. Upon information and belief, it is alleged that neither DoCo Atty Kleine nor DoCo Atty Retelsdorf advised Atty Lefler of the facts as set forth in ¶ 173-179 *ante*.
183. It is unknown at this time whether Atty Lefler knew of the facts as set forth in ¶ 173-179 *ante* from DoCo Atty Kleine or from his relationship with KOFOED.

**KOFOED’S FABRICATION OF EVIDENCE IN THE
BRENDON GONZALEZ DISAPPEARANCE AND
HENK MURDER INVESTIGATION IN 2003⁴⁵**

184. On the early morning of January 7, 2003, Brendan Gonzalez was in the custody of Ivan Henk and disappeared. Henk then fled the police when approached and wrecked the car after a brief chase. He made no admissions to law enforcement at that time. He was charged with flight to avoid arrest, but was NOT charged with any crime involving his son, Brendan Gonzalez.
185. Cass County law enforcement called in DoCoSO CSI Unit to help investigate and process suspected crime scenes.
186. On January 7, 2003, KOFOED and CSI Retelsdorf found several blood droplets on the floor and on a child’s bike located in the Gonzalez garage. There was also a larger blood stain on the seat of a recliner rocker in the garage (S531-1). There were some blood smears on various locations of the Hyundai vehicle driven by Henk when he fled the police. Clothing worn by Henk at the time of his arrest was collected and processed.
187. KOFOED and CSI Retelsdorf used cotton tipped swabs and not “filter paper” during these initial CSI searches to collect the evidentiary samples. These cotton swabs or the actual items of evidence (or a cutting) were submitted to UNMC for DNA testing. However, not all of the items suspected of containing biological evidence collected during these initial searches and processing were submitted to the UNMC DNA Lab on January 8, 9, and 10, 2003.
188. The cotton swabs collected by CSI Retelsdorf from the garage floor were not sent to UNMC in January of 2003, but were logged in as evidence items S531-9 and S531-9 and retained by DoCoSO CSI.
189. On January 10, 2003, KOFOED called the UNMC DNA Lab directly to determine the progress of the testing.

⁴⁵ Again, it is not simply the fact that KOFOED planted evidence in the Gonzalez murder case that is so relevant. It is HOW the evidence was planted and the similarity to KOFOED’s actions in Mr. Edwards’ case. The facts as alleged in this section of Mr. Edwards’ motion were presented at a 404 hearing in *State v. Kofoed* in March of 2010.

190. On January 12, 2003, as part of CSI "Event 10", KOFOED returned to the Gonzalez garage alone and collected additional biological samples. KOFOED identified the items collected as S507-24 (south garage, lower handle), S507-25 (south garage, middle handle), S507-26 (white toddler bed frame), S507-27 (north garage, vertical handle), S507-28 (north garage, lower handle), S507-29 (swab from garage floor near bike ref: S-2), S507-30 (swab from garage near bike front tire ref: S-1), S507-31 (leaves & debris with greasy substance), S507-32 (blue gloves). The two swabs collected by KOFOED suspected of containing Brendan Gonzalez' DNA (S507-29, S507-30) were from similar areas as the swabs collected earlier by CSI Retelsdorf. (S531-9, S531-10).
191. All four garage floor swabs (S531-9, S531-10, S507-29, S507-30) remained in DoCoSO CSI possession until June 26, 2003, when they were release to S. Dion, CassCoSO.
192. On March 23, 2003, the UNMC DNA Lab issued a report to KOFOED stating that DNA from the upholstery cutting (S531-11) take from the rocker in the garage (S531-1), was consistent as coming from Brendan Gonzalez. The other samples tested were mixed samples, or consistent with the DNA profile for Henk.
193. On May 15, 2003, KOFOED and CSI Retelsdorf went to the Gonzalez residence and collected sink drains, carpet samples, and took swabs of the carpet. These items were listed in the Douglas County property report as S531-34 (the carpet), S531-35 (drain), S531-36 (drain), S531-37 (bag with 2 swabs from carpet), and S531-38 (bag with filter paper from carpet).
194. These May 15, 2003 items were not submitted to UNMC DNA Lab for testing at that time. This delay in submitting the suspected biological evidence was inconsistent with practice of DoCoSO CSI after their earlier searches.
195. On June 2, 2003, Henk gave an additional statement and identified a dumpster located at the "R" apt at 12814 S. 9th St in Bellevue, Nebraska as the location where he had disposed of Brendan's body on January 7, 2003.
196. On June 2, 2003, KOFOED and CSI Retelsdorf reported that a presumptive test was positive for "blood" for locations in the dumpster and on

debris removed from that dumpster. This activity was recorded as DoCoSO CSI “Event 17.” These items of evidence were identified in the Douglas County property reports as S507-33 (debris from dumpster), S507-34 (bag with cardboard box with two swabs used on dumpster), S507-35 (folded paper with glass debris from dumpster debris), and S507-36 (folded paper with dumpster debris).

197. On June 5, 2003, KOFOED claimed to have processed debris from the dumpster. It does not appear that anyone else was present or involved in this activity. The CSI index of reports lists this processing as “Event 18.”
198. The CSI index and the property report state that KOFOED collected two items of evidence on June 5, 2003, when processing item S507-33 (debris from dumpster). KOFOED did not use cotton swabs, but filter papers. These filter papers (S507-37 - paper bag containing folded paper with filter paper that had been tested with phenolphthalein and S507-38 - paper bag containing folded paper with filter paper) were then submitted to the UNMC DNA Lab.
199. CSI Retelsdorf delivered items S507-34 through S507-38 and the other items from the May 15, 2003, search to the UNMC DNA Lab where they were logged in by Kelly Duffy. However, the original dumpster debris (S507-33) that KOFOED swabbed using filter paper was not sent to UNMC.
200. On June 11, 2003, UNMC laboratory technician, Duffy, examined, documented, and photographed these items before beginning her DNA extraction, PCR amplification, and STR-DNA testing. Duffy’s UNMC notes indicate that item S531-38, which was supposed to have been obtained from the Gonzalez residence on May 15, 2003, was “sealed”, but had written on it "filter paper from dumpster 2 June 03".
201. Duffy’s notes indicate that item S507-38 that was supposed to be from the dumpster, was marked "15 May 03." Duffy transposed the dates in her notes and recognized this mistake when she reviewed her materials for the US Attorney.
202. On June 13, 2003, the UNMC DNA Lab tested S507-34 (the cotton swab obtained by directly swabbing the dumpster on June 2, 2003). The STR-DNA results were badly degraded with barely reportable alleles.

