

IN THE IOWA DISTRICT COURT FOR BLACK HAWK COUNTY

JERRY MARK, Applicant vs. STATE OF IOWA, Respondent	No. APPLICATION FOR POST- CONVICTION RELIEF
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COMES NOW, the Applicant, Jerry Mark, by and through his undersigned counsel, the IOWA STATE PUBLIC DEFENDER, WRONGFUL CONVICTION UNIT by Erica Nichols Cook and Elaina Steenson pursuant to Iowa Code Chapter 822 and in support of his Application for Post-Conviction Relief states:

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	PROCEDURAL HISTORY	7
III.	FACTUAL BACKGROUND	8
A.	The Mark Family	8
B.	The Discovery of Les, Jorjean, and the Children	16
C.	The Investigation	18
1.	Murder Suicide Assumption/Initial Investigation	18
2.	Homicide Investigation	21
3.	Evidence from Crime Scene	23
a.	Fingerprints	23
b.	Shoeprints	24
c.	Firearms & Bullets	26
d.	Toolmark Evidence	28
e.	Serology Evidence	28
f.	Suspect Development	29
4.	Trial: State's Evidence	43
a.	Matching Bullets from the Scene	46
b.	Toolmark Evidence	49
c.	Alga and Leon Forrest's Gun Identification in California	50
d.	Comparative Bullet Lead Analysis ("CBLA") by the FBI	50
e.	Serology	51
f.	Shoeprints & Gait Analysis	52

g. Fingerprints	53
h. Route of Travel/Sightings/Timeline	54
i. Theory of Attack	55
5. Defense Trial Evidence	58
a. Alternate Suspects.	58
b. Jerry Was Not in Iowa on October 31, 1975.	58
6. Post-Trial Proceedings and Evidence	59
c. Jerry was in Nebraska October 31st and the Morning of November 1, 1975.	60
d. Forensic Evidence Errors	62
IV. GROUNDS FOR POST-CONVICTION RELIEF	63
I. JERRY MARK IS ENTITLED TO A NEW TRIAL UNDER IOWA CODE 822(1)(a) AND (1)(d) AND SCHMIDT V. STATE BECAUSE HE IS ACTUALLY INNOCENT.	65
A. Timeliness	66
B. Actual Innocence	66
1. DNA Analysis Proves State Theory was False	67
2. These Murders were Committed by Organized Crime Professionals, Not a Crime of Passion by Jerry in Anger at his Youngest Brother.	68
3. Investigators Ignored Suspects with Motive because of Fraudulent Real Estate Deals by Wayne and Les Mark	74
4. Investigators' Cognitive Bias Precluded Objective Investigation and Erroneously Identified Jerry as the Perpetrator.	76
5. Firearm Identification Evidence	80
6. Shoeprints and Gait Analysis Testimony is Meaningless.	83
7. Jerry Was Not Seen in Iowa on October 31 or November 1, 1975 and It Was Physically Impossible for him to Have Committed These Murders.	84
8. Tool mark Identification.	88
II. JERRY MARK IS ENTITLED TO A NEW TRIAL BECAUSE THERE IS NEWLY DISCOVERY EVIDENCE UNDER MORE V. STATE.	89
A. Newly Discovered Evidence	89
1. Newly Discovered Evidence of the Use of Firearm and Toolmark Analysis.	93
2. Newly Discovered Evidence of the Use of CBLA	94
3. Newly Discovered Evidence of Faulty Methods of Eyewitness Identification.	95
4. Newly Discovered Evidence of Shoeprint and Gait Analysis	95
5. Newly Discovered Evidence of a Professional Crime	96
III. JERRY MARK IS ENTITLED TO A NEW TRIAL BECAUSE THE STATE PRESENTED FALSE TESTIMONY IN VIOLATION OF NAPUE V. ILLINOIS.	98
A. The State Presented False Testimony by DCI Agent, John Jutte	100
B. The State Presented False Testimony by Proximity Witness Leslie Warren	101
C. The State Presented False Evidence of Jerry's Route of Travel	104
IV. A VIOLATION OF DUE PROCESS EXISTS WHEN A CONVICTION IS BASED ENTIRELY ON FALSE, MISLEADING, UNRELIABLE FORENSIC SCIENCE.	109
V. EXHIBITS, DOCUMENTS, AND RECORDS ATTACHED TO THIS APPLICATION	111

I. INTRODUCTION

The unimaginable happened in rural Iowa over 48 years ago on Halloween night 1975. A young and beloved family was murdered in their home, at night, in their beds. Generations of the Mark family had owned and operated a farm in Black Hawk County. And not surprisingly, the murders of Leslie (Les) Mark and his young family left the community stunned and scared—with no clear motive or suspect. Les and his wife Jorjean were shot multiple times at close range and their two young children were executed in their beds while they slept. This tragic crime affected the community, created fear, and pressured law enforcement to solve the crimes quickly. There was not a single eyewitness,¹ nor physical evidence of the perpetrators—no DNA, no fingerprints, no clear shoe prints, no weapons, no shell casings, and no clear motive. Despite this, Jerry Mark, innocent, was convicted of four counts of murder. Jerry Mark was not in Iowa on October 31, 1975, nor did he sneak into his childhood home with a rare .38 revolver and methodically murder his younger brother, sister-in-law, niece, and nephew without leaving a single trace of his presence.

New evidence demonstrates that Les and his family were not the intended victims. Unknown to investigators in 1975, Dorothy Mark's Brazilian son, Renato Balestra, was involved in the largest drug smuggling and cartel investigation of

¹ A traditional eyewitness is a witness who saw the crime occur or saw the perpetrator leaving the scene of the crime. There are no eyewitnesses to the horrific crime in this case—not a single person observed the shooter in the farmhouse or leaving the farmhouse. But numerous witnesses observed an unknown blue car on the Mark property and nearby area. T.2810–18, 2847–50, 2868–80.

its time and had testified against those in the drug cartel. And pending the trial of drug kingpin Auguste Ricord, Wayne Mark posted Renato's bond.

In 1975, investigators were desperate to solve this unimaginable crime and quickly focused on the siblings of Leslie (Les) Mark—Richard (Dick), Thomas (Tom), and Jerry Mark.² They quickly ruled out the eldest brother, Richard because he lived in Canada and was a pastor. Investigators questioned Tom Mark, but cleared him as well despite the family's belief that Tom was involved. Tom relied on Les and Dorothy Mark for support due to his alcoholism and schizophrenia. Investigators continued their focus on Jerry. Jerry had been on a road trip, after departing from his home in California, when Les and his family were murdered and because it was 1975, Jerry was not easily reachable by cell phone. Before interviewing Jerry, law enforcement interviewed Jerry's live-in girlfriend, her parents, and Jerry's estranged wife, who all resided in California. Jerry had been well-liked and well-known growing up in Cedar Falls, but after his time in the Peace Corps, he became an outcast for his liberal views and his abandonment of the community's way of life.

Iowa investigators had local California law enforcement interview Jerry on November 3, 1975. Shortly thereafter, Jerry and Marilyn (Mimi) Forrest traveled to Iowa for the family funerals. On November 7th, Mimi, Jerry's live-in girlfriend, was interrogated for fourteen hours by Iowa investigators, including prosecutor

² Since the tragic murders involve numerous members of Jerry Mark's family, the family members will be referred to by their first names throughout this pleading. Thus, the Applicant, Jerry Mark, will be referred to as Jerry. Non-family witnesses will be referred to by their last name, unless otherwise indicated.

David Dutton questioning her in front of the court. Mimi was then arrested for perjury and transferred to jail. Mimi was only released on November 12th, after habeas proceedings were instituted by counsel and Jerry had been arrested on November 10, 1975.

Investigators released the Mark home and ceased searching for evidence when Jerry was arrested on November 10th—a mere 10 days of investigation into these horrific murders.

Investigators concluded that Jerry was the perpetrator almost immediately, before they interviewed him, before any forensic analysis or laboratory results, and before the investigation had been completed. They detained Mimi Forrest and sought witnesses to support the belief that Jerry was the murderer. This was clearly demonstrated in their search for “eyewitnesses” that may have seen Jerry in Iowa leading up to the murders, because investigators only showed Jerry’s photo when they canvassed gas stations, truck stops, and restaurants along an assumed route. Investigators found and relied on Mimi’s estranged husband, Alga Forrest to develop a motive. Alga’s animosity to Jerry was obvious, and yet Alga testified Jerry was jealous of Les and wanted the family farm. Investigators purchased shoes for Jerry to ‘match’ them to shoeprints seen at the Mark farm. Investigators then consulted with the FBI to ‘match’ the bullets recovered from the Mark family to bullets found in the ditch near the farm and opine that these rare bullets could have been fired from Alga’s missing firearm.

However, in the decades since Jerry was convicted and sentenced to life in prison for the murders of his family, forensic science has drastically changed and new evidence has been discovered of Jerry's innocence. New evidence will show that Les and his family were not the intended victims of this tragedy. New evidence also shows that none of the forensic science used to convict Jerry is reliable or admissible under current scientific standards.

The jury's verdict was based on unreliable forensic evidence: serology, shoeprint and gait analysis, firearm and tool mark identification, including Comparative Bullet Lead Analysis (CBLA)—all which are now known to be unreliable. The scientific community has acknowledged that pattern matching "sciences" are unreliable, misleading, and we now know that misleading forensic science is one of the leading causes of injustice in the criminal justice system, causing wrongful convictions. The jury also heard that random persons saw Jerry on a supposed route of travel—placing him in Iowa, but these "proximity identifications" are not reliable eyewitness identifications and were created by investigators to support their belief Jerry was the perpetrator. Any such "proximity identification" testimony has been rejected by the scientific community. In prior PCR proceedings, the court learned that the State suppressed identification and critical information from witnesses placing Jerry six hundred (600) miles from the Mark farm on November 1, 1975 and whose testimony contradicted the State's theory.

Jerry Mark is actually innocent of the murders of Les, Jorjean, Julie, and Jeffrey Mark. The conviction of an actually innocent person violates due process

of both the Iowa and U.S. Constitutions. This Court must vacate Jerry's convictions, because he is innocent, his due process rights were violated, and he did not receive a fair trial.

