ELECTRONICALLY FILED AUG 19, 2020 CLERK OF SUPREME COURT

IN THE IOWA SUPREME COURT
S.C. No. 18-0296
Marion County No. LACV095809

BILLY DEAN CARTER, BILL G. CARTER, and the ESTATE OF SHIRLEY D. CARTER by and through BILL G. CARTER, EXECUTOR,
Appellees,

vs.

JASON CARTER,
Appellant.

APPEAL FROM THE DISTRICT COURT
FOR MARION COUNTY
HON. MARTHA L. MERTZ

APPELLANT'S PROOF BRIEF

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E. Clearly, *McCormick's Handbook of the Law of Evidence* § 60, 137-38 (2d ed. 1972)

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Iowa R. Civ. P. 1.1012

Iowa R. Civ. P. 1.1013

Iowa R. App. 6.907

ROUTING STATEMENT

Jason Carter ("Jason")[1] requests the Iowa Supreme Court retain this case pursuant to:

- Iowa R. App. P. 6.1101(2)(c) because it presents substantial issues of first impression due to the unique background and violation of constitutional rights by the state through use of civil court proceedings; and
- Iowa R. App. P. 6.1101(2)(d) because it presents fundamental issues of broad public importance requiring ultimate determination by the Iowa Supreme Court.

STATEMENT OF THE CASE

This case arises out of the June 19, 2015 homicide of Shirley Carter ("Shirley") in Marion County ("the homicide"). On January 5, 2016, Plaintiffs Bill G. Carter, Billy Dean Carter, and Estate of Shirley Carter (collectively, "Plaintiffs," individually "Bill" and "Billy Dean") filed this lawsuit against Jason. Jason and Billy Dean are brothers; their parents are Bill and Shirley. Jason denied the allegations. (Am. App. I at 12, 17). When the case was filed, no criminal charges were pending against Jason.

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[1] For clarity, the parties are referenced by first name throughout briefing.

On December 15, 2017, a Marion County jury found Jason civilly liable for the homicide. (Am. App. I at 319). Three days after the civil verdict, the State charged Jason with first-degree murder. (Am. App. I at 611). On March 21, 2019, a jury acquitted Jason after less than two hours deliberation.[2] (Am. App. at 2271 (Acquittal[3])).

Significant history of the case includes:

- Motion to Continue: On December 5, 2017, Jason moved to continue the civil trial until the criminal investigation concluded because he lacked access to DCI's investigation. (12/5/2017 Trial Tr. 13-14). Continuance was denied. (12/5/2017 Trial Tr. 19).

- Motion for JNOV: On December 18, 2017, Jason moved for judgment notwithstanding the verdict. (Am. App. I at 321). JNOV was denied. (Am. App. II at 711).

- Petition for Relief: On May 30, 2018, Jason petitioned for relief based on newly discovered material evidence under Rule 1.1012(6). Beginning February 2018, the State provided substantial evidence in the criminal discovery, including hundreds of documents and audio recordings. (Am. App. I at 626).

  On December 10-12, 2018, the court heard the petition for relief. On January 31, 2019, the court dismissed the petition. (Am. App. II at 713).

- Motion to Enlarge or Amend: On February 6, 2019, Jason moved to enlarge or amend the ruling on the petition for relief. (Am. App. I at 1260).

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[2] The criminal case and related acquittal are important to issues on appeal, because the fact finders in the civil and criminal cases had access to and considered drastically different bodies of evidence.

[3] Jason requests this Court take judicial notice of acquittal in *State v. Carter*, Marion County Case FECR029316 pursuant to Iowa R. Evid. 5.201(b).

- On June 7, 2019, the court denied Jason's motion to take judicial notice and affirmed its dismissal of the Petition for Relief. (Am. App. II at 744).

- Second Petition for Relief: On August 30, 2019, Jason filed a second petition for relief based on additional newly-discovered evidence received in criminal discovery (Am. App. I at 1267).

- Motion for Recusal: On February 14, 2020, Jason filed a motion requesting Judge Mertz recuse herself. (Am App. I at 2437).

- On February 24, 2020, the court denied Jason's motion for recusal. (Am. App. II at 758).

- On February 24, 2020, after hearing, the court dismissed the second petition for relief, finding it lacked jurisdiction. (Am. App. II at 756).

Appellate Events Include:

- On February 19, 2018, Jason appealed the district court's rulings to date. (Am. App. II at 764).

- This Court entered stay orders of appeal while district court proceedings occurred. (10/10/18 Order; 2/24/19 Order).

- On June 27, 2019, Jason appealed the rulings on the first petition for relief. (Am. App. II at 766).

- On July 11, 2019, this Court consolidated 19-1084 with 18-0296. (7/11/19 Order).

- On September 26, 2019, this Court stayed 18-0296 based on the pending second petition for relief. (8/28/19 Motion).

- On February 25, 2020, Jason appealed the court's ruling on the second petition for relief. (Am. App. II at 768).

- On March 17, 2020, this Court consolidated 20-0378 with 18-0296. (3/17/20 Order).

STATEMENT OF THE FACTS

Evidence is addressed in three divisions. First, related to the December 2017 civil trial. Second, related to the May 2018 petition for relief and associated December 2018 hearing. Third, related to the August 2019 petition for relief and associated February 2020 hearing.

I. December 2017 Civil Trial

Timeline: Morning of the Homicide

On Friday, June 19, 2015, Shirley made a call at 8:44 AM. (Am. App. II at 249). There is no evidence any party saw or heard from Shirley between 8:44 and 11:08 AM.

Jason spent the morning hauling corn to and from Cargill in Eddyville, Iowa. (12/12/17 Trial Tr. 54:12-14; 55:1; 56:17-57:18). Video footage shows Jason leaving Cargill at 9:58 AM.[4] (Tr. Video Ex. K1). Jason went to his parents' farm ("Carter farm"). (12/12/17 Trial Tr. 58:6-15). Bill and another witness testified this drive takes an hour. (12/11/17 Trial Tr. 66:7-10; 12/14/17 Trial Tr. 13:18-24). On route to Carter farm, Jason stopped at another farm,

[4] Plaintiffs ignored this video evidence, arguing Jason left Cargill at 9:52 AM based on the scale ticket time stamp. (12/11/17 Trial Tr. 68:21-25). Jason testified regarding the check-out process between the scale and leaving Cargill. (12/12/17 Trial Tr. 11:3-7). Plaintiffs offered no evidence indicating Cargill's video surveillance equipment was unreliable.

left his tractor-trailer and drove his pickup truck. (12/12/17 Trial Tr. 58:6-15). That stop took several minutes. (12/12/17 Trial Tr. 58:6-15; 12/14/17 Trial Tr. 53:14-25).

Evidence shows Jason composed many text messages on a flip phone during the drive. (Am. App. I at 1536-39 (56 texts between 10:07 AM - 10:50 AM)). Jason was going to Carter farm to spray fields. (Am. App. II at 48). At 10:55 AM, Jason sent a text requesting delivery of chemicals to Carter farm. (*Id.*).

Accounting for the vehicle exchange, the likely earliest time Jason arrived at Carter farm was 11:03 AM (one hour five minutes after leaving Cargill). After parking and walking into the house, Jason discovered Shirley's body. (12/12/17 Trial Tr. 67:16-17; 68:1-3). He began a series of phone calls. (Am. App. II, 206). Jason called his sister at 11:08 AM. (*Id.*) Jason called 911 at 11:11 AM. (*Id.*)

Shirley was shot. (Am. App. II, 695). Blood spots around the body were liquid, but drying around the edges. (12/13/17 Trial Tr. 166:22-167:2). Her face was pale; her eyes were sunken, open, fixed and dilated. (12/13/17 Trial Tr. 159:19-21). Bill arrived at Carter farm shortly after Jason called 911. (12/11/17 Trial Tr. 83:13-16). Emergency responders arrived at 11:33 a.m. (12/13/17 Trial Tr. 158:9-13; 154:23-155:2).

First Responders

Jason told the 911 operator it seemed Shirley was on the floor for two hours. (Audio Tr. Ex. 13). At trial, Jason confirmed his guess. (12/12/17 Trial Tr. 87:23-88:2). Jason told the operator there was a hole in the floor and in the refrigerator. (Audio Tr. Ex. 13). Scene photos show noticeable holes in these areas. (Conf. App. at 103, 105). Bill also identified the hole in the refrigerator to first responder Curt Seddon. (12/5/17 Trial Tr. 119:15-122:3). Seddon testified Jason told him, "she's been shot. There's two holes."[5] (12/5/17 Trial Tr. 106:25-107:1). Seddon's testimony was crucial to Plaintiffs' case; Plaintiffs argued it was circumstantial evidence indicating Jason had premature knowledge about Shirley's death. (12/15/17 Trial Tr. 36:7-12).

In deposition, emergency responder Laurie Goff testified the pool of blood surrounding Shirley was dry. (12/13/17 Trial Tr. 166:4-167:2). At trial, Goff stated the blood was mostly wet and drying around the edges. (*Id.*).

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[5] Law enforcement interviewed Seddon at the scene on the day of the homicide. Contrary to trial testimony, audio recordings reflect Seddon stated he did not know if Bill or Jason commented about "two holes." (Conf. App. at 19). Jason received that audio recording during criminal proceedings and offered it in support of his petition for relief. (*Id.*)

Family Relationships

According to all witnesses, Jason enjoyed a loving relationship with his mother, Shirley. (12/14/17 Trial Tr. 35:24-36:6; 12/6/17 Trial Tr. 117:4-7; 12/7/17 Trial Tr. 206:19-25; 207:4-10). Jason and his family regularly spent time with Shirley in the evenings because Jason's son raised show hogs at Carter farm. (12/6/17 Trial Tr. 159:19-160:10). Both Jason and his wife (Shelly) were close to Shirley.

Both Bill and Shirley independently confided in their daughter-in-law Shelly. Bill told Shelly he and Shirley were growing apart. (12/6/17 Trial Tr. 165:17-21). Shirley told Shelly that Bill criticized her for actions as trivial as the way she mowed lawn. (12/6/17 Trial Tr. 165:10-13).

Law Enforcement Interviews

DCI Agent Mark Ludwick was in charge of the investigation. (12/6/17 Trial Tr. 58:5-25). Detective Reed Kious of the Marion County Sheriff's Office received direction from Ludwick. DCI interviewed Jason and Bill. (*Id.*; *id.* at 67:8-11). In his interview, Bill stated it takes about fifty-five minutes to get to Carter farm from Cargill "if you speed." (12/11/17 Trial Tr. 68:11-20). Bill stated he touched Shirley when he arrived at the scene and she was "cold," "stiff," and there wasn't any doubt "she was gone." (12/11/17 Trial Tr. 45:1-46:3).