203. UNMC did not attempt DNA testing on items S507-35 (glass debris from dumpster) or S507-36 (debris from dumpster) because the preliminary screening tests were all negative for blood. This debris (S507-35, S507-36) should have been at least as stained with blood as the debris (S507-33) KOFOED claimed that he swabbed with filter paper.
204. In contrast to the badly degraded dumpster swab profile (S507-34), KOFOED's filter paper swabs S507-37 and S507-38 produced complete 16 loci profile without any evidence of degradation or contamination from the garbage that would have gone through the dumpster.
205. The quantity of DNA and quality of the STR-DNA profile obtained from KOFOED's filter papers would be impossible under the existing environmental conditions of heat, temperature, UV light, other contamination, bacterial action, time, periodic filling and removal of trash and other garbage that existed from January 7 to June 2, 2003. In addition to these factors, there would have been the condoms, sanitary napkins, left-over food, milk, beer, and other assorted liquids found in typical garbage that would have facilitated bacterial action. This bacteria would feed on any biological materials (such as blood), if blood were present and further degraded any DNA (if there was any).
206. The "R" apartment dumpster was exposed for twenty-one weeks to heat and humidity as extreme as artificially created in the recent scientific studies. C.R. Thacker, C. Oguzturun, K.M. Ball D. Syndercombe Court, An investigation into methods to produce artificially degraded DNA, International Congress Series, Volume 1288, April 2006, Pages 592-594. In one study human DNA was artificially degraded by storing cotton squares soaked with blood or saliva at 37 degrees centigrade (98.6 degrees Fahrenheit) and 100% humidity. The samples were then tested at 2, 8, 12 (saliva), and 16 (blood) week periods to quantify the DNA present and attempt to obtain DNA profiles. This study found that the quantity of DNA able to be extracted reduced dramatically after only two weeks and was negligible or non-existent by the sixteenth week. Using similar PCR-STR types of analysis, the study found that, "After several weeks, virtually all the DNA had degraded and no profile was obtained." L.A. Dixon, et al.,

Analysis of artificially degraded DNA using STR's and SNPs - results of a collaborative European (EDNAP) exercise, Forensic Science International, 164 (2006).

207. The four cotton swabs from the Gonzalez garage floor (S531-9, S531-10, S507-29, S507-30) were untested and in storage at DoCoSO CSI on June 5, 2003. They were not taken to UNMC until November 18, 2003.
208. Kristi Spittle and Dr. Brian Wraxall of SERI testified regarding testing conducted on the items KOFOED claimed had produced the complete profile of Brendon Gonzalez. It was essentially impossible, in their opinion, to have gotten such results under the environmental factors present in the dumpster. (KOFOED BoE – 404 hearing 395:14-437:23; 504:1-539:6)
209. Based on the facts and the scientific evidence available, there was compelling circumstantial evidence that the filter paper swab reportedly collected by KOFOED on June 5, 2003, could not have been from blood of Brendan Gonzalez deposited in the dumpster on January 7, 2003.
210. The issue regarding whether KOFOED planted evidence in the Brendon Gonzalez disappearance was the subject of an extensive 404 hearing in *State v. KOFOED*. The trial judge found clear and convincing evidence that the blood had been planted by KOFOED.
211. The FACT that KOFOED planted evidence in the Brendon Gonzalez disappearance/murder investigation has been judicially determined, affirmed on appeal in *State v. KOFOED*, 283 Neb. 767 (2012), and is not subject to review or challenge by the State in the Edwards case under principles of collateral estoppel.

GROUND NUMBER ONE: THERE IS COMPELLING IMPEACHMENT EVIDENCE THAT SHOULD HAVE BEEN PRESENTED TO THE JURY WHICH ESTABLISHES THAT KOFOED WAS A MEMBER OF THE STATE'S PROSECUTION TEAM AND FABRICATED EVIDENCE AND FALSIFIED REPORTS IN TWO OTHER MURDER INVESTIGATIONS AND WAS IN A POSITION TO FABRICATE EVIDENCE, FALSIFY REPORTS, AND DID TESTIFY FALSELY IN MR. EDWARDS' MURDER PROSECUTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, NEB. CONST. ART. I, § 3, AND THE DECISIONS IN UNITED STATES V RUSSELL, 411 U.S. 423 (1973), MILLER V. PATE, 386 U.S. 1 (1967), NAPUE V. ILLINOIS, 360 U.S. 264 (1959), ALCORTA V. TEXAS, 355 U.S. 28 (1955), PYLE V. KANSAS, 317 U.S. 213 (1942), AND MOONEY V. HOLOHAN, 294 U.S. 193 (1935) AND THEIR PROGENY.

"I mean if I wanted to do this, . . . I would put it somewhere where it would link him [the accused], lock him down on it. . . . and for me to be the one that found it even makes less sense. I'm the boss. I don't have to do that stuff. I can assign somebody to do it."

KOFOED (6/30/08)

212. As to the claim for relief under Ground One, Mr. Edwards incorporates by reference the factual allegations as set forth in ¶ 1 thru 211 *ante*.
213. It is well established in Nebraska law that evidence can be direct or circumstantial. There is no distinction between the two types of evidence. See NJI2nd Crim. 5.0.
214. The circumstances regarding how KOFOED planted the evidence as set forth in ¶ 141-211 *ante* are strikingly similar to the collection and control of the evidence in Mr. Edwards case. See, ¶ 65, 77-79 *ante*
215. Mr. Edwards alleges that KOFOED only falsified reports and fabricated evidence in cases when:
 - a. Law enforcement had identified a suspect and KOFED "knew" the person was "guilty." In the *Henk* and *Liver/Sampson* cases, KOFOED "knew" that Henk had confessed and that Livers had confessed implicating Sampson.
 - b. The prosecutor might be reluctant to file charges with the available evidence or it might make it difficult to obtain a conviction because of legal "technicalities."