II. PROCEDURAL HISTORY

Jerry was convicted of four counts of First-Degree murder pursuant to Iowa Code Section 690.2 in Black Hawk County, Case Numbers: FECR17404 through FECR17407, and was sentenced to life in prison without the possibility of parole. *See State v. Mark*, 286 N.W.2d 396, 400 (Iowa 1979). The Supreme Court of Iowa affirmed all four counts of First-Degree murder on December 19, 1979. *Id.* at 414.

Jerry sought post-conviction relief (PCCV069121) on June 30, 1987, raising due process violations, as well as claims relating to the State's suppression of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). *Mark v. State*, 568 N.W.2d 820, 821 (Iowa Ct. App. 1997). The district court denied this application. *Mark*, 568 N.W.2d at 821. Jerry appealed and the Iowa Court of Appeals affirmed the district court's ruling on April 30, 1997. *Id.* at 827.

Jerry sought habeas corpus relief on July 8, 1997 in the United States District Court for the Northern District of Iowa, raising *Brady* violations and seeking DNA testing. *See Mark v. Burger*, No. 97CV4059, 2006 WL 2556577 (N.D. Iowa Aug. 31, 2006). Habeas relief was granted on August 31, 2006 because: (1) the State suppressed from the Court ten (10) exhibits (21 pages); (2) the trial

court suppressed fourteen (14) exhibits that should not have been suppressed (32 pages); (3) the State failed to perform its exclusive duty to process exculpatory evidence; and (4) the Iowa Court of Appeals did not consider the cumulative effect of the suppressed documents. *See id.* The State appealed, and the Eighth Circuit reversed, holding that even if the wrongfully suppressed evidence was exculpatory to some degree, it was not “material” for *Brady* purposes when considered collectively. *Mark v. Ault*, 498 F.3d 775, 785–86 (8th Cir. 2007).

Jerry sought post-conviction relief (PCCV104047) again on December 12, 2007, raising claims regarding DNA and firearm evidence. *Mark v. State*, No. 09–0800, 2013 WL 5498146, at *1 (Iowa Ct. App. Oct. 2, 2013). Jerry requested DNA testing under Iowa Code § 81.10, which was denied on March 13, 2009, and the entirety of the application for relief was dismissed on April 17, 2009. *Id.* at *1–2. Jerry appealed on May 15, 2009, and the Iowa Court of Appeals affirmed the lower court’s ruling on October 2, 2013. *See id.*

III. FACTUAL BACKGROUND

A. The Mark Family

Wayne and Dorothy Mark were the parents of four children: Richard (Dick), Jerry, Thomas (Tom), and Leslie (Les). T.2919, 2921. The Mark family was well-known in the Cedar Falls and Waterloo community and were active in their church, schools, and community organizations. The Mark family lived on a farm Northwest of Cedar Falls, Iowa, which they called “the homeplace” or “the farm.” T.2922, 2931. This homeplace, a 17-room farmhouse, was built by Wayne’s

father and grandfather in the early 1900's. T.250–51. Wayne's father retired and moved to California, selling the farm to Wayne and leaving his youngest children with Wayne on the homeplace. T.252–53. Wayne's youngest brother, Victor Mark, worked and farmed with Wayne, Les, and Clark Renner. T.257–58. The Mark family also hosted international students, including Ole Kurt Ugland from Norway and Renato Balestra from Brazil. *See Ole Kurt Ugland, Staying with the Mark Family 1959/60: Recollections Based on My Diary* (01/2021) (copy on file and available upon request); Attach. 1, Letter from Renato Balestra to Judge Bauercamper (1993).

Jerry was one of the first members of the Peace Corps and served in Brazil from 1962–63. T.101, 1991. Jerry graduated from Iowa State with a Bachelor's degree in 1966 and earned his law degree in 1972 from the University of Iowa. T.1991–92, 2929; Attach. 2, University of Iowa Law School Graduation Confirmation (1972). Jerry spent his early adult years protesting the Vietnam War. Attach. 3, Affidavit of Jerry Mark (5/29/2024). Jerry had diligently avoided the Vietnam War draft by obtaining student and family deferments and attending Navy officer candidate school. Attach. 4, Interview of Jerry Mark (11/07/1975). Jerry also worked for a Black Democrat senator which caused his father to throw him out of the family home. Attach. 4, Interview of Jerry Mark (11/07/1975).

Among the four brothers, Jerry and Les were the closest, despite their seven-year age difference. T.2923. In fact, when the brothers got married, Les was Jerry's best man and Jerry was Les'. T.118–19, 2923–24. Growing up, Jerry taught Les about farming. T.2923. In the spring of 1968 and 1969, the two

brothers began farming together on their father's land. Attach. 3, Affidavit of Jerry Mark (5/29/2024).

While serving in Brazil, Jerry spent time with Renato Balestra and his family. Attach. 4, Interview of Jerry Mark (11/07/1975); Attach. 5, Interview of Renato Balestra (11/05/1975). The Balestra family was well connected and influential in Brazil, and Renato's father, Nelo Balestra, was a politician and entrepreneur—owning and operating many business ventures in Brazil, such as: buying and selling grain and coffee beans, money lender, and cheese and butter producer. Attach. 6, *Roberto Balestra*, Wikipedia (last accessed Apr. 1, 2024); Attach. 7, Barbosa Nunes, *In the Family, In Politics and in Freemasonry: Garcita Soyer Balestra*, GOB (Mar. 6, 2015). Wayne and Dorothy visited Jerry in Brazil, meeting the Balestra family. Attach. 8, *World Community Day at Hudson Church on Friday*, The Courier (Waterloo Iowa), (10/30/1963). Renato followed Jerry back to the United States, and the Mark family sponsored Renato's student visa so that he could study in Iowa and reside with them while he attended the University of Northern Iowa. Attach. 5, Interview of Renato Balestra (11/05/1975). Renato had become a part of the Mark family and had lived in the farmhouse. Attach. 3, Affidavit of Jerry Mark (5/29/2024).

On October 20, 1970, Renato was arrested for smuggling drugs as a pilot into the United States as part of a large-scale drug cartel investigation. Attach. 9, Letter from US Att'y Walter Phillips Jr. (02/08/1973). Renato had flown a small plane with Cesar Bianchi that was carrying 66 pounds of heroin when it landed in the United States (Miami). Attach. 13, Paul L. Montgomery, *U.S. Opens*

Case Against Alleged Kingpin of Heroin Ring and Outlines Smuggling Route, N.Y. Times (Dec. 6, 1972).

On November 23, 1970, six individuals: Gahou, Balestra, Bianchi, Becker, Varela-Segovia, and Rodriguez-Benitoz were charged for conspiring to bring 94 pounds of heroin (worth \$10 million) into Florida. Attach. 14, Ricord Case Compilation P.2–3. Auguste Joseph Ricord, a French-born Argentine citizen and a master-mind of a “complex heroin-smuggling conspiracy” and an “overlord of drug trafficking in the Western Hemisphere” was prosecuted in the Federal District Court in Manhattan. Attach. 13, Paul L. Montgomery, *U.S. Opens Case Against Alleged Kingpin of Heroin Ring and Outlines Smuggling Route*, N.Y. Times (Dec. 6, 1972).

On January 20, 1971 Jerry’s father, Wayne, posted Renato’s bond (\$10,000). Attach. 10, Personal Recognizance Bond for Renato Balestra, Case no. 70-cr-994 (01/20/1971). Included on the bond was Wayne Mark’s address (RR3, Cedar Falls, Iowa). Attach. 10, Personal Recognizance Bond for Renato Balestra, Case no. 70-cr-994 (01/20/1971).

On January 24, 1971, two co-defendants escaped from custody from the Federal House of Detention in New York before Ricord’s trial and have not been accounted for: Enio Anibal Varela-Segovia and Aron Muravnik. Attach. 14, Ricord Case Compilation P.4–7 Both men were considered to be Ricord’s lieutenants in the operation, along with six others who were involved in the drug

trafficking ring, and all escaped from the Federal House of Detention in New York. *Id.* at 5–7; see Evert Clark & Nicholas Horrock, *Contrabandista!* (1973).

While the federal charges were pending, after Wayne had posted his bond, Renato was living in Cedar Falls. Attach. 15, *United States v. Balestra*, Case No. 70 Cr. 994 (Order, 10/18/1971). Renato met and married Jeanne Sue Vaughn in January of 1972. Attach. 11, *Iowa Couple Wed Mile Above Waterloo Home*, Estherville Daily News (Jan. 17, 1972). Renato's parents traveled to Iowa and stayed with the Mark family for the wedding. Attach. 3, Affidavit of Jerry Mark (05/29/2024); Attach. 11, *Iowa Couple Wed Mile Above Waterloo Home*, Estherville Daily News (Jan. 17, 1972).

The Mark family continued to support Renato while the charges were pending and on July 13, 1972, Wayne Mark authorized and supported an extension of the bond to include Brazil and served as the co-surety for Renato. Attach. 16, *United States v. Balestra*, Case No. 70 Cr. 994 (July 7, 1972), Order to Expand Bond; Attach. 3, Affidavit of Jerry Mark (05/29/2024).

On December 4, 1972, the Government filed an additional charge against Ricord for threatening a key witness (Bianchi). Attach. 14, Ricord Case Compilation P.8–10; Attach. 13, Paul L. Montgomery, *US Opens Case Against Kingpin of Heroin Ring*, NY Times (Dec. 5, 1972). On December 5, 1972, Ricord's trial began and he was represented by Herbert Handman. The court severed Renato's case from Ricord's and Renato was the first witness to testify against Ricord. Attach. 14, Ricord Case Compilation P.8–10; Attach. 13, Paul L.

Montgomery, *US Opens Case Against Kingpin of Heroin Ring*, NY Times (Dec. 5, 1972). On December 6, 1972, Bianchi testifies. Attach. 14, Ricord Case Compilation P.5-7.