Gun Safe

Two days after the homicide, law enforcement allowed the family inside the Carter farmhouse. (12/8/17 Trial Tr. 163:11-165:24). The family found evidence DCI missed, including a revolver, a bullet and Bill's gun safe. (12/11/17 Trial Tr. 92:12-14; 109:9-16; 108:24-109:2; 109:5-8). The next day Jason called DCI to request collection of this evidence; DCI collected the gun safe. (*Id.*). Jason's fingerprints were in the safe.[6] (12/8/17 Trial Tr. 126:3-6). Jason did not remember the safe. (12/12/17 Trial Tr. 96:13-15). Bill believed Jason bought the safe for Bill over ten years ago. (12/8/17 Trial Tr. 184:11-18). Jason testified if he bought the safe, he would have assembled it. (12/12/17 Trial Tr. 95:24-96:15). The fingerprints inside the safe were consistent with assembly, including prints behind the locking mechanism.[7] (12/8/17 Trial Tr. 131:3-13; 142:15-22; Am. App. II at 15).

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[6] Evidence showing Jason's fingerprints in the gun safe was one of the limited pieces of evidence the State provided for use during the December 2017 civil trial. (Conf. App. at 119, 124, 130, 132, 439, 442).

[7] After the December 2017 civil trial, Bill provided photographs to DCI showing Jason assembling the gun safe in 2003. (Am. App. II at 15). Jason received the photographs during criminal proceedings and offered them in support of his petition for relief. (12/12/18 Trial Tr. 16:13-17).

Financial Considerations

Plaintiffs alleged Jason had financial motive to kill Shirley. (12/5/17 Trial Tr. 75:4-8; 60:10-21). Witnesses familiar with Jason's financial status – his wife, his agricultural loan officer, and his tax attorney/certified public accountant - testified Jason was financially comfortable. (12/7/17 Trial Tr. 12:3-8; 26:9-20; 27:4-11; 12/13/17 Trial Tr. 127:3-8; 147:23-148:1; 81:10-15; 81:19-22; 81:23-82:1; 82:13-19; 84:8-11; 12/7/17 Trial Tr. 209:4-10). Testimony established Jason's line of credit and land rental situation was common for farmers of his age and experience. (12/14/17 Trial Tr. 19:13-17; 29:16-23). Previously, Bill stated Jason was not in financial trouble. (12/11/17 Trial Tr. 34:1-35:12). Jason did not stand to inherit upon Shirley's death; Bill was the sole beneficiary. (Am. App. II at 689).

State Collaboration with Plaintiffs

During a June 2017 hearing, Jason learned Plaintiffs were privately meeting with DCI and with government attorneys. (6/16/2017 Trial Tr. 55:7-16). Plaintiffs' counsel disclosed that private meetings in April 2017 determined what documents/evidence the State provided to Plaintiffs, including evidence "beyond what they had produced in the summer of 2016."[8] (*Id.*) Following meetings, Plaintiffs served DCI with a subpoena seeking

[8] Jason received no DCI evidence from Plaintiffs in the summer of 2016.

specified documents. (Am. App. II at 779 (April 2017 Subpoena to DCI)). The State assisted Plaintiffs in drafting that subpoena. (6/16/2017 Trial Tr. 55:17-21). The State only provided inculpatory evidence towards Jason. (Conf. App. at 119, 124, 130, 132, 439, 442). The court admitted this evidence over Jason's objection. Plaintiffs spent significant time discussing fingerprints. (12/8/17 Trial Tr. 110:22-139:16; 12/6/17 Trial Tr. 94:24-96:17).

II. Record Supporting First Petition for Relief

In July 2015, DCI began receiving information implicating other suspects in the homicide. (Am. App. I at 390). By the December 2017 trial, DCI received at least 40 leads consistently pointing to particular suspects; many leads lacked follow-up.[9] (*Id.*) Jason did not learn about the alternate suspects nor about the delayed investigation until he received discovery from the State in criminal proceedings. (Am. App. I at 383, 429, 1274, 1343 (*See generally* Briefs in Support of First and Second Petitions for Relief and supporting appendixes)).

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[9] The criminal investigation largely stalled from January 5, 2016 (when Plaintiffs filed the civil suit) to July 2018 (when Jason's criminal counsel deposed Ludwick and Kious). Between July 2018 and December 2018 (when the district court heard Jason's petition for relief), law enforcement began following up on years-old leads. (*E.g.*, 12/11/18 Trial Tr. 87:2-6; 90:5-12; 93:23-94:15; 95:22-96:3; 96:16-21). Even at the December 2018 hearing, Jason had not received numerous reports and audio recordings. (*Compare* Appendix Supporting 2nd Am. Pet. for Relief *with* Appendix Supporting Second Petition for Relief).

After receiving voluminous exculpatory evidence in criminal proceedings, Jason filed a petition for relief in May 2018. Hearing on the petition occurred in December 2018. The additional evidence included law enforcement investigative reports, testimony from Detective Kious, testimony from Agent Ludwick, and audio recordings of Bill's interviews.

The court denied the Petition based on admissibility of evidence, materiality, and likelihood of changing the result. (Am. App. II at 713, 744).

Law Enforcement Reports

During criminal proceedings, Jason received law enforcement investigative reports pointing to particular suspects. (12/10/18 Trial Tr. 82:10-83:23). Those investigative reports were offered in support of his petition for relief. (Am. App. I at 429, 935 (*see* exhibits filed on 5/30/18 re: first petition for relief, and on 10/18/18 re: second amended petition for relief)). The court denied admissibility of the reports. (Am. App. II at 719).

Jason offered numerous interviews by law enforcement. (Am. App. I at 429). Multiple individuals implicate Joel and John Followill and Matt Kamerick in the homicide. (*Id.*; *see also* Br. in Support of First Pet. for Relief; 12/11/18 Trial Tr. 92:3-7; 100:2-123; 125:14-16; 131:10-13; 151:13-16; 152:1-8). Individuals provided information about the homicide weapon, the car used, other individuals involved, and the motive to burglarize the Carter

home. Informants also provided the identity of other possible informants. (*Id.*) Several individuals stated they heard first-hand confessions to the homicide from Sedlock and the Followills. (Am. App. I at 429).

Detective Kious

Kious testified at hearing on the petition for relief. (12/11/18 Trial Tr. 8-154). Kious was aware of: other suspects with a lack of alibi, allegations involving a vehicle used in the homicide, allegations of the weapon used and its location, and details of the possibly related burglary. Kious testified multiple reports were missing.

<u>Other Suspects and Lack of Alibi:</u> Kious received multiple statements implicating: the Followills (12/11/18 Trial Tr. 91:8-92:7; 125:14-16; 131:10-13); Joe Sedlock (*Id*. at 20:16); and Matt Kamerick (*Id.* 92:22-25). (*Id.* at 151:13-16, 100:2-10). The implicated individuals lack alibis for the morning of the homicide. (*Id.* at 92:8-21; 100:2-10)). These reports were received as early as September 2015. (Conf. App. at 20).

<u>Vehicle Used:</u> Kious received multiple statements implicating Charity Roush and/or Charity Roush's car. (12/11/18 Trial Tr. 96:22-25). Roush does not have an alibi for the morning of the homicide, and was not interviewed until after July 2018. (*Id*. at 93:14-24; 94:10-15). These reports were received

prior to the civil trial and Kious did not inform Jason's counsel. (12/11/18 Trial Tr. 136:19-138:13).

<u>Homicide Weapon and Location/Disposal:</u> Kious received multiple statements identifying the homicide weapon or addressing disposal of the homicide weapon. (*Id.* at 94:16-95:7). Kious did not write a report of nor record at least one interview of someone who identified the weapon and its location. (*Id.* at 94:16-95:7; 97:9-18; 97:21-98:4; 10:16-18). The interview of Cory Ford, a person allegedly involved in disposal of the homicide weapon, did not occur until after July 2018. (*Id.* at 95:19-24). Kious did not follow up after October 2015 when a witness (Sedlock) told Kious he believed he could procure the homicide weapon. (*Id.* at 20:25-21:4; 36:21-37:4). Multiple reports indicated John Followill or Matt Kamerick were trying to dispose of a gun. (*Id.* at 152:1-8). These reports were received beginning as early as September 2015 and Kious did not inform Jason's counsel of the reports. (12/11/18 Trial Tr. 136:19-138:13).

<u>Possible Burglary:</u> Kious received multiple statements indicating the homicide was committed in the course of a burglary. (*Id.* at 113:13-21). Kious admitted individuals involved in multiple burglaries in the area of Carter farm would be viable suspects. (*Id.* at 129:16-20). Multiple reports indicated Shirley was surprised by someone breaking into the Carter home. (*Id.* at

149:6-10). Kious placed weight on an expert's opinion the burglary was staged, even though that expert did not have access to the criminal investigation file.[10] (*Id.* at 141:20-23).

Missing Records: Reports and audio recordings related to the homicide investigation were lost, including reports and/or recordings of Rory Pearson, who was repeatedly associated with the homicide and who left Iowa shortly after the homicide. (12/11/2018 Trial Tr. at 19:14-20:20; 20:3-6; 93:1-6).

Interview with Jason's Counsel: When Kious met with Jason's civil counsel in November 2017 he did not inform counsel about the following individuals from the homicide investigation: Wendy Bonnett, Brad Calder, Michelle Daniels, Jordan Durham, Shaina Flesher, Shawn Gerdom, Sr., Brittney Jans, Tameka Jenkins, Matt Kamerick, Jeremiah Laird, Jennifer Miller, Mitch Parker, Callie Shinn, and Sharon Webb. (*Id.* at 137:6-138:13). Kious mentioned one person to defense counsel (Adam Glover); he neither completed a report of nor recorded his interview of Glover. (*Id*. at 137:17-138:1). Kious did not mention the Followills as suspects (about whom he had at least 30 reports). (Audio Tr. Ex. C6).

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[10] Plaintiffs alleged in the December 2017 trial that the homicide scene was staged to look like a burglary. (*See, e.g.*, 12/7/17 Trial Tr. 128:8-13). Jason did not dispute this at trial because he did not have access to the investigation evidence.

Lead DCI Agent Ludwick

Agent Ludwick testified at hearing on the petition for relief. (12/10/18 Trial Tr. 90-233). His testimony was admitted, except for testimony submitted under an offer of proof. (*Id.*).