- i. Henk had made dramatic admission in open court, then gave a detailed confession to the investigation officers in a subsequent interrogation. However, CCo Atty Cox had not filed murder charges.
 - ii. Livers had given a confession implicating Sampson, but had then recanted, making the conviction of Sampson extremely difficult since there was no forensic evidence connecting him to the murders.
 - iii. The was “no body” in the Edwards case.
- c. The local investigating officers would NOT question the discovery incriminating evidence since those officers were also convinced the suspect(s) were guilty.
 - d. The local prosecuting attorney would NOT question the discovery of incriminating evidence, since the prosecuting attorney wanted to get a conviction.
 - e. The other CSI employees under his supervision would not question his instructions or entertain the possibility that he had planted evidence or falsified reports since he was the Commander of the DoCoSO CSI Unit⁴⁶.
 - f. KOFOED’s direct supervisor, Cpt. (ret.) Olson would not question his actions because of their personal and professional relationship and he could count on command intimidation of any DoCoSO CSI Unit employee who came forward with information. KOFOED’s confidence in Cpt. (ret.) Olson was best exemplified when:
 - i. Cpt (ret.) Olson sent an email all CSI employees (and DoCo Sheriff Dunning) on June 7, 2009, with his unpublished article “The Power to Harm” with the following comments to the DoCoSO personnel:

⁴⁶ KOFOED allegedly used his position as Douglas County CSI Commander to plant evidence in other situations in an attempt to discipline and/or embarrass subordinates in his department. In one case, CSI Kush claimed that KOFOED placed fingerprint on a surface of a vehicle after she had conducted her examination. KOFOED then criticized Kush for having “missed” this obvious print. See Kush deposition (7/15/10) in *Livers v. Schenck et al.*)

Thought you would find it interesting because it brings to light some of the overlooked/ignored facts in Dave KOFOED's case. This op-ed is especially important for CSI employees because it sets the record straight in spite of the unwarranted beat down you have suffered over the past 18 months at the hands of petty hacks, weak-kneed wimps hiding behind keyboards taking shots from a distance, and political pimps with the power to abuse an innocent man, and by extension an innocent CSI Division, by manipulating the system for political gain and career advancement. Please remember that this cloud of bad news will pass and things will be better soon. In the meantime, I urge you all to support Dave KOFOED, as I am doing, not just because he is a friend, but because this is the worst case of abuse of the government's power to harm that I have ever witnessed in my 30 years of public service. You have the unabridged version of the op-ed, and the emails sent to one of the staff writers of the WH. And in case you are one of those long timers from the old CSI, my comments about "talented employees" in the op-ed refers to you (Dave S. and Bill K.) and is not intended to infer that you were, or ever have been, anything less than professional and dedicated.

- ii. Cpt (ret.) Olson forwarded KOFOED a copy of a complaint Olson sent to the DoJ Office Professional Responsibility on September 11, 2009, attacking AUSA Stecher.
- g. DoCo Sheriff Dunning would not question KOFOED's actions that might be suggestive of misconduct because:
 - i. KOFOED had been moved from relative obscurity within OPD to a position of significant supervisor responsibility as Commander of the DoCoSO CSI Unit.
 - ii. KOFOED was given expanded authority to change CSI policy, hire and fire personnel, and increase the profile of the CSI unit through seminars and teaching opportunities.
 - iii. Dunning intended to build a first rate DoCoSO CSI Unit with a significant expenditure of funds and increase in personnel.
 - iv. Dunning wanted to merge or take over the CSI and forensic functions also being performed by OPD.

- v. Dunning wanted to expand the CSI functions to surrounding counties, such as Sarpy County, Cass County, and others so as to increase revenue for the department.
- vi. On December 13, 2006, DoCo Sheriff Dunning presented KOFOED with a letter of commendation in recognition of being “civilian employee of the month” for November. The citation was prepared by Cpt (ret.) Olson. (Dunning depo 1/21/10 at 117:5-15; 172:9-25)
- vii. Dunning repeatedly issued public statements of support for KOFOED to the FBI agents in May-June 2008, public statement in regards to the IA investigation, BEFORE the grand jury Indictment was returned, and then after the criminal charges were filed, Dunning publically attacked the state and federal prosecutors for filing the charges.
- h. The DoCo Attorney would not question his actions and seek an independent, unbiased, investigation through appointment of a special prosecutor and grand jury because:
 - i. KOFOED had personally supported DoCo Atty Kliene for appointment to the position of DoCo Attorney over Stu Dornan in 2003. KOFOED received a private letter of reprimand SOLELY for having used a DoCoSO email account to send his letter to the Omaha World Herald.
 - ii. DoCo Atty Retelsdorf was the brother of DoCoSO CSI Retelsdorf.
 - iii. KOFOED’s confidence was justified because:
 - 1. Following the June 2008 DoCoSO Internal Affairs investigation and after DoCo Sheriff Dunning consulted with the DoCo County Attorney’s Office, KOFOED was only punished by the loss of two days of vacation. There was no change in his official duties or responsibility and he continued to work crime scenes as a CSI. (Dunning depo (1/10/10) 263:8-265:9)

2. When KOFOED was charged criminally in state and federal court, Sheriff Dunning and the DoCo Attorney's Office went to the DoCo Board and advised them that KOFOED was being wrongfully accused⁴⁷. (Dunning depo (1/10/10) 306:19-308:2)
 3. Any investigation into the DoCoSO CSI Unit would call into question dozens, if not more, criminal convictions obtained by the DoCo Attorney's Office from 1999 to the present time, including the investigation and conviction of Mr. Edwards.
 - i. Knew that with his unrestricted supervisory access to the evidence, bio-hazard room, review of reports, and control of assignments that he could institute damage control at any time, if needed.
216. KOFOED had constructed what was a beautifully simple and foolproof plan, until the unexpected happened. First, KOFOED planted evidence against two totally innocent people who had the remarkable good fortune to have the evidence prove beyond any reasonable doubt the identity of the actual guilty parties. Second, two dedicated civil rights attorneys connected the dots in regards to the only plausible theory which was the blood was planted and the identity of the person unknown. Third, the civil rights allegations caught the interest of the FBI which did not have a provincial interest in covering up felony criminal conduct. See, ¶ 17-19, 34-35, 89-90, 93-94, 100-102, 109, 117-118, 119 *ante*.
217. The pattern and practice of now convicted felon KOFOED planting and fabricating evidence is sufficiently serious so as to make any evidence collected, stored, and processed while under KOFOED's supervision and control inherently suspect and presumptively inadmissible. See, *In the matter of an investigation of*