On December 15, 1972, Ricord was found guilty of conspiracy of smuggling 94 pound of heroin into the United States. Attach. 14, Ricord Case Compilation P.11-12. At the same time, over 60 pounds of heroin was stolen from their NY Police evidence room. Attach. 14, Ricord Case Compilation P.13. The stolen heroin was from the French Connection drug case and possibly the heroin Ricord was convicted of smuggling into the United States. *Id.* at 13.

After graduating from law school in 1972, Jerry worked at the Polk County Legal Aid Society until he devoted his efforts to anti-war organizing and working as a teamster. T.1992; Attach. 3, Affidavit of Jerry Mark (5/29/2024). Jerry remained close with Renato during Ricord's trial and conviction.

On January 5, 1973, Ricord was allowed to review and inspect information and subject matter not introduced at trial, including names and address of witnesses in connection with the trial, including access to Renato's bond slip and Wayne Mark's address. Attach. 17, *United States v. Ricord, et al.*, Case No. 72 Cr. 1105 (docket sheet entry Jan. 5, 1973).

Bianchi was sentenced to 5 years. Attach. 14, Ricord Case Compilation p. 14. But, because Balestra cooperated with the government and he testified against Ricord, the charges against Renato were dismissed. Attach. 9, Letter from US Att'y Walter Phillips (02/08/1973); Attach. 12, *Nolle Prosequi* signed by

Walter Phillips, Asst. U.S. Atty. (3/8/1973); Attach. 13, Paul L. Montgomery, U.S. *Opens Case Against Alleged Kingpin of Heroin Ring and Outlines Smuggling Route*, N.Y. Times (Dec. 6, 1972).

In 1974, Jerry, his wife Rebecca, and two young daughters left Iowa, traveled, and settled in Central California in a trailer park. T.1995–97. While in California, Jerry and Rebecca became acquainted with Alga and Marilyn (Mimi) Forrest as neighbors in the trailer park. T.1996–97. By mid-1975, both couples had separated, and Jerry was living in Berkeley with Mimi who was divorcing Alga Forrest. T.1998–99, 2930.

Wayne and Dorothy personally owned about 500 acres of land. T.2929. In addition, Wayne had other land holdings with partners and his son Les. T.2929–30. In total, the Mark family owned and controlled approximately 1,200 acres. T.2929–30. Wayne had evolved his family business from farming to include real estate brokerage of farm land. T.212. He was a partner in a corporation which acquired real estate property called Vi-Vim with local attorneys William Sindlinger, Leo Baker, and his son Les. Attach. 18, Letter from Sindlinger to Wayne Mark with Quit Claim (10/03/1973). During the 1960's and 1970's competition for land pitted neighbors against each other and the vast divide in family farms and corporate farms began. Neil Hamilton, *The Land Remains: A Midwestern Perspective on our Past and Future*, 128, 149 (2022). Suburban sprawl began as farmland was developed. *Id.* at 293–94.

After Jerry was convicted, Vi-Vim and its shareholders became ensnared in corruption and fraud violations for misconduct in land transactions. Attach. 52, Vi-Vim Compilation p. 2-3.

Wayne, Jerry's father, was diagnosed with a resurgence of bone cancer in April of 1975. T.2925–26. In May of 1975, Jerry, Mimi, and his two daughters visited the homeplace in Iowa for a few weeks, at the end of their school year. T.2927, 2930. During this visit to Iowa, the two brothers discussed Wayne's estate planning. T.2934–35. Les and Jorjean were living at Cedar Mark Farm,³ and the plan was for Les and his family to move to the homeplace to operate the farm as Wayne's health deteriorated. T.2957–59. Jerry encouraged his father to let Les move into the homeplace, and Jerry raised a concern about their brother Tom's future needs due to his schizophrenia diagnosis. T.2934, 2936, 2939. Under Wayne's estate planning, each son was to receive \$50,000 from the multi-million-dollar estate of farmland and real estate development property. T.2935. Jerry suggested revising the estate planning documents to increase in funds for Tom. T.2936–37. However, Les did not want to disturb the finally achieved estate plan. T.2934–35. The brothers' disagreement was only verbal and was quickly resolved by their agreement that they would fund Tom's needs from their own bequests. T.2934–35. This request was fulfilled in Wayne's revised will, when Tom received \$100,000, instead of the original \$50,000. Attach. 19, Will and Last Testament of Wayne Mark (02/13/1976).

³ Cedar Mark Farm was also owned by the Mark family and located approximately two miles west from the homeplace.

In the fall of 1975, Wayne and Dorothy moved about a mile north of the homeplace to a house at 7147 Pioneer Drive in Wayne's rural real estate housing development subdivision called Turkeyfoot Heights. T.64, 2919, 2942, 2957. Les and his family moved to the Mark homeplace in September of 1975. T.111. At the time of the murders, Wayne and Les were managing the family farm together. T.2958. Wayne died on November 23, 1976. Attach. 20, *Wayne Mark Obituary*, Des Moines Register (Nov. 25, 1976).

B. The Discovery of Les, Jorjean, and the Children

On the morning of Saturday, November 1, 1975, shortly after 8:00 a.m. the bodies of Les, Jorjean, Julie, and Jeffrey were discovered in the homeplace. T.2943–44. All four victims were fatally shot. T.404, 425, 436–37.

Clark Renner, who farmed with the Mark family, had plans to meet Les to continue harvesting and drying corn the morning of November 1st. T.164. Les had told Renner he planned to return to the dryer on Renner's farm between 5:00 a.m. and 6:00 a.m. *Id.* Les did not show up at the dryer. *Id.* Renner tried to call Les at the homeplace, and no one answered. T.165. Around 6:45 a.m., Renner drove to the Mark homeplace, he did not see any lights on in the house, but saw their vehicles. T.164, 168. He went to the south porch door, saw the broken window, called for Les, found the broken door locked, and not hearing any response, he left. T.169–71. Renner returned to his farm, called the homeplace and called Wayne and Dorothy's home, but did not reach anyone. T.172. Renner returned to the homeplace with a load of corn and began

unloading it. T.173–74. He sent his farm hand, Ronnie Malone back to the dryer with the grain truck and took Les’ truck to Wayne and Dorothy’s house. T.175–77.

Renner asked Wayne and Dorothy to return to the homeplace with him because he could not rouse Les. T.177, 2943. When they arrived, Wayne stayed in the truck while Dorothy and Renner went into the house together. T.178, 2943. Dorothy reached through the door’s broken window and unlocked it. T.179. Dorothy and Renner walked over a broken flower pot and dirt on the floor in the kitchen. T.180. Renner also noted glass on the floor from the broken grandfather clock. T.112–13, 181.

Dorothy and Renner searched for Les and his family. T.180. Les and Jorjean were using the downstairs bedroom that Dorothy and Wayne had inhabited for decades. T.81, 111, 169. Dorothy and Renner walked through the office, which was the room outside Les and Jorjean’s bedroom. T.181. From there, they could see what appeared to be blood that had seeped out from under the door. *Id.* Renner forcefully pushed open the door to the bedroom about 6–10 inches so that he could look inside. T.182. Although it was dark, Renner saw the bodies of Les and Jorjean. T.182–83. Jorjean was on her side on the floor and Les was in a crouched position on the floor with his hands underneath him up against the door. T.182–83.

Dorothy found the children deceased in their beds in their individual upstairs bedrooms. T.185. The electricity in the house was off and Dorothy flipped the circuit breakers in the basement. T.188, 2944. Dorothy and Renner

called the police shortly after 8:00 a.m. using the house's phone to report the deaths. T.186, 2945.

C. The Investigation

1. Murder Suicide Assumption/Initial Investigation

Renner and Dorothy assumed that the deaths were a murder-suicide. T.189–90. Community members, friends, and family began congregating in the first floor living room, dining room, and kitchen. T.246. This included Clark and Carol Renner, Dorothy, Wayne, numerous law enforcement personnel, prosecutors, and the Mark family minister, Reverend Harold Burris. T.186, 246.

At 8:48 a.m. on November 1, 1975, Black Hawk County Sheriff⁴ Deputies James Wieser and Jack Suiter arrived at the homeplace. T.320–21. Renner informed Wieser that it was a murder-suicide since the position of the bodies was against the bedroom door. T.189–90. Renner had also gone back into the adults' bedroom and looked for a suicide note near Jorjean before law enforcement arrived. T.190–91, 233–34.

The investigators utilized a communal ashtray on the kitchen table that everyone was instructed to use for their cigarettes while they were processing the scene. T.342. After an initial search of the house, the deputies and Renner looked outside for anyone on the premises—they searched a camper near the

⁴ Hereinafter Black Hawk County Sheriff is referred to as BHCS.

machine shed, went through the barn, and went through the old cow barn. T.193–94, 237. They saw tire tracks and shoeprints around the farm. T.238, 246.

Their search of the children's bedrooms revealed nothing of evidentiary value—such as footprints, spent cartridges, bullets, cigarette butts—except a bullet exited through the bottom of Jeffrey's crib and lodged in a children's book. T.329–31, 348–52. The deputies observed blood seeping out from under the first-floor bedroom door into the office area. T.331–32. Because Dorothy and Renner had told them that Les' body was against the bedroom door, they went outside and looked in at the bodies through the window. T.332.

BHCS Deputy Michael Kubik and Sergeant John Sewick arrived at the homeplace around 9:13 a.m. T.335–36, 2644. Kubik pulled his squad car across the front of the driveway to block traffic. T.336. Access had not been limited previously and law enforcement, family, neighbors, farmworkers, coroners, and the Mark family minister had all been allowed free access to the house and all surrounding farm buildings and adjacent yard. T.301.

BHCS Sergeant Gehrig LaVelle arrived at 9:25 a.m. and began searching the interior of the house. T.373–75. Sewick searched the exterior. *Id.*, T.2644. Wieser pushed open the bedroom door approximately three feet, moving Les' body, so Sewick and Kubik could gain access to the first floor bedroom. T.336–37, 355. BHCS Deputy Charles Simpson arrived around 9:25 a.m. and began collecting evidence from the homeplace. T.345, 541.

Deputy County Medical Examiner Dr. Edward Ceilley examined the bodies at 9:40 a.m. Attach. 21, Medical Examiner Investigation Report (11/03/1975).