Ludwick acknowledged the Followills could not be ruled out as suspects. (12/10/2018 Trial Tr. 196:17-197:10; 198:17-24). He did not know the Followills' whereabouts during the homicide. (12/10/2018 Trial Tr. 196:17-197:10; 198:17-24).

Ludwick did not know where several people implicated were that morning, had not reviewed their cell phone location records, and did not know whether their cell phones pinged towers near the homicide. (*Id.* at 200:8-12 (Sedlock); 201:2-7 (Callie Shinn); 202:5-14 (Michelle Kamerick (a/k/a Michelle Daniels); 12/15/17 Trial Tr. at 201:20-202:1 (Matt Kamerick); 12/10/17 Trial Tr. at 201:20-23; 202:8-9 (no efforts made to verify Matt Kamerick or Michelle Daniels' whereabouts)).

Ludwick admitted no forensic evidence linked Jason to the homicide. (*Id.* at 202:21-24). He verified as "accurate" the testimony of Mike Halverson, a DCI criminalist, who testified there is "no forensic evidence . . . . no DNA, no fingerprints, no ballistic evidence that said Jason Carter was responsible or not responsible for this death." (*Id.* at 205:8-21). In the civil trial, DCI agents

were limited in their testimony; they were bound to (limited) material DCI provided the Plaintiffs. (12/5/17 Trial Tr. 8:19-9:5; 17:9-21; 18:1-8). Importantly, DCI evidence at the civil trial failed indicate there was no forensic evidence linking Jason to the homicide; rather, the gun safe fingerprint evidence suggested the opposite, without context, and without photographs of Jason assembling the gun safe. At the civil trial, Jason did not have access to DNA tests, other fingerprint evidence, ballistic evidence, witness accounts, or audio recordings (which are all exculpatory).

Ludwick testified to existence of an unidentified fingerprint on the gun safe that was not tested as of July 2018.[11] (*Id.* at 208:16-18; 209:2-13). This information existed during the civil trial but was not disclosed.[12] (12/6/17 Trial Tr. 106:23-25; 12/8/17 Trial Tr. 144:9-12; 144:20-23).

Ludwick did not interview several individuals who had information concerning the homicide. (*See, e.g.,* 12/10/18 Trial Tr. at 223:7-15 (Randy Vancenbrock)). Ludwick stated many individuals should have been interviewed and he thought Detective Kious completed those interviews. (*Id.*

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[11] In his criminal deposition in July 2018, Ludwick did not know whether it was ever tested. (12/10/2017 Trial Tr. 208:23-209:1). The unknown fingerprint is admittedly "significant evidence." (*Id.* at 209:10-16).

[12] Ludwick also said on the stand he "[didn't] recall" an unidentified print. (12/6/17 Trial Tr. 106:23-25).

at 223:16-224:11 (Garrick Messmaker); 225:8-10 (Jordan Durham); 232:2-6 (Taylor Jones)).

Kious did not interview those individuals.[13] (12/11/18 Trial Tr. 63:22-23 (Jordan Durham); (*Id.* at 94:16-23 (Taylor Jones)). As an example, Jordan Durham allegedly heard Joel Followill confess to the homicide; Ludwick admitted it was a significant omission if Kious did not interview her. (12/10/18 Trial Tr. 225:8-10).

During cross-examination, Ludwick admitted:[14] Matt Kamerick stated he heard Joel Followill was involved in the homicide (12/10/18 Trial Tr. 216:6-10); Wendy Bonnett stated Shirley was shot in a robbery for pain relief patches (*Id.* at 219:11-14); Bonnett stated the Followills and Sedlock were involved in a gunshot homicide (*Id.* at 220:2-6); Charity Roush stated Sedlock and the Followills shot Shirley. (*Id.* at 222:8-12). None of this information was available to Jason at trial and there was little or no follow up to the information.

[13] Ludwick did not interview Garrick Messmaker according to his July 2018 deposition transcript. (Ex. U6 to Second Pet. for Relief at 34:14-15).

[14] Through cross examination without objection.

Jason Beaman

In October 2015, Sedlock told law enforcement Jason Beaman knew a rifle was used in the homicide. (Am. App. I at 635). In fall 2015, Tameka Jenkins told law enforcement she heard Beaman say "they weren't going to find the gun" used in the homicide. (Am. App. I at 1201).

Other witnesses stated Beaman knew the homicide weapon location; however, Jason did not receive those statements until after the Petition for Relief was filed. (*Compare* Appendix to 2nd Am. Petition for Relief *with* Appendix to 2nd Pet. for Relief). Further, Beaman's cell phone pinged the tower closest to Carter farm during the timeframe of the homicide. (*Id.*; Am. App. I at 1536).

Despite reports Beaman knew the homicide weapon location, Beaman was not interviewed until May 2018, two and a half years after receiving reports. (Am. App. I at 2411). In July 2018, Ludwick testified he did not know Beaman's connection to the case. (Am. App. at 1772). Once again, Jason received this information through criminal discovery, much of which emerged after the Petition for Relief was denied.

Jordan Durham

In fall 2015, Tameka Jenkins told law enforcement Jordan Durham may have information about the homicide because she runs with "that crowd" and Durham was present when Beaman commented that law enforcement would not find the gun. (Conf. App. at 47). In May 2016, Brad Calder told law enforcement Durham stated the Followills were responsible for killing an elderly lady near Pleasantville. (Conf. App. at 37). In October 2016, Mitch Parker stated Durham was present when Joel Followill was having nightmares and saying, "she won't stop screaming, she won't stop screaming." (Conf. App. at 29). In January 2018, Wendy Bonnett stated she was present for a phone conversation between Durham and Joel Followill when Followill audibly confessed to the homicide. (Conf. App. at 40).

Despite multiple statements including those above, law enforcement did not interview Durham until January 2019. (Am. App. I at 1566). In Ludwick's July 2018 deposition, he had no memory of interviewing Durham, and did not know anything about her except she was known to the court system. (Am. App. I at 1778). In the hearing on the petition for relief, Ludwick did not recall if there was an allegation Durham heard a confession from Joel Followill. (12/10/18 Trial Tr. 139:9-16). He did not know and could not state if Durham was interviewed. (*Id.* at 142:19-22; 143:13-15).

Charity Roush

In January 2018, Brittney Jans stated the Followills and Sedlock tried to pay her to clean "the evidence" out of the car following the homicide, but she refused. (Conf. App. 44, Ex. S4 to 2nd Am. Pet. for Relief)). She stated ultimately, the Followills and Sedlock paid Charity Roush $100 to clean the car and Roush asked for advice on how to get out of the situation. (*Id.*). Roush also told Jans that Sedlock confessed to the homicide. (*Id.*).

Law enforcement did not interview Roush until November 2018. (12/11/18 Trial Tr. 93:21-94:15). By hearing on the petition for relief, Jason's counsel knew Roush was but did not know the contents of the interview; the tardiness of interview alone demonstrates inadequacy of investigation.

Roush's interview was provided after the Petition for Relief was heard.[15] In her interview, Roush told law enforcement Sedlock confessed he murdered Shirley with the Followills and Callie Shinn drove them to the Carter home because the Carters were supposedly receiving medication in the mail. (Am. App. I at 2139; O7 (audio) to 2nd Pet. for Relief)). Specifically, Sedlock told Roush they were startled, a gun went off in Joel Followill's hand,

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[15] This appears to be intentional withholding of evidence. The State knew the Petition would be heard in December 2018.

and Sedlock returned and fired a second shot to kill "the woman" because she saw them. (*Id.*).

Tameka Jenkins

On unknown dates in fall 2015, Tameka Jenkins provided the following statements to law enforcement:

- Jason Beaman stated "they weren't going to find the gun."
- Jeremiah Laird held onto the "guns" for at least a week after the homicide and then sold them, and one was a .270 rifle.
- She believed Shirley was getting fentanyl patches in the mail and Joel Followill intended to steal them.
- The guns had been hidden in Rory Pearson's mother's barn. [16]
- Jeremiah Laird was told to get rid of a .270 rifle by John Followill.
- John Followill called Emily Gullion and told her he called Mr. Laird and told him to get rid of the gun.
- Michelle Daniels stated John Followill shot Shirley.
- Michelle Daniels deleted everything from her phone on June 19, 2015, because she was "freaked out."

(Conf. App. at 47).

Wendy Bonnett

In January 2018, Wendy Bonnett provided the following statements to law enforcement. (Conf. App. at 40):

[16] No one went to look for the gun at Rory Pearson's mother's barn. Pearson's mother was never interviewed. (12/11/18 Trial Tr. 59:16-61:3).

- Michelle Daniels, Sedlock, John Followill, and Joel Followill were involved in the homicide.
- Bonnett was in a vehicle with Jordan Durham when Durham received a phone call from Joel Followill, who was in jail at the time and crying. Bonnett hear the phone conversation including Joel repeating he did not want to shoot Shirley, but she would not stop screaming so they had to shoot her.
- Joel Followill shot and killed Shirley because she would not stop screaming, and then Sedlock and John Followill shot her again with the same gun (this matches physical evidence).

(*Id.*)

Brittney Woodson Jans

In January 2018, Brittney Woodson Jans provided the following statements to law enforcement:

- Jans previously gave information about the homicide to Kious.[17]
- Jans spoke with law enforcement when they questioned her then-boyfriend, Guy Weldon.
- Charity Roush told her about Sedlock and the Followills and their involvement in the homicide.
- On the date of the homicide, Sedlock and the Followills asked Jans to clean evidence out of the car for them.
- On the date of the homicide, Sedlock and the Followills paid Charity Roush $100 to clean up the car, and Roush asked Jans for advice to get out of the situation.
- Sedlock admitted to pulling the trigger, according Roush.[18]

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[17] Kious did not write a report or record any interview with Jans.

[18] This is corroborated by Charity Roush's interview conducted in November 2018, weeks before the hearing on the Petition to Vacate. (Am. App I at 2139). The State possessed this interview, knew the hearing on the petition for relief was approaching, but did not provide any report until after the petition for relief was heard.

- Sedlock and the Followills believed Shirley received a fresh allotment of opiate pills.
- Sedlock and the Followills killed Shirley because either she refused to give them the pills or there were no pills at the house.
- Taylor Jones[19] got rid of the homicide weapon at a pawn shop believed to be in Des Moines.

(Conf. App. at 44).