⁴⁷ It is unprecedented for a sitting county attorney to go to a county board and advise them in his OFFICIAL capacity that any defendant, including an employee of the county, has been "wrongfully accused" in an Indictment brought by the Department of Justice and a duly impaneled federal grand jury, and charges filed by a duly appointed special deputy county attorney. Compare, DoCo Treasurer Dept Employees Fred Capellano, Anthony Sorbello, Sofia Mayorga, and DoCo Corrections employee Ralph Bruchner for example.

the West Virginia State Police Crime Laboratory, Serology Division, 438 S.E.2d 501, 520 (W.Va. 1993) (Zain I) (All evidence handled by West Virginia Crime Lab Director Fred Zain held to be presumptively unreliable because of his history of fabricating evidence.).

218. The evidence identified by Mr. Edwards and presented in *State v. Kofoed* establishes that the physical and forensic evidence identified in ¶¶ 65-66, 77-79 *ante* must be presumed unreliable, fabricated, and inadmissible.

219. KOFOED was not “just another witness” who may have lied and falsified evidence. KOFOED was an integral member of the prosecutorial team who had participated in and supervised the collection and processing of ALL the forensic evidence in this case. Reversal of Mr. Edwards conviction is required. *Smith v. Florida*, 410 F.2d 1349 (5th Cir. 1969); *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964); *Curran v. Delaware*, 259 F.2d 707, 713 (3d Cir. 1958), citing original record in *Pyle v. Kansas*, 317 U.S. 213 (1942).

220. Mr. Edwards should have the opportunity to present to the jury as part of his defense evidence that these critically important items of forensic evidence were unreliable and fabricated. See, *Holmes v. South Carolina*, 547 U.S. 319 (2006)⁴⁸. The history of serial misconduct on the part of an essential member of the State’s prosecutorial team is of such magnitude as to violate Mr. Edward’s constitutional right to due process under the Fourteenth Amendment to the United States Constitution, Neb. Const. Art. I, § 3, and the decisions in *Miller v. Pate*, 386 U.S. 1 (1967)⁴⁹, *Napue v. Illinois*, 360 U.S. 264 (1959), *Alcorta v. Texas*, 355 U.S. 28 (1955), *Pyle v. Kansas*, 317 U.S. 213 (1942), and *Mooney v. Holohan*, 294 U.S. 193 (1935) and their progeny.

⁴⁸ The United States Supreme Court unanimously vacated the rape and murder conviction where the defendant had been denied the opportunity to present evidence of a third party's guilt. The state trial court believed the prosecutor's forensic evidence was too strong for the defendant's evidence to raise an inference of innocence. The Court ruled that this exclusion violated the right of a defendant to have a meaningful opportunity to present a complete defense, because the strength of a prosecutor's case had no logical relationship to whether a defendant's evidence was too weak to be admissible.

⁴⁹ Illinois death row inmate entitled to habeas relief where prosecution knowingly misrepresented paint-stained shorts as blood-stained, and failed to disclose the true nature of the stains. Mr. Edwards is not alleging that Atty Retelsdorf or DoCo Atty Kleine knowingly presented false evidence. However, as a member of the prosecution team the State is responsible for the conduct of KOFOED. See, *Kyles v. Whitely*, 514 U.S. 419 (1995) (Failure of law enforcement to disclose exculpatory evidence imputed to the State as a violation of *Brady v. Maryland*, even if prosecutors were unaware of the evidence.)

221. The actions of any law enforcement officials in planting and falsifying evidence against the Defendant is “outrageous government conduct” that requires the reversal and dismissal of all charges under the due process clause of the Fourteenth Amendment and the decision in *United States v. Russell*, 411 U.S. 423 (1973) and its progeny.

GROUND NUMBER TWO: THE FAILURE OF LAW ENFORCEMENT AGENTS AND/OR STATE PROSECUTORS TO DISCLOSE MATERIALLY EXCULPATORY IMPEACHMENT EVIDENCE TO MR. EDWARDS AND HIS ATTORNEYS THAT CSI COMMANDER KOFOED HAD FALSIFIED REPORTS AND FABRICATED EVIDENCE IN OTHER MURDER INVESTIATIONS – INCLUDING UNDER CIRCUMSTANCES SIMILAR TO THOSE PRESENT IN MR. EDWARDS CASE – VIOLATED MR. EDWARDS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND NEB. CONST. ART I, § 3 AND 11, AND THE DECISIONS IN KYLES V. WHITELY, 514 U.S. 419 (1995), BRADY V. MARYLAND, 373 U.S. 83 (1963) AND THEIR PROGENY.

“I still to this day believe he was wrongly accused. . . . And I made it known to the county board. . . . [O]ut of due respect for them, I had to make sure they were aware of what took place. The county attorney and I went and talked to them.”

DoCo Sheriff Dunning depo (1/21/10)⁵⁰

222. As to the claim for relief under Ground Two, Mr. Edwards incorporates by reference the factual allegations as set forth in ¶ 1 thru 221 *ante*.

223. The statutory responsibilities of the county attorney are set forth in Neb. Rev. Stat. 23-1201 which states:

(1) . . . [I]t shall be the duty of the county attorney, when in possession of sufficient evidence to warrant the belief that a person is guilty and can be convicted of a felony or misdemeanor, to prepare, sign, verify, and file the proper complaint against such person and to appear in the several courts of the county and prosecute the appropriate criminal proceeding on behalf of the state and county. . .

⁵⁰ This deposition was taken two months before KOFOED’s felony conviction on March 22, 2010.

(2) It shall be the duty of the county attorney to prosecute or defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state in which the state or the county is a party or interested. . . .

224. Neb. Rev. Stat. § 29-1408 grants to the county attorney the authority to request the district court to call a grand jury. When it appears that investigation should be made into matters regarding the official acts of county officials, then a special prosecutor should be appointed.