Dr. Ceilley estimated the victims had been dead for several hours based on the degree of *rigor mortis* he observed. Attach. 22, Deposition of Dr. Edward Ceilley P.6–7 (05/13/1976). Dr. Ceilley gave LaVelle permission to move Les' body; LaVelle and Sewick photographed Les' body, moved him, but did not find a firearm. Attach. 23, Deposition of Gehrig LaVelle P.26–27 (03/15/1976). Since they did not find any firearms, investigators announced it was a homicide investigation and continued to collect evidence. *Id.* at 25–27.

Dr. Gilbert Clark conducted autopsies of Les and Jorjean Mark the afternoon of November 1, 1975 and determined that autopsies were not necessary for Julie and Jeffrey Mark.⁵ T.396, 448, 451–52. Dr. Clark described the bullet wounds on Julie and Jeffrey's bodies as "through-and-through" and opined that either the head or heart wounds could have been fatal. T.433–34.

Dr. Clark opined on the entrance and exit wounds and the powder burn patterns—which indicated that the gun was within two feet to the skin. T.396. According to Dr. Clark, Les' body had five wounds: (1) above his left ear, (2) left posterior head and impacted the right temple bone; (3) right jaw that exited the right neck; (4) left jaw and lodged into fifth vertebrae in the neck; and (5) right abdomen that did not exit the body. T.396–98. In his opinion, the left posterior head wound was fatal and instantaneously caused death. T.401. Dr. Clark

⁵Dr. Clark described the chest wound on Julie as traversing the heart and the second wound as above her right eye. T.434–35; State Trial Exs. 52, 48, & 278. He opined she was shot from her right side and he observed powder burns above her right eye. T.435. He observed two wounds on Jeffrey, one to chest that traversed his heart and would have been fatal. T.437. And he testified that the second wound was just above the right eye with similar powder burns as on Julie and would have also caused death. T.438.

recovered bullets or slugs from Les' body. T.399, 401, 403, 407. The only powder burns observed on Les were on his left arm. T.396.

The autopsy examination of Jorjean's body showed a bruise above her right eye, no powder burns, and four (4) entrance wounds. The entrance wound behind her left ear, contained two bullets; Dr. Clark opined that she was shot twice in the same wound. T.423. Dr. Clark testified there was another entrance wound in the middle of Jorjean's back. In Dr. Clark's opinion either the heart wound or head wound would have caused instantaneous death. T.424. The last wound was characterized as a grazing wound on lower right ribcage. *Id.*

The time of death for Les, Jorjean, Julie, and Jeffrey was not determined by the forensic pathologist because law enforcement gave Dr. Clark the impression that they knew the time of death. T.462–63.

2. Homicide Investigation

Investigators took photographs, collected evidence, searched for evidence in and outside the house. T.2644–46. Sewick photographed two sets of shoeprints north of the house. T.2645. The BHCS's office sought assistance in the investigation from the Waterloo Police Department and the Iowa Bureau of Criminal Investigation (BCI, now known as DCI). T.2640. Investigators maintained possession of the homeplace for ten (10) days, searching for any physical evidence that would lead them to a suspect. T.1270.

In the course of the investigation, law enforcement talked to neighbors of the homeplace. Freida Wrage lived south of the homeplace and was interviewed

on November 1st because her phone was not working. T.1236–37, 1239; Attach. 24, PCR #69121 Pet Ex. 10, Voluntary Statement of Freida Wrage (11/01/1975). Wrage’s phone was the only one impacted by the damage at the phone junction box near the homeplace. T.1255–56. Wrage did not see anything out of the ordinary. T.1237; Attach. 24, PCR #69121 Pet Ex. 10, Voluntary Statement of Freida Wrage (11/01/1975).

Officers determined that Dick, the oldest son of Wayne and Dorothy, worked and lived in Winnipeg, Canada. T.60, 255, 2960. Tom, the second eldest son, lived nearby and struggled with schizophrenia and alcoholism. T.2043; Attach. 4, Interview of Jerry Mark (11/07/1975). The third son, Jerry, resided in Berkeley, California. T.2960. Jerry was not at his home in California on November 1st, when efforts were made to contact him. T.2456. Rev. Harold Burris spoke to Mimi and gave instructions to tell Jerry what had happened. T.2453; Attach. 35, Voluntary Statement of Rev. Harold Burris (11/14/1975). Jerry had left his California home on a motorcycle trip on October 29, 1975. T.2009. During his motorcycle trip, Jerry would routinely call home to Mimi’s or her parents’ house on a pay phone. T.2013–14. When Jerry called collect on Saturday, November 1st, he was told by Mimi’s mother to call home. T.2028, 2451–53. Jerry did not understand she meant to call his parents. When Jerry called on Sunday, November 2, 1975, from Nevada, Mimi’s mother told Jerry about Les, and Les’ family’s deaths. T.2031–32, 2454–58.

Jerry called the Callenbergs again on November 2, 1975 and traveled towards the Callenbergs home in South Lake Tahoe, California. T.2031–32,

2034, 2454–58. The Callenberg’s came to pick Jerry up along the way and they loaded Jerry’s motorcycle in the Callenberg’s vehicle and returned to South Lake Tahoe. T.2034; PCR #69121 T.1251–52. Jerry was interviewed the next day, November 3, 1975 at the Callenberg’s home in California. T.2988–89. Later that day, Mimi and Jerry returned to their home in Berkeley to prepare for their trip to Iowa. T.2035.

Les, Jorjean, Julie, and Jeffrey Mark’s funerals were held on November 4th at 2:00 p.m. T.2945. Jerry and Mimi attended and later that day, were contacted by investigators requesting an additional interview. T.2946; PCR #69121 T.1256–57.

3. Evidence from Crime Scene

a. Fingerprints

Investigators searched and collected latent prints at the crime scene. T.567, 1294, 1296, 1302, 1305. Investigators did not collect any identifiable prints in Julie or Jeffrey’s bedrooms. T.598. Deputy Simpson collected partial prints on the back door and door casing—the assumed entry point of the perpetrator, a full print in an unused upstairs bedroom, and several partial prints in the hallway and back stairway. T.566–69.

Waterloo Police Department Detective Robert Anton collected fingerprints by dusting all the smooth surfaces in the house and since the dusting provided limited results; Anton also sprayed the walls of the home with a chemical called ninhydrin. T.1291–92.

b. Shoeprints

Investigators examined shoeprints found in the house and outside in the farmyard. T.1272. There were a multitude of varying prints in the dirt of the driveway, near outbuildings, sheds, and machinery. Attach. 25, Deposition of Charles Simpson P.45 (03/18/1976). Simpson only photographed prints that had been circled or marked by investigators. *Id.* at 46. He also observed tennis shoe and boot prints throughout the farm, but only selected the most complete tennis shoe prints to photograph, took photographs from above and he made no notes to reference the location or proximity to other prints. *Id.* at 47–48; T.602–04.

Sewick also took photographs of the outbuildings, farmyard, and tennis shoe tracks he saw.⁶ T.2645. Sewick and Simpson determined they had taken photos of different shoeprints. T.248–49, 585, 602–05.

On November 1st, Anton arrived to the homeplace after Simpson and Sewick had taken photographs. T.1382, 1476, 2644–45. Anton spent minimal time outside following shoeprints around the farmyard. T.1377–80, 1391–92. After a rainstorm, on November 3rd, Anton then preserved three shoeprints, taking a photo of one of them. T.1391–92. Investigators eliminated other first responders with a visual inspection and the shoes of others known to be on the

⁶ Even though both Sewick and Simpson saw different types of prints, they only took photographs of tennis shoe prints, leaving work boots and work shoe prints undocumented. T.2938–39.

farm yard. T.238, 279, 1401-03, 1522-23. Investigators documented four (4) shoeprints and those are shown in Exhibits 154, 155, 156, and 157.⁷

Anton determined that the shoeprints in question were made by a shoe that was 12 inches long, 4 inches wide and had an alternating zig-zag patterned tread. T.1383. He disregarded bloody shoeprints in the hallway outside the downstairs bedroom and collected a partial print seen on broken glass, which was later determined to be Simpson's. T.1277, 1286.

Anton examined a pair of Victor Mark's tennis shoes⁸ and a pair of Les Mark's shoes. T.1523-24. Anton ruled out that Victor's shoes made the shed prints because of the 'spacing of the treads' and tread pattern. T.1403-04.

At Anton's direction, investigators purchased a pair of Converse tennis shoes called Indy 500 that matched the tread pattern of the suspect shoeprint. T.1395-96. He then made a visual comparison with the purchased shoes in the dirt next to the suspect print in the machine shed. T.1396-97. He opined that the two prints were identical, but did not document the comparison with a photograph. T.1397. Anton consulted a podiatrist and had them view the shoeprints at the scene. T.1400. Anton then had Jerry wear the shoes he bought.

⁷ The shoeprint in Exhibits 154 and 155 were found near machine shed/tool shed. T.1389. The shoeprint in Exhibit 156 was found leading to a field behind the farmstead. T.1384-85. The shoeprint in Exhibit 157 was taken just inside the shed. T.1384-85. Anton was told about shoeprints in a shed on November 3, 1975. T.1391-92. This print was photographed and identified as Exhibit 279. T.1391-92.

⁸ Victor's shoes were admitted at trial as State Trial Exhibit 281 and Anton made a comparison of the shoes and the shoeprints in the shed on November 4, 1975. T.1401-02.

T.1405–07. When the size 11 shoes did not fit Jerry, Anton bought an 11.5 size pair of Converse shoe.⁹ T.1406–07. On April 27, 1976, Anton filmed¹⁰ Jerry in a park while walking in the size 11.5 shoes and Jerry's gait was evaluated by a podiatrist. T.1408. Anton then compared the prints Jerry made on April 27th in the Converse shoes purchased by law enforcement to the prints in the machine shed. T.1409.¹¹

Investigators did not locate any shoes in Jerry's possession that were similar to the Converse Indy 500 or the shoeprints at the supposed perpetrator's shoeprints at the crime scene. T.3118.

c. Firearms & Bullets

A total of fourteen (14) bullets were found at the crime scene and no shell casings were located within the Mark home.¹² T.149–51, 651. On November 1st, dozens of officers searched the farmyard and ditches, and found no weapons or ammunition. T. 2639–40. The next day, on November 2nd around 6:00 p.m., BCI

⁹ State Trial Exhibit 87 are size 11 shoes and State Trial Exhibit 88 are size 11.5 shoes. T.1407.