Strange Vehicles

Six individuals reported strange vehicles near Carter farm during the week and day of the homicide. (Conf. App. at 50, 55, 10, 58); (12/10/18 Trial Tr. 68:12-79:22; 165:4-168:15; 12/11/18 Trial Tr. 210:23-211:22). Witnesses gave descriptions of vehicles and drivers. These vehicles were either behaving oddly or were never previously seen in the neighborhood. Law enforcement did not show any witness photographic line-ups, did not have any witness meet with a sketch artist, and did not request detailed descriptions of the drivers. (12/10/18 Trial Tr. 75:14-22; 12/11/18 Trial Tr. 168:5-15; 206:4-15; 78:19-22; 79:15-25).

Audio Recording of Interviews with Bill Carter

During the civil trial, Bill denied Shirley was in rigor mortis when he arrived at the house. (12/11/17 Trial Tr. 46:4-16). In two separate audio recordings entered at hearing on the Petition to Vacate, Bill directly states

[19] Detective Kious did not interview Taylor Jones until July 2018, about an unrelated matter. (12/11/2018 Trial Tr. 94:16-23).

Shirley was in rigor mortis when he arrived at the house. (Conf. App. at 17 (Exs. D5 and E5 (audio)); 12/10/18 Trial Tr. 181:8-183:15; 189:5-14)). In recordings, Bill uses the term 'rigor mortis' and references his experience doing "a lot of skinning and butchering," and he "know[s] when something's been dead for a long time." (Trial Ex. E5 (recording); Def. Post-Trial Brief at 7, filed 12/28/18).

III. Record Supporting Second Petition for Relief

Between the December 2018 hearing on the first petition for relief and the March 2019 criminal trial, Jason received significant further exculpatory evidence that existed during the December 2017 civil trial. In August 2019, Jason filed his second petition for relief. The material newly-discovered evidence was neither available to Jason at trial *nor during the first petition for relief*. The evidence is overwhelmingly exculpatory and would have changed the outcome of the 2017 civil trial.[20]

In February 2020, Jason filed a motion to recuse Hon. Martha Mertz. (Am. App. I at 2437). An attorney testified that shortly after Jason's criminal acquittal, Judge Mertz stated Jason Carter was "guilty as sin." (Am. App. I at

[20] The court did not admit these exhibits or reach the merits of the Petition. Jason provided the petition and appendix as an offer of proof. (2/24/20 Trial Tr. 12:23-13:11; 17:14-18). The court declined saying it lacked jurisdiction and this Court could review the evidence on its own. (*Id.* at 17:21-18:9).

2443). At that time, Jason's Motion to Enlarge was pending before Judge Mertz. (*Compare* 2/06/19 Motion *with* 6/07/2019 Order). Another witness testified he witnessed Judge Mertz having *ex parte* communications with the prosecutor for Jason's criminal case and with Plaintiffs' attorneys during the 2017 civil trial, outside the presence of Jason's counsel. (Am. App. I at 2444). Judge Mertz would not confirm or deny these assertions and did not recuse herself. (Am. App. II at 758; 02/24/2020 Trial Tr. 6:14-17; 7:6-8).

On February 24, 2020, the court dismissed Jason's second petition for relief, stating the court lacked jurisdiction because the petition was untimely. (Am. App. II at 756; 02/24/2020 Trial Tr. at 14:20-15:4)).

Additional facts are provided in argument.

SUMMARY OF THE ARGUMENT

During the December 2017 civil trial, Jason had not been charged with any crime and investigation was ongoing. After private meetings, the State provided Plaintiffs with select evidence. Jason objected as it contained seemingly inculpatory information but did not provide context (or exculpatory information). This evidence bolstered Plaintiffs' case but deprived Jason of evidence to defend himself.

After Jason received significant exculpatory evidence in criminal discovery, he filed a petition for relief. The petition was heard in December

2018. After December 2018, Jason continued to receive significant exculpatory evidence. Much of that evidence existed during hearing on the first petition for relief; however, the State did not provide it until after the petition was heard. Jason filed the second petition for relief in August 2019.

Issue I addresses error denying Jason's motion to continue the civil trial until the criminal investigation concluded. The court allowed only unfairly prejudicial evidence to be provided, subject to private negotiations between the State and Plaintiffs, giving Plaintiffs an unfair advantage.

Issue II addresses error denying Jason's motions to quash subpoenas to DCI. Iowa law prohibits release of evidence from an ongoing homicide investigation. Allowing Plaintiffs and the State to reach an agreement regarding evidence disclosure from the then-ongoing homicide investigation unfairly prejudiced Jason.

Issue III addresses error denying Jason's motion for judgment notwithstanding the verdict. Plaintiffs did not offer evidence sufficient for a reasonable mind to conclude Jason battered Shirley.

Issue IV addresses error dismissing Jason's first petition for relief. First, the newly-discovered evidence was material. Second, the newly-discovered evidence was admissible as non-hearsay to show law enforcement's lack of investigation and bias. Third, the newly-discovered evidence was admissible

because it had potential to lead to admissible evidence. Fourth, the court failed to consider how Plaintiffs' non-disclosure of evidence and Jason's lack of access affected trial preparation and strategy.

Issue V addresses error denying recusal.

Issue VI addresses error dismissing the second petition for relief.

ISSUE I: THE DISTRICT COURT ERRED BY DENYING JASON'S MOTION TO CONTINUE TRIAL UNTIL THE HOMICIDE INVESTIGATION CONCLUDED.

Preservation of Error

Jason preserved error in his motion to continue and at the related hearing. (12/5/2017 Trial Tr. 14:1-5; 19:21-22).

Standard of Review

The standard of review for a denial of a motion to continue is abuse of discretion. *Bell v. Iowa Dist. Court*, 494 N.W.2d 729, 731 (Iowa Ct. App. 1992). Iowa appellate courts "will find an abuse of discretion . . . when a district court has exercised its discretion on grounds clearly untenable or to an extent clearly unreasonable." *Crow v. Simpson*, 871 N.W.2d 98, 108 (Iowa 2015) (internal quotations omitted).

"[U]nreasonable means not based on substantial evidence." *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 88 (Iowa 2004) (internal quotations and brackets omitted). "A ground or reason is untenable

when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *State v. Brown*, 856 N.W.2d 685, 688 (Iowa 2014), *as amended* (Feb. 23, 2015) (internal citation and quotations omitted).

Argument

Jason moved to continue the civil trial until the homicide investigation concluded because Jason suspected there was significant exculpatory evidence held by DCI and because DCI provided piecemeal, seemingly inculpatory evidence to Plaintiffs without context to discredit the evidence. (12/5/17 Trial Tr. 13:5-14) ("[w]e believe . . . we have been prejudiced by the fact we were not privy to any of these agreements; we weren't parties to it. We don't have the full access to all of the DCI's records. It may contain exculpatory evidence."). The concern the investigation contained significant exculpatory evidence was validated by later production of piles of evidence pointing to other suspects and refuting the plaintiffs'/state's theories.

The court denied Jason's motion to continue. In the same breath, the court allowed cherry-picked evidence from the State to be provided to and used by Plaintiffs. If the court granted Jason's motion to continue trial, Jason would have had access to the entire investigation file including exculpatory evidence disproving or countering plaintiffs' evidence. Instead, Plaintiffs

were given an advantage and Jason defended himself with incomplete evidence.

The decision to grant or deny a continuance rests within discretion of the trial court. *Hawkeye Bank & Trust v. Baugh*, 463 N.W.2d 22, 26 (Iowa 1990). The trial court, however, is given guidelines to help exercise this discretion, which reviewing courts use to measure reasonableness. *Id.* These guidelines provide "a continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained." Iowa R. Civ. P. 1.911(1). When a motion to continue "alleg[es] a cause not stemming from the movant's own fault or negligence, the court must determine whether substantial justice will be more nearly obtained by granting the request." *State v. Birkestrand*, 239 N.W.2d 353, 360 (Iowa 1976).

Justice required continuance.[21] The court was aware: (1) DCI investigation was protected information under Iowa law and was not accessible to Jason through civil discovery or subpoena, (2) Plaintiffs were

[21] *See AFSCME Iowa Counsel 61 v. Iowa Pub. Emp't Relations Bd.,* 846 N.W.2d 873, 878 (Iowa 2014) (citing Webster's Third New International Dictionary at 1228, and defining "justice" as "the quality or characteristic of being just, impartial or fair," and defining "just" as "conforming to fact and reason").

provided access to certain information from DCI through a private agreement, (3) Plaintiffs intended to offer that information at trial, (4) Jason's counsel was not party to that agreement, and (5) grounds for the requested continuance did "not stem[ ] from the movant's own fault or negligence." *Id.* Denial of continuance was not supported by substantial evidence, and defies fairness at the core of civil litigation.

Additionally, by denying continuance, the court failed to apply the standard of "substantial justice" when exercising discretion. This was "untenable" as the denial was not supported by substantial evidence and was "based on an erroneous application of the law." *Brown*, 856 N.W.2d at 688.

The decision to deny Jason's motion to continue, while simultaneously allowing DCI to provide cherry-picked evidence to Plaintiffs and denying Jason access to all investigative evidence, cut against guidance for motions to continue and prevented substantial justice at trial. The court's decision was prejudicial, contrary to public interest, and contrary to Iowa law. This abuse of discretion warrants reversal of the decision, and remand for retrial based on all available evidence.

ISSUE II: THE DISTRICT COURT ERRED BY DENYING JASON'S MOTIONS TO QUASH.

Preservation of Error

Jason preserved error in the motions to quash and at the related hearing. (Am. App. I at 30, 95, 109, 260; 12/5/17 Trial Tr. 13:5-14; 6/16/17 Trial Tr. 53:15-54:9; 64:5-15).

Standard of Review

The standard of review for a denial of a motion to quash is abuse of discretion. *Farnum v. G.D. Searle & Co*., 339 N.W.2d 384, 389 (Iowa 1983).

Argument

The court should have granted the motion or required all evidence be provided to parties. Allowing provision of segmented prejudicial evidence pursuant to a private agreement gave Plaintiffs an unfair advantage.

A. Statutory Law and Case Law Prohibit Disclosure of Files from an Ongoing Criminal Investigation.

Iowa Code section 622.11 protects State investigation files from disclosure to private litigants. Iowa Code § 622.11 (1983); *see also State ex rel. Shanahan v. Iowa Dist. Court for Iowa County*, 356 N.W.2d 523, 527 (Iowa 1984). This "cloak of protection" extends to a public officer being

examined and prohibits disclosure of protected information. *Shanahan*, 356 N.W.2d at 527.

Communications to DCI officers are confidential records under Iowa Code. Iowa Code § 22.7(5). The DCI files were protected from public disclosure by Iowa Code section 22.7(5) and were subject to the qualified privilege of Iowa Code section 622.11.