225. Neb. Ct. R. of Prof. Cond. § 3-503.8 states:

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

. . . .

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

226. Comment 1 to Neb. Ct. R. of Prof. Cond. § 3-503.8 states:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

227. At the time DoCo Atty Kleine assumed his duties as the Douglas County Attorney in January 2007, he had unique knowledge regarding the circumstances of KOFOED's discovery of the blood in Will Sampson's vehicle, and its importance in the incarceration of two innocent persons, Livers and Sampson as set forth set forth in ¶ 173 thru 179 *ante*.

228. Once the discovery of KOFOED's criminal conduct began to publically unravel starting on March 20, 2007, Douglas County, DoCo Atty Kleine, and DoCo Sheriff Dunning were in a very difficult position. See, ¶ 85-140 *ante*.

- a. ALL of the actual falsification of reports and fabrication of evidence by KOFOED in the Stock and Gonzalez murder investigation physically took place in Douglas County.
- b. KOFOED knew he falsified his report and fabricated evidence on April 27, 2006, and submitted the fabricated evidence on May 8, 2006.
- c. The essential "fact" that KOFOED falsified major portions of his 5/8/06 CSI and property report was reportedly known by Cpt. (ret) Olson in the summer of 2006. DoCoSO Sheriff Dunning admits that he knew this fact as early as March of 2008. DoCoSO Kleine certainly knew this fact by June/July 2008 when he was consulted regarding the DoCoSO IA investigation.
- d. Neither CoCoSO Dunning nor DoCo Atty Kleine sought ANY out-side professional forensic review of how blood could have accidentally gotten into Will Sampson's automobile as part of the DoCoSO IA investigation in June of 2008.
- e. Once it was clear that KOFOED had been at the car on April 27, 2006, rather than May 8, 2006, and that he initiating the swabbing on his own initiative and not at the direction or urging any specific law officer, the list of "persons of interest" was reduced to one, KOFOED.
- f. DoCo Atty Kleine had specific information regarding the details how KOFOED planted evidence in both the Stock and Gonzalez murder investigations from the letter from Attorney Soucie date April 27, 2009⁵¹.

229. Neither KOFOED, Cpt. (ret) Olson, DoCo Sheriff Dunning, nor DoCo Atty Kleine communicated any of these facts to Mr. Edwards, or an attorney who was not operating under a conflict-of-interest in representing Mr. Edwards and KOFOED.

⁵¹ It is unknown whether DoCo Atty Kleine shared the contents of this letter with DoCo Sheriff Dunning. It seems logical that he would. Sheriff Dunning testified that he was aware of allegations about the Henk case during his deposition, but did nothing to investigate.

230. DoCo Sheriff Dunning and DoCo Atty Kleine then took the following joint actions on behalf of KOFOED:
- a. They appeared before the DoCo Board in June/July 2009 and stated that the pending state and federal charges were “unfounded”;
 - b. They facilitated the appointment of Atty Lefler to represent KOFOED in the civil rights cases where Atty Lefler would be compensated at the rate of \$200/hr to conduct parallel discovery useful in the criminal defense at DoCo expense;
 - c. They allowed DoCo Atty’s Carlson and Dolan to file Answers to the civil rights complaints stating that KOFOED had at all times been acting within the scope and authority of his employment;
 - d. They did not seek any stay of the Answer to the complaints or discovery in the federal civil cases to allow the facts and dispositions KOFOED’s criminal cases to be resolved, and
 - e. They allowed Atty Lefler to proceed with representation of KOFOED in both criminal and civil litigation where DoCo was paying his attorney fees in the civil case, so as to create a conflict-of-interest that would attempt to protect DoCo’s financial exposure at the expense of appropriate criminal prosecution. See ¶ 234- 248 *post*.
231. The law enforcement officials involved in the Mr. Edwards’ prosecution team, which would have included DoCo Atty Kleine, DoCo Sheriff Dunning, KOFOED, and CSI Retelsdorf, were aware of information that KOFOED had falsified reports. KOFOED knew he had fabricated evidence. DoCo Atty Kleine, DoCo Sheriff Dunning, and CSI Retelsdorf, were aware that there was circumstantial evidence KOFOED had fabricated evidence in the Stock murder investigation which was clearly exculpatory impeachment evidence in regards to KOFOED’s involvement in the collection and control of the forensic investigation in Mr. Edwards’ prosecution.
232. The failure of the State and its agents to disclose this information to Mr. Edwards, or to an attorney for Mr. Edwards not operating under Atty Lefler’s conflict of interest in representing KOFOED, violates due process under the

Fourteenth Amendment to the United States Constitution, Neb. Const. Art. I, § 3, and the decisions in *Brady v. Maryland*, 373 US 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995) and their progeny.

GROUND NUMBER THREE: MR. EDWARDS' ATTORNEY HAD A CONFLICT OF INTEREST BECAUSE OF HIS PERSONAL AND PROFESSIONAL RELATIONSHIP WITH KOFOED THAT PREVENTED ATTY LEFLER FROM TAKING ACTIONS DURING PRE-TRIAL, TRIAL, AND ON APPEAL ON BEHALF OF MR. EDWARDS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND NEB. CONST. ART I, § 3 AND 11, AND THE DECISIONS IN HOLLOWAY V. ARKANSAS, 435 U.S. 475 (1978), CUYLER V. SULLIVAN, 446 U.S. 335 (1980), WOOD V GEORGIA, 450 U.S. 261 (1981), WHEAT V. UNITED STATES, 486 U.S. 153 (1988).

"I know you [KOFOED] to be a man that's always striving to become better at what you do, . . ."

Atty Lefler (10/30/06)

233. As to the claim for relief under Ground Three, Mr. Edwards incorporates by reference the factual allegations as set forth in ¶ 1 thru 232 *ante*.

234. Atty Lefler's representation of Mr. Edwards began in June of 2006. This was before Atty Lefler began to represent KOFOED in regards to his various criminal and civil legal troubles related to falsifying reports and fabricating blood evidence in the Stock and Henk murder investigations⁵².

235. Atty Lefler has never obtained informed consent from Mr. Edwards to represent KOFOED in connection with any allegations that he falsified reports and/or fabricated evidence. Neb. Ct. R. of Prof. Cond. § 3-501.9 states:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

. . . .