¹⁰ State Trial Exhibit 81 is the film taken of Jerry.

¹¹ State Trial Exs. 78–83 & 361 were testified about by Anton, but were not admitted at trial. T.1442.

¹² Simpson found 'slugs or bullets' on the floor in Les and Jorjean's bedroom. T.543. One was found at the head of the bed, undamaged but with blood on it. T.543–44. Simpson also found a heavily damaged bullet on the floor on the north side of the bed. T.546. The third bullet he located was on the floor in a pool of blood imbedded in the floor where Jorjean's head had been found. T.549. Simpson recovered bullets or slugs in Julie's bedroom lying on the floor next to the bed. T.551. He also found a bullet in the mattress. T.553–54. Simpson recovered bullets or slugs in Jeffrey's bedroom. T.556. The first bullet was lodged in a child's book underneath the crib. T.556. The second was recovered from inside the crib mattress. T.557–59.

Agent John Jutte crossed the road to view the phone junction box, while crossing the ditch, Jutte stumbled in a hole and as he fell, he observed two shiny objects laying in the grass, which he determined to be firearm cartridges. T.517–18, 562. They were admitted as State's Exhibit 91. T.524.

Anton determined that the bullets were .38 caliber and opined that the weapon had to be thirty (30) years old, but the ammunition had been recently purchased. Attach. 26, Investigative Report of Robert Anton RE Crime Scene (11/21/1975). Jutte, who was not a firearms examiner, opined that .38 caliber Long Colt ammunition was unusual. T.521.

In search for potential murder weapons, Waterloo Police Officer Harry Helgesen went to California on November 4, 1975, to continue the investigation. T.865. He called the sport and gun shops listed in the yellow pages for San Luis Obispo where Jerry, Alga, and Mimi had lived. T.866, 1124. He located records at Ken's Sport Shop on November 8th, where Jerry had purchased ammunition. T.866–67. Helgesen purchased the two remaining boxes of Winchester Western .38 Long ammunition at Ken's Sports Shop and those were admitted as State's Exhibits 216–17. T.868–89.

Anton was able to rule out guns that Clark Renner owned as having fired the bullets.¹³ T.1435. On November 14th, , four days after Jerry was arrested, BCI Criminalist Andrew Newquist collected firearms to show Alga Forrest in an attempt to identify the gun Alga had previously owned and had been in Jerry's

¹³ Other neighbors and suspects owned firearms, but there is no testimony about any test fires or comparisons of those to the bullets found at the Mark home.

storage unit. T.977. Newquist showed his collection of possible guns to Alga and Leon Forrest on November 18, 1975 and on May 14, 1976. T.989, 1008–09. No firearm, weapon, or gun was recovered from Jerry or the Forrest's. T.1189–90.

d. Toolmark Evidence

Agents collected evidence that the phone lines across the road from the Mark homestead had been cut. T.525–27. Analysts compared Jerry's tools, including a wire cutter, and were unable to duplicate the exact cut seen on the wires. T.1808.

e. Serology Evidence

Cigarette butts from Julie's upstairs bedroom, the basement, and unused upstairs bedroom were collected and analyzed for blood serology. T.2555–56. The basement cigarette butts were discovered on November 8th—a week after the murders. T.1372, 1502. The upstairs cigarette butts were found by Simpson on November 1st, after other investigators failed to find them and after investigators had been in the homeplace smoking. T.349–50, 504, 569, 3120. Based on the saliva left on the cigarette butts, Robert Harvey, a criminalist from the BCI Lab, conducted serology testing on the cigarette butts found at the crime scene. T.2518. Harvey determined that the person who smoked the cigarette butts had type O blood, and that Jerry also had type O blood. T.2527, 2556. Deputy Weiser testified he smoked the cigarette in the unused upstairs bedroom, U-7 and that he was type A blood. T.342–43. Both Les and Jorjean were type A blood. T.2504–05. Investigators also collected used condoms and a jar of Vaseline from the first-

floor bedroom. T.496–98. A third condom was found on Jorjean. T.500. Harvey determined seminal fluid was present in two condoms and was blood type A. Attach. 27, Laboratory Report of Robert Harvey (11/21/1975).

f. Suspect Development

Within hours of the crime, investigators focused on Les Mark's family and people near the crime scene. They canvassed neighbors, interviewed Halloween Party goers in the area and talked to the usual suspects. *See e.g.*, Attach. 45, Clayton Abkes Compilation; Attach. 46, Robert Bentley Compilation; Attach. 47, Jan DeYoung Compilation; Attach. 49, Steve Fitkin Compilation; Attach. 53, Roger Keigan Compilation; Attach. 54, Clark Renner Compilation; Attach. 55, Norman Scarborough Compilation; Attach. 56, Bennie Southworth Compilation; Attach. 57, Halloween Parties Compilation. The investigation was focused on suspects with motive, means, and opportunity, and investigators were looking for suspects with access or possession of a weapon that could have fired the bullets found in the ditch, suspects that had matching shoe prints or tire tracks seen at the homeplace, sightings of cars or persons near the homeplace, and anyone that could have had disputes with Les or Jorjean Mark.

Tom Mark: Les and Jerry's Brother

Wayne Mark told deputies that Tom Mark, Les' older brother, should be a suspect because he had mental health issues and hated Les very much.¹⁴ Attach.

¹⁴ Tom had lived with Jerry and his family in Des Moines in 1972. Tom returned to Waterloo when Jerry left Iowa. Law enforcement would call Les

28, Report of Jack Suiter (11/01/1975). Based on Black Hawk County Attorney David Dutton and Wayne's beliefs that Tom was a suspect, Tom was taken into custody and interviewed on November 1st—the day Les' family was found. Attach. 29, Interview of Thomas Mark (11/02/1975); Attach. 30, Supplementary Report of Loras Jaeger (11/01/1975). His motel room was searched and items were seized.¹⁵ Attach. 31, Consent to Search of Thomas Mark and Property Receipt (11/01/1975). Tom had schizophrenia. T.2043, 2047. Investigators concluded that Tom did not own a firearm, could not access one, and did not have the motive to kill Les and his family. Attach. 32, Deposition of John Lang P.22–23 (04/19/1976). His whereabouts could not be confirmed on the night of October 31st and no resident at Carlton Hotel, where Tom lived, saw him. Attach. 33, List of Potentially Exculpatory Evidence.

Victor Mark: Les and Jerry's Uncle

Victor Mark, the brother of Wayne Mark and uncle of Les, was briefly considered a suspect in the investigation because he may have been the last person to see Les alive. T.250, 254, 277–78. Victor was interviewed on November 3rd and explained that he was helping Les shell corn late and into the early

because Tom would abandon his car when it ran out of gas. Tom's car was parked at the homeplace at the time of the murders and investigators collected cigarette butts from Tom's car. T.1377. Tom was the subject of a conservatorship in 1973, received social security disability and disability from his former employer, John Deere. Les helped Tom with day to day needs, but the conservatorship was managed by a bank. Attach. 3, Affidavit of Jerry Mark (05/29/2024).

¹⁵ Vaseline and cigarette butts were collected from Tom's motel room and cigarette butts were collected from his car. T.1377; Attach. 36, Property Log of Loras Jaeger (11/01/1975).

hours of November 1st, parting was around 12:30 a.m. to get some sleep. T.270. Victor cooperated with the investigation, providing fingerprints and tennis shoes to law enforcement for comparison. T.1401-03, 1813; Attach. 34, Laboratory Report of Darwin Chapman (01/22/1976). No further investigation was conducted into Victor Mark.

Jerry Mark: The Defendant

Rev. Burris contacted Merrilyn (Mimi) Forrest and Rebecca Mark to notify Jerry about the family deaths. Attach. 35, Voluntary Statement of Rev. Harold Burris (11/14/1975). Mimi's father, Russell Callenberg called local law enforcement on November 2, 1975, while Jerry was traveling back to California to ask if Jerry was involved in the family homicides. Attach. 37, Report of Edwin Newman (11/02/1975). Mimi spoke with Jerry on Sunday, November 2nd, when he called from Nevada and he was upset having just learned about Les' death. Attach. 38, Mimi Forrest Mat. Wit. Hrg. T.55 (11/07/1975).

Local law enforcement met with Jerry on November 3, 1975 at the Callenberg's home with Mimi and her parents present. T. 2988-89. Investigators interviewed Jerry's estranged wife, Rebecca Mark on November 6, 1975. Attach. 39, Interview of Rebecca Mark (11/06/1975).

On November 5, 1975, investigators observed Jerry's motorcycle at the Callenberg home in South Lake Tahoe and interviewed Mimi's parents. T.1677-78. Russell Callenberg, Sr. related to investigators that Jerry had never expressed any disputes with his brother Les, but that he was concerned that his father, Wayne, took advantage of people and would not provide for his mother.

Attach. 40, Interview of Russell Callenberg, Sr. (11/05/1975). The next day, agents returned to the Callenberg home to remove the taillight assembly from Jerry's motorcycle. T.1677-78.

After the funerals on November 4, 1975, investigators asked Jerry and Mimi for another interview; Jerry agreed and during the November 7th interrogation, investigators told Jerry he was involved with the murders and Jerry denied it. T.2037.

Mimi was interrogated and polygraphed on November 7, 1975. T.1990; Attach. 41, PCR Pet. Ex. 150, Mimi Forrest Intv; Attach. 38, Mimi Forrest Mat. Wit. Hrg. T.61 (11/07/1975). The same day, Mimi was compelled to testify before the court at 10:00 p.m. by the county attorney after being interrogated since 9:00 a.m. Attach. 38, Mimi Forrest Mat. Wit. Hrg. T.61, 66 (11/07/1975). The county attorney, Dutton asked leading, suggestive questions of Mimi, berating her, demanding the truth, and generally accusing her of hiding evidence that Jerry was involved in his family's murders.¹⁶ *Id.* at 55. At the end of the hearing, the State charged Mimi with felony perjury, and the court set bail at \$100,000,

¹⁶ "Q: Well, tell me what he said. A: Don't yell; Q: I will yell unless you tell me the truth. A. I am telling you the truth. Q: Answer my questions—A. I am telling you the truth. Q: -- and stop lying. A: I am not lying, sir." Mimi Forrest Mat. Wit. Hrg. T.56 (11/07/1975).