In *Shanahan*, this Court addressed the public interest in preserving confidentiality of criminal investigation files. *Shanahan*, 356 N.W. at 529. In *Shanahan*, parties to a wrongful death action sought discovery of an ongoing homicide investigation. *Id.* at 525-26. The Iowa Supreme Court enforced the statutory privilege of Iowa Code chapter 622 and reversed a district court order to disclose the investigation files. *Id.* at 531.

B. The District Court's Interpretation of *Shanahan* was in Error.

In denying Jason's motion to quash, the court focused on two distinctions between *Shanahan* and this case. (Am. App. II at 696, 703). First, DCI did not move to quash the April 2017 subpoena. (*Id.*) Second, DCI agreed with Plaintiffs to mutually exchange information. (*Id.*) These distinctions do not eliminate statutory protections.

Shanahan clarifies the protected nature of the DCI investigation is based on "[t]he interest of the public—public safety . . . , not the interest of

the officer or the person communicating in confidence." *Shanahan*, 356 N.W.2d at 527. This is a "broader and more protective" privilege; therefore, unlike privately protected information the confidential nature of the DCI file cannot legally be "waived" by DCI for use in the civil trial. *Id.* at 528.

The court did not account for "public and private interests" affected by maintenance of the privilege. The court failed to recognize fundamental injustice of releasing selected inculpatory information. *Id.* at 530. First, unlike *Shanahan*, both civil litigants were investigated as suspects, and *both* may have been suspects at the time of the requested disclosure. Second, the court allowed Plaintiffs and DCI to come to an agreement regarding provision of evidence for civil litigation, to the exclusion and prejudice of Jason. Neither party in a civil case should expect to discover privileged information. *Id.* Protection against disclosure does not turn on whether DCI enters agreement or deigns to assert a privilege (especially in this scenario, where DCI shared inculpatory information to "test" a criminal case). *Shanahan* mandates protection of the confidential ongoing DCI investigation. In effect, the court allowed Plaintiffs and DCI to use the criminal investigation to bolster civil litigation (and vice-versa). This arrangement defied justice. To allow State collaboration with a party sets a dangerous precedent which is impermissible

under the United States Constitution, the Iowa Constitution, Iowa law, and is contrary to the public interest.

ISSUE III: THE DISTRICT COURT ERRED BY DENYING JASON'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT.

Preservation of Error

Jason preserved error in his motion for judgment notwithstanding the verdict. (Am. App. I at 321).

Standard of Review

The standard of review is for correction of errors at law. Iowa R. App. P. 6.907; *Crookham v. Riley*, 584 N.W.2d 258, 265 (Iowa 1998). In reviewing rulings on a motion for judgment notwithstanding the verdict, the reviewing court asks if a fact question was generated. *Crookham*, 584 N.W.2d at 265.

Argument

The standard for granting judgment notwithstanding the verdict is whether there is sufficient evidence to justify submitting the question to the jury. *Gerace v. 3-D Mfg. Co., Inc*., 522 N.W.2d 312, 325 (Iowa 1994). The question should not be submitted to the jury where evidence supporting the verdict is such that a reasonable mind would not accept it as adequate. *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990).

Plaintiffs' evidence on each element was speculative and insufficient to generate a jury question. This case should not have been submitted because a reasonable mind would not accept speculative evidence as adequate to conclude Jason committed the homicide (which was the ultimate question before the jury).

A. Plaintiffs' Evidence Was Insufficient for a Reasonable Mind to Find Intent to Harm.

Plaintiffs' case rested on unsupported speculation. There was no evidence Jason intended to harm Shirley. There was speculation Jason was in financial trouble, but actual evidence showed the contrary – Jason was financially comfortable, and Jason gained nothing from his mother's death. (Am. App. II at 689).

B. The Evidence Was Inadequate for a Reasonable Mind to Find Jason Harmed Shirley.

There was no evidence Jason harmed Shirley. The only evidence was minimal speculative evidence of opportunity and minimal evidence of knowledge about the circumstances of the homicide.

i. Jason's Knowledge About the Homicide Came from Discovery of the Body.

Jason's statement to 911 conveyed his observations. (Audio Tr. Ex. 13). These are observations which were shared by other witnesses and observable

to other witnesses. Photos showed a hole in the floor and a hole in the refrigerator were large and visible at the time of the homicide. (Conf. App. at 103, 105). Bill identified the hole in the refrigerator to first responder Curt Seddon. (12/5/17 Trial Tr. 119:15-122:3). Bill observed the body to be cold and stiff. (12/11/17 Trial Tr. 45:1-46:3). First responders testified it takes "a few hours" for rigor mortis to set in. (12/13/17 Trial Tr. 162:10-13).

ii. <u>Jason Did Not Have Time to Commit the Homicide.</u>

The timeline (supported by ***actual*** evidence) shows it was impossible for Jason to commit the homicide; therefore, there is insufficient evidence. Video surveillance shows Jason left Cargill at 9:58 AM. (Video Tr. Ex. K1). Jason was traveling to and from Cargill and detoured to another farm to switch vehicles. (12/12/17 Trial Tr. 54:12-14; 55:1; 56:17-57:18; 58:6-15; 12/14/17 Trial Tr. 53:14-25). The video evidence, the detour, the cell text records, the testimony of witnesses indicate it took Jason an hour and five minutes to drive from Cargill to Carter farm. (Video Tr. Ex. K1, 12/11/17 Trial Tr. 66:7-10; 12/14/17 Trial Tr. 13:18-24). This put Jason at Carter farm at 11:03 AM (earliest). Jason called his sister to state he found his mother at 11:08 AM. (Am. App. II at 193).

Plaintiffs acknowledge the homicide would have taken at least 18 minutes. (12/11/17 Trial Tr. 70:15-21). The testimony Plaintiffs offered to

implicate Jason is both speculative (e.g., "he must have been speeding," 12/11/17 Trial Tr. 70:2-4) and incorrect.

Even if Plaintiffs had shown Jason "had the time" they offered no proof of ***actual acts*** leading death.

iii. Jason's Fingerprints in the Gun Safe Were Not Evidence of Homicide.

Jason's fingerprints in the gun safe are consistent with assembly. (12/8/17 Trial Tr. 131:7-13; 142:15-22). Additionally, his son's tiny fingerprints indicate assembly.[22] Jason's fingerprints are found behind an installed locking mechanism which is only accessible during assembly. (*Id.*) Neither Jason nor Bill recalled Jason assembling the gun safe. (12/12/17 Trial Tr. 96:13-15). Jason testified it was likely he assembled the safe. (12/12/17 Trial Tr. 95:96-15).

Additionally, expert witness Gary Rini, testified fingerprints collected after a homicide scene is reopened and contaminated are unreliable. (12/13/17 Trial Tr. 53:5-12).

iv. Plaintiffs Evidence Was Entirely Speculative.

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[22] Smaller versions of Jason's son's fingerprints indicate his son was present for assembly. (Conf. App. 119, 124, 132, 439, 130, 442 (Tr. Exs. 102, 104, 106, 113, 105, 114)). That is confirmed by the later-produced photographs. (Am. App. II, 15 (Tr. Ex. T5)).

By Plaintiffs' own admissions, their claims were based on speculation. (12/14/17 Trial Tr. 39:20-40:8). Plaintiffs introduce no direct evidence supporting those claims. "Speculation is not evidence and a case should not be submitted to a jury for deliberation when no evidence has been presented." *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 800 (Iowa 1984). Plaintiffs' speculations are wholly and openly based on circumstance. "[C]ircumstantial evidence is insufficient to prove causation when it provides mere speculation rather than a reasonable basis for a legal conclusion." *Hasselman v. Hasselman*, 596 N.W.2d 541, 546 (Iowa 1999); *see also Blackhawk Bldg. Sys., Ltd. v. Law Firm of Aspelmeird, Fisch, Power, Warner, and Engberg*, 428 N.W.2d 288, 291 (Iowa 1988) ("A jury cannot be left to speculate, but rather, must be provided with facts affording a reasonable basis for ascertaining the loss.").

The circumstances surrounding the homicide and Jason's discovery of Shirley's body are insufficient to conclude Jason was responsible. "Circumstances are not sufficient when the conclusion in question is based on surmise, speculation, or conjecture." *Willey v. Riley*, 541 N.W.2d 521, 527 (Iowa 1995).

There was no direct evidence showing Jason was responsible. The jury was told there were two suspects and was left to guess between Jason and Bill.

The jury speculated between the two, but did not have solid evidence on which to render any verdict. The court erred by denying Jason's Motion for Judgment Notwithstanding the Verdict.

ISSUE IV: THE DISTRICT COURT ERRED BY DISMISSING JASON'S FIRST PETITION FOR RELIEF.

Preservation of Error

Jason preserved error by specifically challenging the same on the grounds below at hearing and by filing a Motion to Enlarge or Amend Ruling. (Am. App. I at 1260).

Standard of Review

The standard of review is for correction of errors at law. Iowa R. App. P. 6.907; *Shaw v. Addison*, 18 N.W.2d 796 (Iowa 1945).

Argument

In its January 31, 2019 ruling, the court found "virtually all of the allegedly newly discovered evidence is hearsay." (Am. App. II at 713). The court failed to address the argument why this evidence was admissible –it was not offered for the truth of the matter asserted, but to show failure in responsive conduct by law enforcement and failed investigation. *See, e.g.*, *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990) ("When an out-of-court statement is offered, not to show truth of the matter asserted but to explain

responsive conduct, it is not regarded as hearsay."); *see also State v. Plain*, 898 N.W.2d 801, 812 (Iowa 2017). Following this failure, Jason file a Motion to Enlarge, requesting the court address offered evidence. (Am. App. I at 1260).

When ruling on the Motion to Enlarge, the court reaffirmed dismissal of the Petition for Relief. (Am. App. II at 744). This ruling ignored the reasonable probability a jury could have considered law enforcement's failure to follow leads and such testimony would have affected the jury's decision.[23]

A. Standard for Vacation of Judgment

A court may vacate a final judgment on grounds of "[m]aterial evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial, and was not discovered within the time for moving for a new trial under rule 1.1004." Iowa R. Civ. P. 1.1012(6).

Iowa Rs. Civ. P. 1.1012 and 1.1013 provide for vacating a judgment or granting a new trial. The trial court has broad discretion in passing upon a motion to vacate or modify; however, the trial court's determination must have support in the record. *Iowa-Illinois Gas & Elec. Co. v. Black & Veatch*, 497 N.W.2d 821, 828 (Iowa 1993); *Claeys v. Moldenschardt*, 148 N.W.2d

[23] The criminal court found the same evidence admissible. (Am. App. II at 721 (2/25/19 Order, FECR029316)).