⁵² Mr. Edwards does not know if Atty Lefler might have represented KOFOED on other personal or professional matters prior to the Stock murder investigation related matters set forth in this motion.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

236. Atty Lefler has never obtained informed consent from Mr. Edwards to disclose any information to any person related to conversations or information obtained by Atty Lefler's during his representation of Mr. Edwards. Neb. Rev. Stat. § 27-503 and Neb. Rev. Stat. § 27-511. Neb. Ct. R. of Prof. Cond. § 3-501.6 states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). . . .

237. Mr. Edwards has never given informed consent to Atty Lefler to concurrently represent Mr. Edwards while on appeal in this case and represent KOFOED in regards to allegations of falsifying reports and/or fabricating blood evidence that would have been exculpatory impeachment evidence in Mr. Edwards' case. Neb. Ct. R. of Prof. Cond. § 3-501.7 states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

- (3) *the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and*
- (4) *each affected client gives informed consent, confirmed in writing.*

238. It would have been in KOFOED's best interest based upon the evidence against him to have attempted to negotiate a plea to a charge that might have avoided a felony conviction.

239. It was not in Atty Lefler's personal financial interest to work towards joint or individual state and federal settlement in the criminal cases because of the \$200/hr fee he was receiving in the civil rights cases.

240. It was not in Atty Lefler's personal financial interest to seek a "stay" in the federal civil rights cases, both as to discovery issues and pleading, because he had an agreed flat fee payment from KOFOED of \$25,000 for both criminal cases. Once KOFOED was convicted on March 22, 2010, Atty Lefler was fired by DoCo from further representation in the civil cases.

241. Neb. Ct. R. of Prof. Cond. § 3-501.8 states:

(a) A lawyer shall not . . . knowingly acquire [a] . . . pecuniary interest adverse to a client unless:

- (1) *the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*
- (2) *the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*
- (3) *the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

. . .

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) *the client gives informed consent;*

- (2) *there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and*
- (3) *information relating to representation of a client is protected as required by Rule 1.6.*

242. As a result of the conflict of interest based upon his personal friendship and professional representation of KOFOED, Atty Lefler failed to take a number of steps in Mr. Edwards defense pre-trial, trial, post-trial, and on appeal that could have, and should have, been taken.

243. These steps would have involved investigating, asserting, presenting evidence, and arguing that KOFOED (or other members of DoCoSO CSI Unit) in ¶ 66, 77-78 *ante* had either a) cross-contaminated these critical pieces of evidence, or b) planted the blood evidence and that official CSI reports may have been falsified.

244. When representing Mr. Edwards during the pre-trial phase, Atty Lefler failed to:

- a. Take a meaningful and useful deposition by questioning KOFOED regarding:
 - i. The circumstances of how blood could have been found by KOFOED in the car of an innocent person during the Stock murder investigation,
 - ii. The circumstances of finding of blood in the dumpster in the Henk murder investigation,
 - iii. The prevalence of “cross-contamination” by CSI and law enforcement personnel during a homicide investigation,
 - iv. The prevalence of contamination of CSI equipment, vans, clothing, during a homicide investigation, and
 - v. Many other areas of inquiry regarding the specific and unusual facts of the discoveries of blood in Mr. Edwards case on the items set forth in ¶ 65-66, 77-79 *ante*
- b. Conduct a meaningful defense investigation regarding how the blood found on the items set forth in ¶ 65-76, 77-79 *ante* could be the result of

- either a) cross-contamination, or b) planted by someone in law enforcement, including his close personal friend, KOFOED.
- c. File a pre-trial motion under *Brady v. Maryland, supra*, and *Kyles v. Whitley, supra*, requesting SPECIFIC disclosure by the State of the circumstances of KOFOED's discovery of blood in Stock homicide investigation.
 - d. File a pre-trial motion *in limine* to exclude the blood on the items identified in ¶ 65-66, 77-79 *ante* as being the result of contamination and/or planting by law enforcement so as to be inadmissible under Neb. Rev. Stat. § 28-401 thru 403 and the due process clause of the Fourteenth Amendment.
245. When representing Mr. Edwards during the trial phase of this case, Atty Lefler failed to:
- a. Argue that the blood found on the items set forth in ¶ 65-66, 77-79 *ante* could be the result of either a) cross-contamination, or b) planted evidence by someone in law enforcement, including his close personal friend, KOFOED.
 - b. Engage in a vigorous cross-examination of the DoCo SO personnel called by the State showing the circumstances that the blood on the items set forth in ¶ 65-66, 77-79 *ante* was from a) cross-contamination, or b) had been planted.
 - c. Present evidence during the defense case showing that based upon the DoCoSO CSI Unit's handling of the evidence in the Stock murder investigation (3 weeks before the investigation in Mr. Edwards case) blood was found that in Stock investigation that was the result of either a) cross-contamination, or b) planted by law enforcement.
 - d. Counter the arguments by DoCo Atty Retelesdorf and DoCo Atty Kleine regarding the importance of the blood on the items forth in ¶ 65-66, 77-79 *ante*, by arguing the evidence was unreliable because of a) cross-contamination, or b) planted by law enforcement.

246. Even if Atty Lefler was NOT aware of the specific facts regarding the Stock murder investigation either because he wasn't told by his good friend, KOFOED, or it was not disclosed to him as part of *Brady v. Maryland* disclosure by DoCo Atty Klein as alleged in ¶ 227-32 *ante*, Atty Lefler clearly and unquestionably became aware of the facts as a result of his representation of KOFOED during the DoCoSO IA investigation, FBI and federal grand jury investigation, KOFOED's deposition in the federal civil rights cases, the state and federal criminal prosecutions, and the discovery conducted in the *Livers* and *Sampson* federal civil rights cases. See, ¶ 101(1), 104, 110-1, 113, 116, 123-131, 133-137, 139 *ante*.
247. During the post-trial and direct appeal phase of Mr. Edwards' case, Atty Lefler because of his personal and professional conflict of interest failed to:
- a. File a timely motion for new trial pursuant to Neb. Rev. Stat. § 29-2101 *et seq.*, based on newly discovered evidence as Atty Lefler became aware of the facts regarding the Stock investigation⁵³;
 - b. Make an assignment of error in the opening brief that the State had failed to comply with the obligation under *Brady v. Maryland* by disclosing the "cross-contamination" theory of KOFOED in the Stock investigation, or the "evidence planting" theory of AUSA Stecher and Atty Mock in the criminal prosecutions; and
 - c. Request leave to withdraw the previous brief after the state and federal criminal charges were filed on April 22, 2009, request a remand to investigate the allegations from the Stock investigation as they related to Mr. Edwards prosecution, or file a supplemental brief asserting errors based on the factual allegations in the state and federal prosecutions.
248. Atty Lefler's personal and profession conflict of interest because of his friendship and representation of KOFOED and resultant failure to take the cited actions set forth in ¶ 68,78-80, 245-246, 247 *ante*, denied Mr. Edwards his right to conflict free representation under the Sixth and Fourteenth Amendments to the