"Q. Did he tell you anything else? A. Not that I can remember right now. Q. You don't have another chance. A. I know. Q. You don't have any more time. A. Look, I know. Q. It's your last chance. A. I know. Q. We are giving you an opportunity to tell us what happened. Q. Don't, please. Q. I want to level with you: this is your last opportunity to tell us the truth about what happened. We aren't going to ask you again. We are not going to give you another opportunity." Attach. 38, Mimi Forrest Mat. Wit. Hrg. T.59 (11/07/1975).

appointed an attorney, and held her in custody. *Id.* at 63–64. Before she was charged with felony perjury and despite the tense, confrontational, and harassing nature of the questioning, Mimi was adamant that she did not know if Jerry had a gun when he left California or if he was going to Iowa. *Id.* at 35, 55, 39–42, 47, 50.¹⁷ The State made clear that they believed Jerry had told Mimi what to say to investigators. *Id.* at 52.

Investigators also spoke to Mimi’s ex-husband Alga Forrest on November 2, 1975. T.1227. Alga told investigators that Jerry had motive to murder his brother Les over the division of his father’s property when he died. T.1197.

BCI Agent Timothy McDonald was convinced that Jerry murdered Les, Jorjean, Julie, and Jeffrey—he even admitted that prior to concluding the investigation or even his interrogation¹⁸ on November 7, 1975 of Jerry—he had made that determination. T.2066. During this interrogation, McDonald told Jerry he was “there” and showed him photos of his murdered niece and nephew. T.2066. McDonald testified to refusing to acknowledge Jerry’s denial of involvement, repeatedly telling Jerry that he “did it” and to “get it off your chest”

¹⁷ Mimi Forrest sued the Black Hawk County Attorney and various law enforcement for damages and detailed her fourteen (14) hour interrogation and perjury charges, which were quickly dismissed. Attach. 42, Merylyn Forrest complaint against Black Hawk County Attorney et. al. (3/5/1976).

¹⁸ “As illustrated by the Reid technique and other similar approaches, the modern American police interrogation is, by definition, a guilt-presumptive and confrontational process—aspects of which put innocent people at risk.” Saul M. Kassin et al, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law Hum. Behav. 3, 27 (2010).

and McDonald admitted he lied to Jerry during the interrogation.¹⁹ T.2070. Investigators then sought to corroborate their belief that Jerry was the perpetrator by finding people who could have seen Jerry in Iowa near the homeplace the night of October 31st or on his way to and from the homeplace. T.535, 538–39.

Investigators canvassed an assumed route of travel from Berkeley, California to the homeplace and only showed a single photo of Jerry and a photo of his motorcycle. T.535, 538–39. They took Highway 20 west to I-35 junction, then south to Des Moines, Iowa and then I-80 west to Omaha, Nebraska totaling over 100 stops. T.534, 535–36²⁰. Predictably, after enough people were questioned, several claimed to have seen Jerry in the days leading up to the murders.

Investigators then worked to connect Jerry to specific shoe prints found in or near the machine shed. None of Jerry's shoes or boots had similar tread patterns. T.1497–98. After Jerry was arrested, Anton required Jerry wear the

¹⁹ “First, investigators are advised to isolate the suspect in a small private room, which increases his or her anxiety and incentive to escape. A nine-step process then ensues in which an interrogator employs both negative and positive incentives. On one hand, the interrogator confronts the suspect with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured, and refuses to accept alibis and denials. On the other hand, the interrogator offers sympathy and moral justification, introducing ‘themes’ that minimize the crime and lead suspects to see confession as an expedient means of escape.” Saul M. Kassin et al, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law Hum. Behav. 3, 7 (2010); see also *State v. Park*, 985 N.W.2d 154, 160 (Iowa 2023) (discussing the legal threshold of deception by law enforcement).

²⁰ See also State Trial Exs. 290, 290-A, 291, 291-A, & 292.

size 11 pair of Converse and walk in front of a podiatrist. T.1395, 1405–08, 1552–53, 1582.

With the intent to connect Jerry to the crime scene and the crime, investigators: (1) attempted to match Jerry's fingerprints to latent prints recovered in the homeplace without success; (2) concocted a theory based on microscopic scratch marks and miniscule traces of aluminum, that Jerry removed the California license plate from his motorcycle and replaced it with an Iowa plate; (3) repeated chemical tests to chemically match bullets from crime scene to others purchased after the crime, but without any actual firearm to compare or test fire; and (4) examined the cut phone lines and attempted to match the tools from Jerry's possession without success. T.85–87, 910, 1735, 3073.

Blue Car Sighting

Several witnesses observed a blue car near the crime scene around the time of the murders:

Elmer and Sharon Neinkark lived in Waterloo and were driving to a haunted house the night of October 31st. T.2810. Neinkark reported that at 9:20 p.m., he saw a blue car with its lights off driving in the direction Mark homeplace. T.2812. Around 10:15 p.m., Neinkark saw the same blue car parked at one of the two driveway approaches to the homeplace. T.2814.

Early morning on November 1st, Larry Huffman and a friend were hunting on Clark Renner's property near the homeplace. T.2868–69. Huffman saw a car suddenly leave on North Union Road. T.2870–73. He described the car as a beat-

up, 1965 Chevy that was dark blue with three round tail lights on each side. T.2971.

Around 5:15 a.m. on November 1st, Wilbur Murray was on his normal route to work past the homeplace and he saw a blue car pull out of the driveway. T.2847, 2849–50. He described the car as traveling at a high rate of speed, blue Chevy with round taillights. T.2849; Attach. 43, Investigative Report of Frank Bemisdarfer (11/06/1975).

Jack Albright described seeing an old beat-up blue car parked in the wooded area of his farm near the homeplace shortly after 6:30 a.m. on November 1st. Attach. 44, Deposition of Frank Bemisdarfer (11/09/1990). He saw one male in the car. Attach. 43, Investigative Report of Frank Bemisdarfer (11/06/1975).

Despite the significance of the presence of the blue car near the crime scene, the driver of the blue car was never identified.

Alternative Suspects

During their ten-day investigation, while simultaneously manufacturing evidence to support a theory Jerry murdered his brother and family, law enforcement became aware of and disregarded numerous alternate suspects and theories of the crime. *See e.g.*, Attach. 45, Clayton Abkes Compilation; Attach. 46, Robert Bentley Compilation; Attach. 47, Jan DeYoung Compilation; Attach. 48, Dirks and Morgan Compilation; Attach. 49, Steve Fitkin Compilation; Attach. 50, Roger Henning Compilation; Attach. 52, Vi-Vim Compilation; Attach. 53, Roger Keigan Compilation; Attach. 54, Clark Renner Compilation; Attach. 55, Norman Scarborough Compilation; Attach. 56, Bennie Southworth Compilation;

Attach. 57, Halloween Parties Compilation. Investigators were looking for leads and evidence involving weapons, tire treads, motive, and blue vehicles. Those alternate suspects and the investigation are summarized below:

Clayton Abkes: A Neighbor of the Marks

Clayton Abkes' family lived on a farm next to Mark's homeplace. Attach. 45, Clayton Abkes Compilation P.4–5. Abkes owned 12 acres running along Wayne Mark's farm. *Id.* at 2–3. Abkes visited the family farm on October 31st around 10:50 p.m., driving a 1965 Chrysler, on his way to a Halloween party. *Id.* at 4–5. Abkes' car was seen parked near the crime scene with broken glass inside. *Id.* at 6. Abkes consented to searches of his car (a white Chrysler), shoes, work personal locker, and he provided fingerprints, hair samples, and a picture of his blue Ford Ranchero. *Id.* at 7–8. Abkes was eliminated as a suspect by a polygraph and verification of his alibi. *Id.* at 9–11.

Robert Bentley: Resided at Cedar Mark Farm

Dorothy Patten, Vernon Patten, and their nephew, Robert Bentley moved into the Cedar Mark Farm²¹ on September 29, 1975, and lived there at the time of the murders.²² Robert possessed a .22 caliber Stoeneger handgun and drove a dark blue 1966 Chevelle with several rust spots. Attach. 46, Robert Bentley Report Compilation P.2–12. Robert was interviewed and provided investigators an alibi. *Id.* at 13–14. Law enforcement did not interview his alibi witnesses.

²¹ Les, Jorjean, Julie, and Jeffrey lived at Cedar Mark Farm before moving to the homeplace. T.153.

²² Dorothy Patten traveled to Colorado on November 2, 1975 and was interviewed there, while Vernon and Robert Bentley remained in Iowa.

Jan DeYoung: Friend of the Marks

Dorothy and Wayne Mark named Jan DeYoung as a suspect on November 1st. Attach. 47, Jan DeYoung Report Compilation P.2–4. Jan DeYoung was friends with Les and Jorjean and served as a pallbearer. *Id.* at 5–7. DeYoung and his wife had recently divorced and he had an attachment to Jorjean. *Id.* at 8–9. Dorothy and Wayne Mark name DeYoung as a potential suspect who was acting strangely after the murders. *Id.* at 10–15. DeYoung fingerprints were collected, and he took a polygraph. *Id.* at 16–18; T.1813.

Ellen Dirks and Robert Morgan (a/k/a Allen Keene): Wisconsin Murder Suspects

In early October 1975, a similar multiple murder occurred in Wisconsin: George and Toni Mallason and their young child were shot multiple times in their rural home. Attach. 48, Dirks and Morgan Report and News Article Compilation P.2. The murder weapon was thought to be a .38 caliber pistol. *Id.* at 3. Ellen Dirks and Robert Morgan moved in with the Mallason to help work their farm and were the lead suspects. *Id.* at 2. After the murders, they were thought to have left Wisconsin heading West. *Id.* Dirks had family in Waterloo. *Id.* at 4. On November 2, 1975 a citizen called Waterloo Police to report a blue car²³ with Wisconsin plates was at his neighbors' home and was gone the next day. *Id.* at 5. The victims of the murder drove a blue 1969 Ford pick-up truck that went missing from their residence at the time of the murders and could have been in possession of Dirks. *Id.* at 4.