479 (Iowa 1967); *Oldis v. John Deere Waterloo Tractor Works, Inc.*, 147 N.W.2d 200 (Iowa 1966).

Rule 1.012 requires Jason show (1) evidence is newly discovered and could not, in exercise of due diligence, have been discovered prior to conclusion of trial; (2) evidence is material and not merely cumulative or impeaching; and (3) evidence will probably change the result if a new trial is granted. *In re D.W.*, 385 N.W.2d 570, 583 (Iowa 1986).

In its January 31, 2019 ruling, the court erroneously found evidence offered by Jason was not material because of "its inconsistency with other known facts of the case;" and newly discovered evidence would not have changed the outcome of the trial because it was inadmissible. (Am. App. II at 713). The District Court factually and legally erred in these findings.

B. The District Court Erred by Finding Proffered Evidence Was Hearsay and Could Not Have Changed Outcome of the Trial.

The court erroneously found even if newly-discovered evidence was material, it would not have changed the outcome of the trial because it was inadmissible. (Am. App. II at 713). First, the court applied the wrong standard because the evidence was not subject to the hearsay rule. Second, even if the hearsay rule applied, the evidence was not hearsay because it was not offered to prove the truth of the matter. Third, the evidence was admissible under the residual exception.

i. The proffered evidence was not subject to the hearsay rule.

Definition of Hearsay

Hearsay is a "statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). Hearsay must be excluded "unless admitted as an exception or exclusion under the hearsay rule or some other provision." *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003). A statement is not hearsay if it is not offered to prove the truth of the matter asserted. *Id.*; *see also State v. Waterbury*, 307 N.W.2d 45, 50 (Iowa 1981).

Jason Was Entitled to Presumption his Allegations Were True

Petitions for relief are treated as original actions of law, tried as an ordinary action. *Chambliss v. Hass*, 101 N.W. 153, 154 (Iowa 1904). In hearing on the first petition for relief, Jason was entitled to the presumption his allegations were true – there was no bar to truth based on hearsay at this stage. *Douglas Mach. & Engineering Co., Inc. v. Hyflow Blanking Press Corp.*, 229 N.W.2d 784 (Iowa 1975); *see also McGill v. Fish*, 790 N.W.2d

113, 116 (Iowa 2010); *Tall v. Comcast of Potomac, LLC*, 729 F. Supp.2d 342, 346 (D.C. Cir. 2010).

Jason was only required to show the outcome might have been different and this new evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Cornell v. State*, 430 N.W.2d 384, 386 (Iowa 1988) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). The evidence does not need to be admissible in the ultimate trial to be considered at a hearing on a petition for relief. The court erred in rejecting the evidence offered in support of the motion.

ii. Even if the Hearsay Rule Applies, the Evidence Was Not Offered for the Truth of the Matter Asserted.

Evidence of a Faulty and Biased Investigation is Admissible

Evidence of a faulty law enforcement investigation is admissible to attack law enforcement's investigation and show bias. *State v. Stone*, 759 N.W.2d 812 (Table), 2008 WL 4724865, at *2-3 (Iowa Ct. App. 2008); *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). Evidence of law enforcement's course of conduct (and lack of conduct) following receipt of relevant information is likewise not hearsay and admissible. *Mitchell*, 450 N.W.2d at 832; *Plain*, 898 N.W.2d at 812.

Evidence and testimony relating to bias, especially when concerning a testifying witness's motivation to inappropriately inculpate the defendant over

other possibly culpable individuals, is proper to attack a witness' credibility. *State v. Campbell*, 714 N.W.2d 622, 630-31 (Iowa 2006).

Evidence of a faulty or failed law enforcement investigation is admissible to show law enforcement's awareness of evidence, and to show there was insufficient investigation after awareness of the evidence or statements.[24] *See* Am. App. II at 721, FECR029316; *Alvarez v. Ercole*, 762 F.3d 223, 230 (2d Cir. 2014); *see also State v. McCullar*, 335 P.3d 900, 905-06 (Ut. Ct. App. 2014); *Commonwealth v. Bowden*, 379 Mass. 472, 485-86 (Mass. 1980); *Commonwealth v. Fitzpatrick*, 463 Mass. 581, 597 (Mass. 2012); *State v. Niemsyzk*, 551 A.2d 842, 843 (Me. 1988).

The court erred by finding the proffered evidence inadmissible, as it was offered to show a faulty or failed investigation and bias.

Evidence of Third-Party Misconduct as a Defense is Admissible

Evidence of third-party misconduct as a defense is recognized by the United States Supreme Court. *See v. United States*, 138 U.S. 353, 356 (1891). Over years, case law developed more clear definitions of the rules regarding

[24] The evidence offered with the first and second petition for relief was not offered to show the truth of the matter asserted, but instead offered to show the effect on the hearer, and the subsequent course of conduct or lack of conduct. *See, e.g., State v. McCullar*, 335 P.3d 900, 905-06 (2014).

admissibility of this evidence. *See, e.g., Washington v. Texas*, 388 U.S. 14, 22 (1967); *Arizona v. Youngblood*, 488 U.S. 51, 55-57 (1988).

Evidence of possible third-party responsibility for the homicide is admissible to establish doubt as to the defendant's liability, regardless of the purported strength of the plaintiffs' evidence against the defendant. *See Holmes v. South Carolina*, 547 U.S. 319, 323 (2006); *see also People v. Hall*, 718 P.2d 99, 103-04 (Cal. 1986).

Evidence of Law Enforcement Bias is Admissible

The evidence submitted shows extreme bias or "tunnel vision" which resulted in law enforcement ignoring exculpatory evidence. Evidence showing bias is admissible. *See State v. Turner*, 630 N.W.2d 601, 609 (Iowa 2001) (citing *Gregory v. Gregory*, 82 N.W.2d 114, 148 (Iowa 1957); *State v. Peterson*, 219 N.W.2d 665, 671 (Iowa 1974); *Niemsyzk*, 551 A.2d at 842. This evidence is not hearsay because it is offered to show law enforcement's knowledge of certain information and the subsequent course of action (or lack thereof) by law enforcement.

Evidence Showing a Failed and Biased Investigation Would Have Changed the Outcome of the Trial

The evidence met the requirements necessary for admission under current jurisprudence. The evidence made clear Jason was attacking the depth and accuracy of the investigation. This evidence is admissible to show

knowledge and effect on the hearer and was not hearsay. *Stone*, 2008 WL 4724865, at *2-3.

The evidence contained myriad "substantive facts" showing statements of possible culpable third parties, including motive, opportunity, admissions, and subsequent conduct related to the disposal of evidence. This evidence rose beyond a "mere suspicion" given its volume and the specific information therein. *See Campbell*, 714 N.W.2d at 630. All of the uninvestigated evidence was inconsistent with the civil verdict. *See State v. Banoch*, 186 N.W. 436, 437 (Iowa 1922).

State v. Reitenbaugh and State v. McCurry

As with Jason's criminal trial, if granted a new civil trial, Jason would call the investigating officers, who would testify to the content of the report or interview in question and the failure to pursue the evidence. In *Reitenbaugh*, this Court denied admissibility of law enforcement investigative reports where the State did not call the authors of the reports as witnesses. *State v. Reitenbaugh*, 392 N.W.2d 486, 490 (Iowa 1986).

This ruling does not preclude use of reports to cross-examine investigators who *are* called as witnesses. Unlike the State in *Reitenbaugh*, Jason was not relying on reports alone as evidence. Jason was relying testimony of officers who failed to follow up on those reports. Because

testimony of officers would be limited to the follow-up (and lack thereof) by officers, the contents of the reports would not have been offered for the truth of the matter asserted.

In *State v. McCurry*, 544 N.W.2d 444, 448 (Iowa 1996), reports were admissible, even if hearsay, because the authors would be called to testify about them, and their testimony would not be inadmissible hearsay because it would not have been offered for the truth of the matter asserted. As in *McCurry*, these witnesses would be subject to cross-examination. Plaintiffs would not be harmed by admission of reports which are cumulative of evidence from law enforcement testimony.

iii. <u>The Reports and Testimony Were Admissible Under the Residual Exception to the Hearsay Rule.</u>

The residual exception of Iowa R. Evid. 5.807 provides in relevant part:

> A statement not specifically covered by any of the exceptions in rule 5.803 or 5.804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the evidence is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence.

Iowa R. Evid. 5.807. "The requirements of admissibility under the residual exception are five-fold: trustworthiness materiality, necessity, service of the

interests of justice, and notice." *State v. Rojas*, 524 N.W.2d 659, 662-63 (Iowa 1994).

The evidence met requirements of admissibility under this exception. The hearing should have addressed if newly-discovered material evidence could have changed the outcome of the previous litigation. The reports and related testimony were trustworthy because many were supported by related audio statements and corroborated by other evidence. *See Rojas*, 524 N.W.2d at 663. As for audio, statements introduced through playing the audio would permit the jury to hear the questions and the tone and substance of the answers. *See id.* ("[A] videotape is more reliable than many other forms of hearsay because the trier of fact could observe for itself how questions were asked, what the declarant said, and the declarant's demeanor.").

The materiality requirement was met because witnesses' testimony contained statements regarding commission of the homicide along with when, where, how, and what evidence would corroborate those statements. Admission of that evidence is necessary because it was unavailable to Jason during the civil trial and the jury was unable to consider it. Admission of the evidence serves the interest of justice – "[t]he appropriate showing of reliability and necessity were made, and admitting the evidence advances the goal of truth-seeking expressed in Iowa Rule of Evidence 5.102." *Id.*; *see also*

Iowa R. Evid. 5.102. Plaintiffs received adequate notice of Jason's intent to use this evidence.

State v. Metz

State v. Metz, 636 N.W.2d 94 (Iowa 2001) further defines use of the residual exception. Applying *Metz* to the immediate facts, the exception applies because: (1) Jason neither had knowledge of other witnesses regarding the Followills, nor access to these witnesses' statements;[25] (2) hearsay accounts were not duplicative of ***any*** statements or evidence at trial; (3) hearsay statements differed substantially from evidence available to Jason and introduced at trial; (4) there is a strong basis to conclude this evidence was necessary for Jason's case; and (5) interests of justice would be served by admission of this evidence, especially given multiple failures by both law enforcement in its investigation, and Plaintiffs' failure to disclose in discovery information learned from law enforcement regarding other potential suspects, and other potentially exculpatory information learned and not disclosed.

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[25] Nor did Plaintiffs disclose their own knowledge of these witnesses or statements through civil discovery.