⁵³ See, *State v. Smith*, 167 Neb. 492 (1958) (District court not deprived of jurisdiction to hear motion for new trial based on newly discovered evidence during pendency of an appeal.)

United States Constitution, the decisions in *Holloway v. Arkansas*, 435 U.S. 475 (1978)⁵⁴, *Cuyler v. Sullivan*, 446 U.S. 335 (1980), *Wood v. Georgia*, 450 U.S. 261 (1981)⁵⁵, *Wheat v. United States*, 486 U.S. 153 (1988) and their progeny.

GROUND NUMBER FOUR: THE STEP INSTRUCTION ON THE LESSOR INCLUDE OFFENSE OF MANSLAUGHTER FAILED TO DISTINGUISH BETWEEN THE INTENT TO KILL ASSOCIATED WITH SECOND DEGREE MURDER AND INTENT TO KILL RESULTING FROM A “SUDDEN QUARREL” IN VIOLATION OF THE NEBRASKA SUPREME COURT DECISIONS IN STATE V. (RON) SMITH, 282 Neb. 720 (2011), STATE V. (WILL) SMITH, 284 Neb. 636 (2012), THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE UNITED STATES SUPREME COURT DECISION IN MULLANEY V. WILBUR, 421 6U.S. 84 (1975), AND THEIR PROGENY.

249. Mr. Edwards was charged in the Information with second degree in violation of Neb. Rev. Stat. § 28-304 and use of a weapon to commit second degree murder.

250. The district court instructed the jury as to the elements of second degree murder as follows:

Under Count I of the Information, depending on evidence which you find that the State has proved beyond a reasonable doubt, you may find Defendant:

- (1) Guilty of murder in the second degree; or
- (2) Guilty of manslaughter; or
- (3) Not guilty.

SECTION I

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict Defendant of the crime of murder in the second degree are:

1. That Defendant, on or about May 10, 2006, did kill Jessica J. O’Grady;
2. That he did so in Douglas County, Nebraska; and

⁵⁴Public defender representing three defendants alerted trial judge to possibility of conflicts of interest and judge should have appointed different counsel or made inquiry into possibility of conflicts.

⁵⁵Attorney retained by defendants’ employer had conflict between their interests and employer’s interest and since all the facts were known to trial judge, the trial judge should have inquired further.

3. That Defendant did so intentionally, but without premeditation.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the second degree in order to convict Defendant of the crime of murder in the second degree.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements in this Section I is true, it is your duty to find Defendant guilty of the crime of murder in the second degree of Jessica J. O'Grady done intentionally, but without premeditation, and you shall so indicate by your verdict.

On the other hand, if you find that the State has failed to prove any one or more of the material elements in Section I, it is your duty to find Defendant not guilty of the crime of murder in the second degree of Jessica J. O'Grady. You shall then proceed to consider the lesser-included offense of manslaughter set out in Section II.

SECTION II

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict Defendant of the crime of manslaughter are:

1. That Defendant killed Jessica J. O'Grady;
2. That he did so, either:
 - a. without malice upon a sudden quarrel, or
 - b. unintentionally while in the commission of an unlawful act; and,
3. That he did so on or about May 10, 2006, in Douglas County, Nebraska. (Instruction #4)

251. The district court instructed the jury on the meaning of "sudden quarrel" as included in manslaughter as follows:

"Sudden quarrel" means a legally recognized and sufficient provocation causing a reasonable person to lose normal self-control; or passion suddenly aroused which clouds reason and prevents rational action. It does not necessarily require an exchange of angry words or an altercation contemporaneous with the killing and does not require a physical struggle or other combative bodily contact between Defendant and the victim. (Instruction #6)

252. In the jury's FOURTH question, it requested the definition of "malice" and a supplemental instruction was given which stated:

The following question was received the jury on 3-31-07 at 12:05 PM:

"The jury would request a legal definition of the word "malice."

After consulting with counsel, the Court responds as follows:

"Malice -- intentionally doing a wrongful act without just cause or excuse." (Edwards BoE 2892:21-2897:9)

253. In *State v. (Ron) Smith*, 282 Neb. 720 (2011), the Nebraska Supreme Court held that *State v. Jones*, 245 Neb. 821 (1994) which had held there was no "intent to kill" associated with sudden quarrel manslaughter should be overruled consistent with the decision in *State v. Burlison*, 255 Neb. 190 (1998). The Court held that, "An **intentional** killing committed without malice upon a sudden quarrel constitutes the offense of manslaughter."

254. In *State v. (Will) Smith*, 284 Neb. 636 (2012), decided on November 16, 2012, that where murder is charged, a court is required to instruct the jury on all lesser degrees of criminal homicide for which there is proper evidence before the jury, whether requested to do so or not. The Court specifically set forth the source of the rule and stated:

But in a prosecution for murder, both the substance and the source of the rule are different. Neb. Rev. Stat. § 29-2027 (Reissue 2008) provides in relevant part: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it is murder in the first or second degree or manslaughter" This statute, although modified slightly over the years, has been in effect since the late 1800's. We have interpreted it to impose a mandatory rule that where murder is charged, a court is required to instruct the jury on all lesser degrees of criminal homicide for which there is proper evidence before the jury, whether requested to do so or not.