²³ 1970–1975 Dodge or Plymouth car.

Steve Fitkin: Law Enforcement Tip

Steve Fitkin lived near the Mark farm and someone in the community called in a tip that he could have been involved in the Mark family murders. Attach. 49, Steve Fitkin Report Compilation P.2. When interviewed, Fitkin cooperated in a search of his car a black 1968 Ford where numerous boxes of ammunition and multiple guns were located. *Id.* at 3–6. Fitkin also had access to a dark blue 1965 Ford. *Id.* at 2.

Roger Dale Henning: Suspect in Another Violent Crime in the Area

Roger Henning was the suspect of a rape that occurred nearby in Waverly, Iowa in the early morning hours of November 2, 1975. Attach. 50, Roger Henning Report Compilation P.2. The allegations were that Henning held a woman at gunpoint in his 1965 blue Mustang. *Id.* at 3–17. BCI Agent Ron Forrest and Cedar Falls Police Detective David Zarifis²⁴ were assigned to determine if the rape had any connection to the Mark murders. *Id.* Forrest and Zarifis searched Henning's home and confiscated several guns, but determined no weapons were found to be a .38 caliber. *Id.* Henning was eliminated as a suspect because he did not own a gun similar in caliber to the one assumed to be used to commit the Mark murders. *Id.*

²⁴ The Court of Appeals reversed the conviction of a man charged with burglary in Cedar Falls in July 1975. *State v. Pooler*, 255 N.W.2d 328, 329 (Iowa 1977). The court wrote that Detective Zarifis actions were “so outrageous and reprehensible as to be contrary to public policy” *Id.* at 330.

Vi-Vim Fraud Victims

For 31 years, Aage and Sena Kaae and their son Arthur lived and farmed on the Nettie Miller property near the Mark homeplace. Attach. 52, Vi-Vim Compilation P.4. Wayne Mark had made several attempts to purchase the Miller farm, but she refused to sell to him. In 1975, Wayne's company, Vi-Vim purchased the Miller farm.²⁵ Aage Kaae had attempted to purchase the farm from the Miller conservatorship but was denied. *Id.* Les informed the Kaaes, a week before his murder, that they had to vacate the property because he would be farming the land in the spring of 1976.²⁶ Attach. 51, Letter from Steve Petersen to Raymond Walton (04/01/1994).

Roger Keigan: Hunter on the Marks' Property

Roger Keigan had permission from Les to hunt on the Mark farm until a week before Les' murder. Attach. 53, Roger Keigan Report Compilation p. 2. Les informed his neighbors that Keigan's hunting permission was revoked and Keigan was upset with Les. Les had also told neighbors to keep Keigan off their property as well. *Id.* at 3. Keigan was interviewed and no further investigation was undertaken. *Id.* at 4–12.

Clark Renner, Mark Family Neighbors and Farming Partners

²⁵ The Nettie Miller farm sale transaction was the subject of the corruption charges brought against Vi-Vim, and conspiracy charges against Bill Sindlinger and Leo Baker in 1976. Attach. 52, Vi-Vim Compilation P.2–3. Dorothy and Richard Mark were listed as State witnesses in Sindlinger's criminal trial. *Id.* at 5. Judge Engelkes presided over both the sale of the Miller farm, waiving the appraisal requirement and over Jerry Mark's criminal trial. *Id.* at 4, 6.

²⁶ At this time, there was no required period of notice to tenants. In 1983, a code section outlined for the first time that farm tenants must be given six months' notice. Iowa Code §§ 562.5, 562.6; *see also* Hamilton at 128.

Clark Renner sounded the alarm when he could not rouse Les on November 1, 1975, and was with Dorothy when the bodies were found. Attach. 54, Clark Renner Report and News Article Compilation P.2–3. Renner speculated that the deaths were a murder-suicide and the broken window pane in the door was from a prowler or family squabble. T.170, 189–90.

Clark Renner was business partners with Les Mark, but they had their disagreements over the years. *Id.* at 4–5. The year before the murders, Renner had accused Les and Victor of stealing his corn during harvest. T.296–97. It was a misunderstanding, but Renner threatened to kill both Les and Victor if he ever caught them stealing corn. T.296–97; Attach. 54, Clark Renner Report and News Article Compilation P.89–90. Renner had an old .38-caliber German-made gun. T.239. Investigators examined two firearms that belonged to the Renner family and ruled them out based on the bullets found at the scene. T.1435–36. At the time of trial, Renner farmed the Mark land. T.247–48.

Randy Renner was Clark Renner's son and worked on the farm. T.147, 313. Randy was working the night of October 31st until about 10:00 p.m. Attach. 54, Clark Renner Report and News Article Compilation P.91. Investigators compared tire prints from the homeplace with the Randy Renner's truck and found them to match. Attach. 25, Deposition of Charles Simpson P.93 (03/18/1976). Investigators also spoke with Mrs. Renner about shoeprints. Attach. 54, Clark Renner Compilation P.92. No further investigation was conducted.

Norman Scarborough: Friend of Clayton Abkes

An informant said that Norman Scarborough and Clayton Abkes were together on October 31, 1975 in a red Ford shooting up the whole area with guns in Grundy Center. Attach. 55, Norman Scarborough Report Compilation P.2. Investigators questioned Scarborough and asked him to take a polygraph. *Id.* at 4. He refused but consented to a search of his locker at John Deere for shoes and a search of his van. *Id.* at 4–5. The shoes were taken to be examined and nothing was found in the van. *Id.* at 3–6. Investigators concluded that Scarborough did not have a motive and the investigation ceased. *Id.* at 6.

Bennie Southworth: Hitchhiker.

Community members told law enforcement about a hitchhiker seen near the Mark family farm and investigators identified him as Bennie Southworth. Attach. 56, Bennie Southworth Report Compilation P.2. Bennie Southworth was a farmhand for his uncle Harold Kroeze in Shell Rock, Iowa. *Id.* at 2–3. Kroeze reported Southworth ran away from home on October 31, 1975, around 10:30 p.m. *Id.* Jeff Ragsdale picked up Southworth as a hitchhiker, a half of a mile northwest of the Mark homeplace the early morning of November 1st. *Id.* A witness described Southworth as very upset and paranoid of the police on November 1, 1975 and wanted to get out of town. Attach. 62, Report of Larry Dolan (11/06/1975). Southworth told investigators he was high and drunk when they interviewed him. Attach. 56, Bennie Southworth Report Compilation P.4–5. Southworth had been seen, without shoes that were later found in a field near Janesville, Iowa. *Id.* at 6. Investigators interviewed Kroeze and asked about

Southworth's shoes and were shown a pair of boots they determined were not a match to the description of prints found at Mark home. *Id.* at 7–12. A gunshot residue test of Southworth's hands were negative and the investigation concluded. Attach. 34, Laboratory Report of Darwin Chapman (01/22/1976).

Halloween Parties in the Area of the Crime Scene

Investigators learned about two Halloween night parties near the crime scene: (1) a Brotherhood Motorcycle Club at Thunderwoman park and (2) a University of Northern Iowa student party at the Rotary Reserve. Attach. 57, Halloween Parties' Reports Compilation P.2–7. Attendees of both parties were interviewed. *Id.* As a result, James Schnepf, an attendee at the Brotherhood Motorcycle Club party was investigated. *Id.* at 9. Schnepf had a .38 caliber revolver, drove a blue 1965 Chevy, and investigators collected his fingerprints. *Id.* at 8–9. Investigators also recovered a Ruger .357 Magnum from Theodore Land. *Id.* at 10. No further investigation was documented.

4. Trial: State's Evidence

The State's argument at trial was that Jerry was jealous of Les and likened the brothers to the biblical story of Cain and Abel.²⁷ T.3091. According to the

²⁷ "There is a little bit of history illustrative of the conduct of men: 'And Cain talked with Abel, his brother; and it came to pass, when they were in the field, that Cain rose up against Abel, his brother, and slew him. And the Lord said unto Cain, where is Abel, thy brother? And he said, I know not. Am I my brother's keeper?'"

"And He said, what hast thou done? The voice of thy brother's blood crieth unto Me from the ground.'" *Hickory v. United States*, 160 U.S. 408, 415 (1896).

State, Jerry killed Les, Jorjean, Julie, and Jeffrey because he was jealous of Les, greedy, and wanted to return to the family business. T.60, 63, 3067–68. The State relied on unreliable, discredited testimony from Jerry's wife's ex-husband, Alga Forrest. T.1158–59, 1165, 1213, 3109–10. Alga testified that Jerry told him before December 1974 that his father was dying of cancer, Les had screwed him out of the family farm worth millions of dollars, and his father had cut him out of his will. T.1153–57, 1165, 1213. However, Alga lied to the jury, because Wayne Mark did not have cancer in 1974 when Jerry and Alga were friendly neighbors, Wayne's will never cut out Jerry, and Les and Jerry were allies. T.2039, 2042–43, 3110a. Alga admitted that he subscribed to the Waterloo Courier and would have learned details of the Mark family through newspaper articles. T.115–57, 1129, 1198, 3110–10a; Attach. 58, Deposition of Alga Forrest P.43 (03/23/1976).

All the other evidence and witnesses presented to the jury was circumstantial and unreliable. The jury was told that Jerry traveled to Iowa, on a small motorcycle, in early winter, from California in less than three days, arrived in secret at his childhood home, cut the phone lines in the junction box across the road (even if to the wrong house), turned off the electricity at the fuse box, and shot his little brother and his sister-in-law while in bed, and his niece and nephew while they slept in their beds. T.3044–95, 3137–50; Attach. 26, Report of Robert Anton RE Crime Scene (11/21/1975). That Jerry, alone, then staged a break-in to his childhood home by breaking the glass in the family's grandfather clock, rummaging in drawers, and breaking the window out of the

back door with a flowerpot. T.83. The State theorized that Jerry then left Iowa without leaving a trace or evidence, biological or otherwise.