C. The Newly Discovered Evidence Was Material and Admissible.

The court erred by determining proffered evidence was immaterial "because of its inconsistency with other known facts of the case." (01/31/19 Order). That ruling is both factually and legally wrong.

i. Newly Discovered Evidence

"Newly discovered evidence" sufficient to merit a new trial or vacation of judgment is "evidence which existed at the time of trial, but which, for excusable reasons, the party was unable to produce at the time." *Benson v. Richardson*, 537 N.W.2d 748, 762-63 (Iowa 1995).

ii. Materiality Inquiry

Evidence is material for purposes of vacation of judgment or a new trial when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cornell v. State*, 430 N.W.2d 384, 386 (Iowa 1988) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)).[26] This Court holds a "reasonable probability" is "a probability

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[26] In hearing on Jason's Motions to Quash Subpoenas to DCI, Plaintiffs' counsel stated if, after trial, they were able to get this evidence from the DCI, they would "now have newly discovered evidence that would be, as the rule says, material evidence which could not, with reasonable diligence, have been discovered and produced at the trial, thus entitling Mr. Carter to a new trial under Rule 1.1004(7)." (6/16/17 Trial Tr. 69:3-10). Counsel stated "if that evidence is kept out of this case and then we're able to obtain it because . . . DCI does eventually comply with the subpoena or even if it is then later disclosed as part of the criminal prosecution, it would seem . . . that we would

sufficient to undermine confidence in the outcome." *Id.* (citing *Bagley*, 473 U.S. at 682). This Court also provides "[t]he *Bagley* inquiry requires consideration of the totality of the circumstances, *including the possible effects of nondisclosure on defense counsel's trial preparation*." *Id.* (emphasis added). "This test does not require the defendant to prove disclosure of the evidence 'would have resulted in his acquittal.'"[27] *Harrington v. State*, 659 N.W.2d 509, 523 (Iowa 2003) (citing *State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996)). As the United States Supreme Court explains:

> [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. *Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict*."

Strickler v. Greene, 527 U.S. 263, 290 (1999) (emphasis added) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

The court failed to follow *Strickler* by determining evidence offered by Jason was immaterial "because of its inconsistency with other known facts of the case." (Am. App. II at 713). Inconsistency with other known facts is

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then have a very good argument for a new trial based on newly discovered evidence." (*Id.* at 69:11-21).

[27] Or in this case, a finding Jason was not liable.

precisely why the proffered evidence is both material and relevant. If evidence was consistent with facts known to the jury at trial, it would then be merely cumulative and there would be no purpose in vacating judgment or requesting a new trial.

The United States Supreme Court in *Strickler* explicitly states the materiality inquiry is not just a matter of determining whether remaining evidence is sufficient to support the jury's conclusions, but whether new evidence could change the case such that it would be viewed in such a different light as to undermine confidence in the verdict. *Strickler*, 527 U.S. at 290. The court failed to consider whether this new evidence put the case in such a different light as to undermine confidence in the verdict.

iii. Evidence is Admissible Where it Has Potential to Qualify as Material Evidence.

Harrington provides the test for admissibility of material evidence:

> . . . the only remaining task for the trial court was to decide whether there is a nexus between the undisclosed police reports and the recantation evidence on one hand and the defendant's conviction on the other. Clearly there is. Both classes of evidence are the type of facts having the *potential* to qualify as material evidence that probably would have changed the outcome of Harrington's trial. They are, therefore, relevant and, as such, meet the nexus requirement.

659 N.W.2d at 521 (emphasis in original).

As in *Harrington*, the evidence offered was material and likely would have changed the trial outcome or had potential to qualify as material evidence that probably would have changed the outcome of trial. The evidence was admissible.

iv. Standard as to Effect Evidence Would Have Had at Trial.

"If the proffered evidence presents material facts germane to the issue in controversy, which, considered with the evidence presented on the trial, might cause a jury to take the other view, then the motion should be sustained." *Henderson v. Edwards*, 183 N.W. 583, 584 (Iowa 1921). This standard has been upheld for decades. *See, e.g., Farmers Ins. Exchange v. Moores*, 78 N.W.2d 518, 525 (Iowa 1956). *Henderson* and its progeny withstood the test of time, have never been overruled, and establish the "might" standard. This Court further relied on Restatement (Second) of Judgments section 73 in providing post-judgment relief, which provides a judgment may be set aside if "[t]here has been such a substantial change in the circumstances that giving continued effect to the judgment is unjust." *State v. Mulkins*, 330 N.W.2d 251, 252 (Iowa 1983).

At hearing on the first petition for relief, parties disputed whether the standard is the evidence would "probably" change the result if a new trial is granted or if the standard is "could" change the result. One case indicates the

standard is "probably." *In re D.W.*, 385 N.W.2d 570, 583 (Iowa 1986). Other cases indicate the standard is "might." *Henderson*, 183 N.W. at 584. This evidence met either standard.

The other question is whether new evidence could cause the case to be viewed in such a different light as to undermine confidence in the verdict. *Strickler*, 527 U.S. at 290. The question before the court was: is it possible this new evidence could have affected the outcome of the civil trial? The answer is "yes."

D. The District Court Erred by Failing to Consider the Effect of Plaintiffs' Non-Disclosure of Material Evidence.

The court failed to consider Plaintiffs' discovery violations[28] in ruling on the first petition for relief. (Am. App. II at 713, 744). Jason's counsel clearly discussed violations in the presence of the court and urged it to take those violations into consideration as it weighed how violations affected Jason's counsel's preparation and trial strategy. (12/10/18 Trial Tr. 125:5-25; 50:1-8; 50:19-51:20). Jason's counsel briefed the issue on several occasions. (Am. App. I at 870).

[28] This knowledge would have been responsive to the following discovery requests: (Am. App. I, 1107, 1129, 1154); (Am. App. I, 1192).

Jason's counsel explained violations were relevant because failure to disclose affected Jason's trial preparation and strategy. (*Id.* at 50:16-51:20). In its ruling, the court notes Plaintiffs' counsel addressed other possible suspects by name during Jason's deposition. (Am. App. II at 744). The court did not address Plaintiffs' statements to the media confirming Plaintiffs' counsel had long been aware of information Jason's counsel offered in support of the Petition to Vacate. (*Id.*)

The court errantly ruled that Jason had sufficient information about other suspects and Plaintiffs did not act improperly. (Am. App. II at 744). That ruling is not based on fact. A Marion County detective mentioned one name with no context, and no one provided Jason with the names of the Followills and Sedlock (who are mentioned by over 40 separate witnesses and listed in over 40 reports). Jason did not have sufficient information about other suspects to be put on notice to investigate those individuals during trial. *See, e.g.*, *Hook v. Lippolt*, 755 N.W.2d 514, 524 (Iowa 2008). When Plaintiffs' counsel asked about a few specific names in deposition, neither Jason nor his counsel knew of any connection to the homicide because Plaintiffs never identified them in discovery responses. Using those names in deposition showed Plaintiffs' counsel had knowledge of individuals alleged to be connected to the homicide, but did not put Jason's counsel on notice.

i. Plaintiffs Had Knowledge of Relevant, Exculpatory Evidence but Did Not Disclose It.

Plaintiffs were aware of relevant, exculpatory evidence before the civil trial, as shown by questions in depositions and by statements to the press. In Jason's civil deposition, Plaintiffs' counsel questioned Jason about the Followills. (Am. App. II at 12). After questioning Jason about the Followills, Plaintiffs' counsel asked Jason about Callie Shinn. (*Id.* at 150:2-3). Jason's response was "I don't even know who in the hell that is." (*Id.* at 150:4-5). Now, because of the new evidence Jason has obtained through criminal discovery, Jason does know who Callie Shinn is.[29] Plaintiffs' counsel demonstrated knowledge not shared through discovery. Those names were never listed in Plaintiffs' discovery responses.

After Jason filed the first petition for relief, Plaintiffs' counsel told the press his "legal team had long been aware of the other suspects from early in the investigation" but they were "discounted as possibilities based on a complex analysis of lots of factors." (Am. App. I, 1104 (Ex. Q5 to 2nd Am. Pet. to Vacate)). He added "[t]here is nothing of substance new to our side in this motion."

[29] Callie Shinn's name was mentioned as a person with knowledge in the following proposed exhibits, offered under an offer of proof: Conf. App. at 20, 27, 44, 15, 60.

Before, during, and after the civil trial, Bill possessed photographs of Jason assembling the gun safe. (12/12/18 Trial Tr. 28:1-6; Am. App. II, 15 (Tr. Ex. T5)). He keeps photographs organized in a box in his basement. (*Id.* at 28:12-23). This nondisclosure was a discovery violation.

ii. The "Totality of the Circumstances" Consideration Mandated by the United States Supreme Court Requires Consideration of the Effects of Non-Disclosure on Trial Preparation.

Had Jason known of other suspects, counsel would not have pointed at Bill as the likely culprit. Even in trial, Jason stated he did not believe his father committed the homicide. (12/12/17 Trial Tr. at 31:23-32:8). Jason's case would have been drastically different if he could have told the jury this case was not fully investigated, and other suspects were repeatedly implicated.

Bagley requires the court to consider effects of nondisclosure on trial strategy and preparation. Had Jason known other suspects were implicated by alleged confessions and cell tower data, he would have investigated using his investigator. (12/12/18 Trial Tr. 38:13-39:5; 39:11-18). Further, had Jason known about any of this information, he would have deposed these witnesses and may have called them to testify at trial.

Jason's entire strategy was predicated on the belief he and Bill were the only suspects in the homicide. Clearly, his belief was in error—but was based on the limited investigative information received and the limited information

received from the Plaintiffs. Plaintiffs now say they had the opportunity to "discount" these witnesses based on a "complex analysis of lots of factors." Those factors are unknown and nondisclosure affected Jason's entire preparation for trial. That is illustrated by comparing the civil trial strategy (without the evidence) and the criminal trial strategy (with the evidence). "[T]here is a reasonable probability, had the evidence been disclosed, the result of the proceeding would have been different." *Cornell*, 430 N.W.2d at 386 (quoting *Bagley*, 473 U.S. at 682)). The district court erred in concluding otherwise.

iii. Failure to Disclose Relevant Evidence Prejudiced Jason.

Plaintiffs' counsel conceded and demonstrated knowledge of the Followills' and of Callie Shinn's potential involvement in the homicide; therefore, it is reasonable to believe Plaintiffs also had knowledge of other potential suspects or persons with knowledge of claims asserted.

The court should have accounted for Plaintiffs' blatant non-disclosure when considering the evidentiary standard. The court had broad discretion to determine what weight evidence should be given. *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998).