255. In *State v. Ellis*, 208 Neb. 379 (1981), the Defendant was convicted of the lesser offense of manslaughter and had objected to the instruction. There was scant evidence that the Defendant committed the crime, he made no admissions or confessions, there was no physical evidence connecting him to the killing of the woman whose bones were found in a barrel east of Lincoln. The Nebraska Supreme Court held that the instruction on manslaughter was required and affirmed the conviction.

256. The district court's instruction in this case was not a correct statement of the law. The instructions should have been as follows⁵⁶:

The elements which the prosecution must prove by evidence beyond a reasonable doubt in order to convict Mr. Edwards of murder in the second degree are:

- (1) That Mr. Edwards intentionally killed Jessica J. O'Grady;
- (2) That Mr. Edwards did so on May 10, 2006;
- (3) That Mr. Edwards did not do so as the result of a sudden quarrel;
and
- (4) That Mr. Edwards did so in Douglas County, Nebraska.

In order for Mr. Edwards to be found guilty of murder in the second degree, the prosecution has the burden of proving beyond a reasonable doubt each and every one of the foregoing elements, and this burden never shifts to Mr. Edwards.

The elements which the prosecution must prove by evidence beyond a reasonable doubt in order to convict Mr. Edwards of manslaughter are:

- (1) That Mr. Edwards killed Jessica J. O'Grady;
- (2) That Mr. Edwards did so intentionally upon a sudden quarrel;
- (3) That Mr. Edwards did so on or about May 10, 2006; and
- (4) That Mr. Edwards did not do so in Douglas County, Nebraska.

In order for Mr. Edwards to be found guilty of manslaughter, the prosecution has the burden of proving beyond a reasonable doubt each and every one of the foregoing elements, and this burden never shifts to Mr. Edwards.

You must separately consider in the following order the crimes of second degree murder and manslaughter. For the crime of second degree murder, you must decide whether the prosecution proved each element beyond a reasonable doubt. If the prosecution did so prove each element, then you must find Mr. Edwards guilty of murder in the second degree and go to Count II. If you do not unanimously agree on a verdict of guilty of the crime of second degree murder, then you should consider whether the prosecution proved each element of manslaughter beyond a reasonable doubt. If the prosecution did so prove each element, then you must find Mr. Edwards guilty of manslaughter and stop. If you find the prosecution did not prove each and every element of the crime charged, then you must find Mr. Edwards not guilty of all charges under Count I and not guilty of Count II.

⁵⁶The format of the first part of this step instruction is taken from NJI2d Crim. 3.1. The Nebraska Supreme Court stated in *State v. Taylor*, 282 Neb. 297, 313, 803 N.W.2d 746, 759 (2011) that any step jury instruction should conform to NJI2d Crim. 3.1.

257. The district court's instruction in this case failed to properly advise the jury through a negative element instruction that any intent to kill associated with second degree murder could not be the result of a sudden quarrel as required by the Sixth Amendment and Due Process Clause of the Fourteenth Amendment and the decision in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and its progeny.

GROUND FIVE: THE INDIVIDUAL AND CUMMULATIVE EFFECT OF THE MULTIPLE CONSTITUTIONAL ERRORS AS SET FORTH IN THIS MOTION CONSTITUTES STRUCTURAL ERROR IN VIOLATION SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND *NEDERS V. UNITED STATES*, 527 U.S. 1, 7 (1999), *SULLIVAN V. LOUISIANA*, 508 U.S. 275 (1993), AND THEIR PROGENY.

258. As to the claim for relief under Ground Five, Mr. Edwards incorporates by reference the factual allegations as set forth in ¶ 1 thru 257 *ante*.

259. The State of Nebraska has as the chief forensic supervisor in the case a felon who had serially fabricated evidence in other high-profile murder cases and collected, stored, made processing assignments, and transported more than 95% of the evidence in this case. Neither the prosecutors nor the Douglas County law enforcement team disclosed to Mr. Edwards the facts regarding serial fabrication of evidence and falsification of reports by KOFOED. Mr. Edwards was represented by an attorney who had a clear conflict of interest by representing KOFOED during a DoCoSO IA investigation, before a federal grand jury, during state and federal criminal prosecutions, and in a 1983 civil rights action, the very individual who evidence shows was a serial fabricator of evidence, at the very same time he was representing Mr. Edwards. Finally, the jury was improperly instructed as a matter of law on the distinction between second degree murder and manslaughter, thereby making it easier for the State to obtain a conviction. Mr. Edwards' case represents a "perfect storm" of constitutional violations.

260. The errors as set forth in this motion are structural errors "so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome" of the trial. *Neder v. United States*, 527 U.S. 1, 7 (1999). Errors are structural when they "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Washington v.*

Recuenco, 548 U.S. 212, 218 -19 (2006). Structural errors occur only in a very limited class of cases. *Neder*, 527 U.S. at 8. See also, *Arizona v. Fulminante*, 499 U.S. 279, 308-12 (1991), *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

261. These structural errors require that Mr. Edwards' convictions be reversed as a violation of the Sixth Amendment and Due Process Clause of the Fourteenth Amendments to the United States Constitution.

FOR ONE OR MORE OF THE REASONS STATED, Mr. Edwards respectfully moves that his convictions and sentences be vacated because of the violations of his state and federal constitutional rights set forth in this 2nd amended motion for postconviction relief.

Respectfully submitted,

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VERIFICATION

STATE OF NEBRASKA)
) SS
COUNTY OF JOHNSON)

CHRISTOPHER EDWARDS, being first duly sworn upon oath deposes and states that he is the Defendant in the above-entitled action, he has read the forgoing 2nd Amended Motion for Postconviction Relief, knows the contents thereof, and that the allegations contained therein are true as he verily believes.

Christopher Edwards, Inmate #66108
Tecumseh State Correctional Institution
P.O. Box 900
Tecumseh, NE 68450-0900

SUBSCRIBED AND SWORN to before me this _____ of April, 2013.

NOTARY PUBLIC

CERTIFICATE OF SERVICE

BRIAN S. MUNNELLY, the attorney for the Appellant herein, states that on the ____ of _____, 2013, true copies of this 2nd amended motion for postconviction relief were send by regular mail to the Douglas County Attorney’s Office at 100 Hall of Justice, 1701 Farnam Street, Omaha, Nebraska 68183.

By: _____
Brian S. Munnely, #18372