Plaintiffs deprived Jason of the opportunity to investigate claims by eliminating all reference to these witnesses in discovery (other than asking in

deposition if Jason knew certain names). The court should have permissively applied evidence rules. Applying a flexible standard to admissibility of evidence is supported by Iowa law. While the rules of evidence are applicable to both bench and jury trials, *see* Iowa R. Evid. 1101, there is "less need for strict application of evidence rules in a bench trial." *State v. Farnum*, 397 N.W.2d 744, 746 (Iowa 1986); *see also* E. Clearly, McCormick's Handbook of the Law of Evidence § 60, at 137-38 (2d ed. 1972); 89 C.J.S. Trial § 589 (1955 & Supp.).

We do not litigate in a vacuum. Plaintiffs' omission of relevant information from discovery responses prejudiced Jason. The court erred by failing to consider Plaintiffs' disregard for discovery rules in otherwise denying Jason's Petition to Vacate.

ISSUE V: THE DISTRICT COURT ERRED BY FAILING TO RECUSE.

Preservation of Error

Jason preserved error in the court's denial of the motion to recuse by challenging the same on the grounds below at hearing. (Am. App. I at 2437; 2/24/20 Trial Tr. at 6:1-13).

Standard of Review

This motion was tried at law. The standard of review is for abuse of discretion. *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994).

Argument

Judge Mertz made public comments labeling Jason "guilty as sin" while Jason's motion to amend or enlarge was pending. Judge Mertz also met privately with the prosecuting attorney and with Plaintiffs' counsel.

A judicial officer is disqualified from acting in a proceeding if the officer "has a personal bias or prejudice concerning a party . . ." Iowa Code § 602.1606(1). If a judge's impartiality might reasonably be questioned because of such bias, the judge should recuse him or herself. *State v. Haskins*, 573 N.W.2d 39, 44 (Iowa 1997); *State v. Rhode*, 503 N.W.2d 27, 36 (Iowa Ct. App. 1993).

This Court relies on the language of 28 U.S.C. § 455(a) in analyzing Canon 3(D)(1). *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994). The test is whether a reasonable person would question the judge's impartiality. *Haskins*, 573 N.W.2d at 44; *see also McKinley v. Iowa Dist. Court*, 542 N.W.2d 822, 827 (Iowa 1996); *Mann*, 512 N.W.2d at 532.

"'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.'" *In*

re Marriage of Ricklefs, 726 N.W.2d 359, 362 (Iowa 2007) (citation omitted); *see also Mann*, 512 N.W.2d at 532.

The Iowa Code of Judicial Conduct Rule 51:2.11(A)(1) states a judge "shall disqualify . . . herself in any proceeding in which [her] impartiality might reasonably be questioned, including [when] . . . the judge has a personal bias or prejudice concerning a party." *See also id.* at 51:1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."); 51:2.2 ("A judge . . . shall perform all duties of judicial office fairly and impartially."); 51:2.3(A) ("A judge shall perform the duties of judicial office. . . without bias or prejudice.").

Stating Jason was "guilty as sin" shows bias. Iowa Code § 602.1606(1). Judge Mertz's statements would cause a reasonable person to question her impartiality, especially when she was presiding over a case in which Jason was requesting the civil judgment be vacated and requesting a new trial based on new evidence. *Haskins*, 573 N.W.2d at 44; *Rhode*, 503 N.W.2d at 36; Iowa Code of Judicial Conduct Canon 3(D)(1)(a). It is relevant Judge Mertz made the statement while Jason had a pending motion before her, and then denied the motion. (Am. App. II at 744).

Additionally, it was improper or may have reasonably appeared improper for Judge Mertz to speak privately to the criminal prosecutor and Plaintiffs' attorneys outside the presence of Jason's attorneys.

Judge Mertz abused her discretion in denying the recusal motion.

ISSUE VI: THE DISTRICT COURT ERRED BY DISMISSING JASON'S SECOND PETITION FOR RELIEF.

Preservation of Error

The district court dismissed Jason's second petition as untimely. Jason preserved error by specifically challenging the same on the grounds below at hearing. (2/24/20 Trial Tr. 10:25-11:7)

Standard of Review

This case was tried at law. The standard of review is for correction of errors at law. Iowa R. App. P. 6.907; *Shaw v. Addison*, 18 N.W.2d 796 (Iowa 1945).

Argument

Judgment was rendered December 15, 2017. Jason filed the second petition for relief on August 30, 2019, outside the one-year limitation in Rule 1.1013. The court errantly failed to equitably toll the Rule 1.1013 deadline.

In *Shaw v. Addison*, 18 N.W. 2d 796 (Iowa 1945), this Court held a petitioner may invoke the court's equitable powers after the time fixed in Iowa R. Civ. P. 1.1013 passed. *Id.* at 801. The Court provided it

> has been the uniform holding of this court that where the petitioner has not in the exercise of proper diligence discovered the fraud or other grounds upon which he relies within the year after the entry of final judgment . . . he may institute suit in equity invoking the equitable powers of the court to vacate the judgment or grant him a new trial, after the time fixed in the statute for so doing has passed.

Id. See also Johnson v. Mitchell, 489 N.W.2d 411, 415 (Iowa Ct. App. 1992) (citing *City of Chariton v. J.C. Blunk Const. Co.*, 112 N.W.2d 829, 835 (Iowa 1962)).

This makes sense. Rule 1.1013 requires filing the second petition for relief under the original Marion County action.[30] Iowa caselaw expressly provides for equitable tolling of the deadline for petitions for relief to allow conformance with this rule. The second petition for relief satisfied these requirements by specifically invoked the district court's equitable powers. (Am. App. I at 1286; 02/24/20 Trial Tr. 11:8-12; 15:8-10).

Simply because the original action was at law does not prevent equitable relief or limit the court's equitable powers in that action. *See Ruppin v. McLachlan*, 98 N.W. 153, 154 (Iowa 1904). *In re Marriage of Rhinehart*,

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[30] Iowa R. Civ. P. 1.1013(1).

780 N.W. 248 (Table), 2010 WL 446560 (Iowa Ct. App. 2010) addressed a petition for relief filed in an underlying action and outside the one-year deadline. The Iowa Court of Appeals expressly held "Iowa recognizes equitable exceptions to the one-year limitation." *In re Rhinehart*, 2010 WL 446560 at *2. Jason's second petition contained allegations which, under our notice pleading standard, support a common-law cause of action to vacate.

A petition and hearing to vacate a judgment should be filed in the original action, and not by a suit in equity. *Johnson, Lane & Co. v. Nash-Wright Co.*, 96 N.W. 760, 761-62 (Iowa 1903); *see also Rhinehart,* 2010 WL 446560 at *2; *see also Tollefson v. Tollefson*, 114 N.W. 631, 632 (Iowa 1908); *Sorenson v. Sorenson*, 119 N.W.2d 131, 133 (Iowa 1963).

Plaintiffs' argument the Rule 1.1013 deadline is jurisdictional and cannot be tolled directly contradicts Iowa law. The second petition for relief was an equitable claim. *See Addison*, 18 N.W.2d at 801; *Johnson*, 489 N.W.2d at 415. Rule 1.1012(6) recognizes newly-discovered evidence as a ground for relief. Rule 1.1012(2) recognizes irregularity or fraud practiced in obtaining the judgment as a ground for relief. Both grounds formed the basis of the second petition.

Further, although the comment to Rule 1.1013 states the filing deadline is jurisdictional, this Court holds "courts of equity have jurisdiction to grant

new trials independently of the rule or statute" where evidence to support the new trial is not discovered within the deadline. *Sorenson*, 119 N.W.2d 129, 134 (citing *Graves v. Graves*, 109 N.W. 707 (Iowa 1906); *Tollefson*, 114 N.W. 631; *Sudbury v. Sudbury*, 162 N.W. 209 (Iowa 1917); *Pedersen v. Pedersen*, 17 N.W.2d 520 (Iowa 1945)).

Even Plaintiffs' cited cases supporting equitable tolling. Plaintiffs cited *U.S. v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015), which provides

> time bars in suits between *private* parties are presumptively subject to equitable tolling. That means a court may pause the running of limitations statute in private litigation when a party has pursued his rights diligently, but some extraordinary circumstance prevents him from meeting a deadline.

Wong, 135 S. Ct. 1625 at 1630-31 (emphasis in original) (internal citation and quotations omitted).

Although criminal discovery was not complete, Jason filed the first petition for relief within the one-year deadline *because* of the deadline. The evidence that was the subject of the second petition for relief was only made available to Jason after the hearing on the first petition for relief (not coincidentally).

Likewise, evidence supporting the second petition for relief was unavailable to Jason during the December 2017 trial, the first petition for relief, or the December 2018 hearing on the first petition for relief. This

additional, newly-discovered evidence formed additional bases for vacation of judgment and/or a new trial. It was significant, overwhelming, compelling evidence that differed from evidence in front of the court in December 2017 and December 2018.

Iowa courts may invoke both its powers at law and in equity in order to fashion proper relief when so requested by a party. *See, e.g., Waslick v. Simpson*, 836 N.W.2d 153, 2013 WL 2637435, at *1 (Iowa Ct. App. 2013); *Ruppin*, 98 N.W. at 154.

Policy underpinnings weigh in favor of equitable tolling to allow a decision on the merits of the second petition for relief. The evidence presented clearly differed from evidence presented with the first petition for relief in numerous aspects, most notably evidence was not inadmissible hearsay. The district court's decision was in error and warrants reversal.

CONCLUSION

The rulings denying Jason's motion to continue the civil trial until the criminal investigation concluded and denying Jason's motion for a judgment notwithstanding the verdict should be reversed. The dismissal of Jason's first and second petitions for relief should also be reversed and this Court should vacate the judgment entered against Jason in December 2017. The refusal to recuse should be reversed.

REQUEST FOR ORAL ARGUMENT

Jason Carter requests oral argument.

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CERTIFICATE OF FILING

The undersigned certifies on August 19, 2020, I filed this Defendant/Appellant's Final Proof Brief via the Iowa Judicial Branch EDMS system.

/s/ Dani Pigman

CERTIFICATE OF SERVICE

The undersigned certifies on August 19, 2020, I served this Defendant/Appellant's Proof Brief via the Iowa Judicial Branch EDMS system to the attorneys of record.

/s/ Dani Pigman

CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This proof brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this proof brief contains 13,988 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.9903 (1)(g)(1).

2. This proof brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of

Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word - Times New Roman 14 pt.

Dated: August 19, 2020

/s/ Dani Pigman