In order to do this, the State presented testimony that:

- (1) the box of ammunition Jerry bought in California was of the same chemical composition as the bullets found in the ditch and the bullets recovered from the victims; T.880–915.
- (2) the tool marks on the motorcycle showed that Jerry had removed the California plates and replaced them with Iowa plates to avoid drawing attention to himself; T.1880.
- (3) Jerry had disconnected the motorcycle odometer to avoid detection that he traveled all the way to Iowa; T.612–13.
- (4) That the trip from Berkley, California to Cedar Falls, Iowa could be undertaken from October 29th through October 31st. T.1949, 1952.
- (5) Jerry had access to a rare gun, owned by Alga Forrest, that could have fired the specific bullets found at the crime scene; T.1147–48.
- (6) Jerry's blood type matched the blood type found on cigarette butts at the crime scene in Julie's bedroom and in the basement by the fuse box; T.2527, 2556.
- (7) Jerry's walking gait and the shoes the police bought for him to try on matched the shoeprints in the machine shed; T.1569. and
- (8) Random people were shown Jerry's photo, gave varying descriptions of a motorcyclist and then picked Jerry out of a line-up and corroborated a route of travel that enabled Jerry to be in Iowa near

the time of the murders. T.2161 (Shearer); 2194 (Kemp); 2215 (Smith); 2265 (Van Hauen); 2309 (Hurd); 2346 (McGinnis).

The State supported this theory with unreliable forensic evidence as described below:

a. Matching Bullets from the Scene

There was a total of fourteen spent bullets recovered from the crime scene, and two live rounds found in the ditch by the telephone junction box. T.651. Of the fourteen (14), there were eight (8) bullets recovered from the bodies of Les and Jorjean, two (2) fragmented bullets found in Les and Jorjean's bedroom, two (2) bullets found in Julie's bedroom, and two (2) bullets found in Jeffrey's bedroom. T.562. Notably, no casings were located or collected.

Jack Makedonski owned Ken's Sport Shop in California. T.788-89. Makedonski testified he sold Jerry had a box of .38 ammunition in California from Ken's Sport Shop on October 20, 1975. T.790-94; State Trial Exs. 203-204. But Makedonski could not identify Jerry in a lineup. T.797. Investigators purchased two boxes of .38 ammunition from Ken's Sport Shop. T.798, 800; State Trial Exs. 216-217. Investigators also bought .38 long colt ammunition in Black Hawk County at Olsen's Boathouse. Attach. 59, Statement of Robert Olsen (11/20/1975). Olin Corporation provided information about their manufacturing process and analysts opined that the bullets used at the homeplace were identical to the bullets made by Olin Manufacturing on April 8, 1975. T.107,

683–730; State Trial Exs. 231–243. The box of ammunition purchased by Jerry on October 20th was never located.

BCI Criminalist Darwin Chapman testified that in his four years of experience working on 200 cases, he had never seen .38 long colt ammunition. T.628. Chapman opined that bullets were specifically .38 long colt, were fired by a revolver, not an automatic, and that he could exclude guns that could not have fired the bullets. T.640–41, 463.

Chapman analyzed the bullet evidence.²⁸ He testified that the bullets recovered from the homeplace and bodies were (1) fired from the same firearm, (2) .38 Long Colt caliber bullets manufactured by Winchester Western, and (3) shot from a revolver. T.612, 619, 624–26. Chapman’s opinion was based on similarities of class characteristics²⁹ of six (6) land and groove impressions with

²⁸ State’s Exhibits 5 through 14 (the bullets and lead fragments removed from the bodies of the victims during the autopsy), State’s Exhibits 165 through 171 (the bullets removed from the farmhouse), and State’s Exhibit 91 (the two live rounds of ammunition found in the ditch by the junction box). T.608, 611–12.

²⁹ “Briefly, examination begins with an evaluation of class characteristics of the bullets and casings, which are features that are permanent and predetermined before manufacture. If these class characteristics are different, an elimination conclusion is rendered. If the class characteristics are similar, the examination proceeds to identify and compare individual characteristics, such as the striae that arise during firing from a particular gun. According to the Association of Firearm and Tool Mark Examiners (AFTE) the ‘most widely accepted method used in conducting a toolmark examination is a side-by-side, microscopic comparison of the markings on a questioned material item to known source marks imparted by a tool.’” See President’s Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring the Validity of Feature-Comparison Methods (2016) (“PCAST Report”) available online: https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf (citing Foundational Overview of

a left-hand twist on the bullets. T.644. Chapman told the jury that only seven (7) firearms could have fired the bullets. T.643–44. The seven firearm manufacturers were: (1) Colt company, (2) Spanish made copies of the Colt Smith and Wesson, (3) Miroku—a Japanese revolver, (4) Eig—a German manufacturer, (5) Sguibman, (6) Bingham, and (7) Smith and Wesson. T.643–44.

Chapman testified he used emission spectrograph analysis to analyze the chemical composition of the bullets. T.631–32. Chapman opined that the bullets in the farmhouse and ditch were chemically similar to each other. T.635–36, 638–40. This allowed the argument that the rare .38 long colt ammunition purchased by Jerry in California was used to murder Les and his family because (1) all the bullets were fired by the same revolver, (2) it was a rare one like the firearm previously owned by Alga Forrest, and (3) the person who cut the phone lines also dropped unspent bullets in the ditch.

The crime lab enlisted the help of the FBI. T.885. The FBI conducted neutron activation analysis on the bullets to determine chemical elements of the lead and make comparisons. T.881, 883, 885–86, 909. The FBI analyst, Donald Havekost opined that the bullets bought from Ken’s Sport Shop in California by law enforcement and the bullets found in the Mark homeplace had the same elemental composition. T.910. He also opined that the bullets found by Jutte in the ditch had the same chemical composition as the ones found in Les and Jorjean’s bedroom. T.973.

Firearm/Toolmark Identification tab on afte.org/resources/swggun-ark (accessed May 12, 2016)).

b. Toolmark Evidence

Odometer: BCI Criminalist Chapman opined that the odometer on Jerry's motorcycle was disconnected because of microscopic toolmarks he observed. T.612–13. This allowed for the inference that Jerry was hiding how far he actually traveled on his road trip.

Phone Lines: Chapman was unable to match any tools from Jerry's motorcycle toolkit to the cuts on the phone lines, but the State relied upon the matching bullets to argue Jerry cut the phone lines. T.1807–08, 1903.

License Plates: Jerry bought a 1973 Honda 450 motorcycle licensed in the state of California on October 3, 1975. T.1628, 1631. Jerry also owned a 100cc Honda motorcycle licensed in the State of Iowa. T.1633, 1654. Investigators seized the Honda 450 motorcycle from Mimi's father, Russell Callenberg to determine if the California license plate had been removed. T.1693.

Chapman testified that Iowa and California license plates were different in composition and size. T.1861–62. He opined that an Iowa license plate would not fit on the 1973 Honda 450 motorcycle. T.1861–70. Chapman testified that the rear portion of the motorcycle's bracket had paint chippings and, in his opinion, the California license plate had been removed and an Iowa license plate was at some point attached to the license plate bracket. T.1880. The markings were only visible with a microscope when magnified and printed as a photograph. T.1701. Chapman also concluded that there were traces of aluminum on the license plate bracket, which was consistent with the aluminum Iowa license plates. T.1861–62, 1880. California plates were made of steel. T.1861.

c. Alga and Leon Forrest's Gun Identification in California

Alga and his father, Leon Forrest were asked by law enforcement to identify the gun that had been in Alga's camper when Mimi had taken possession of it. T.989. The Forrests were presented with multiple firearms, they each chose two firearms as being the most similar to their firearm and it was a Spanish copy of Smith & Wesson (see State Trial Ex. 221) and a Smith & Wesson (see State Trial Ex. 223). T.990–94. This identification was made after viewing photographs and actual firearms provided by investigators. T.1000, 1003, 1010, 1019, 1147; see State Trial Exs. 219–230, 309–311. BCI Criminalist Newquist testified he obtained eleven (11) firearms (7 guns of Spanish make from Chicago police and 4 from BCI [2 being Colt and 2 being Smith & Wesson]) for this identification procedure. T.978, 990–94.

Alga testified that his gun was a Spanish copy of a Smith & Wesson six shot revolver with .38 caliber bullets. T.1147–48. The State argued that Jerry took Alga's firearm, purchased the rare .38 long colt ammunition, and murdered Les, Jorjean, Julie, and Jeffrey by shooting them at close range. T.3071.

d. Comparative Bullet Lead Analysis ("CBLA") by the FBI

In 1975, the FBI utilized analysis of the chemical properties of lead bullets known as Comparative Bullet Lead Analysis or Neutron Activation Analysis (CBLA/NAA, sometimes referred to as CABL). Iowa analyst, Chapman, made comparisons of the bullets from the farmhouse and ditch to each other, but had

no definitive results, except that the bullets were fired from a “revolver-type firearm.” T.612–32. The FBI subsequently conducted a chemical analysis of the crime scene bullets to new ammunition purchased at Ken’s Sports Shop in California. T.67–70, 880–915. Using the NAA, FBI analyst Havekost compared the composition of the bullets and determined the newly purchased California ammunition and the Iowa crime scene bullets had the same elemental composition and were made at the same time. T.880–915. “Every one of the bullets used to kill the family came from the same source or an identical source with the bullets that were in the boxes.” T.3073.

Investigators did not locate any ammunition, shell casings/cartridges, or firearms on Jerry’ person, his motorcycle, or at his home. T.3091–92. Jerry told investigators that the ammunition he purchased in California. PCR #69121 T.1276. Records obtained by investigators show that Jerry was at Ken’s Sport Shop and bought one box of .38 Long ammunition with his Iowa driver’s license on October 20, 1975. T.792–94.

e. Serology

BCI Criminalist Harvey testified at trial that the blood type on all of the cigarette butts found at the crime scene was the same as Jerry’s blood type—type O. T.2522–23, 2527–28, 2556. Deputy Wieser testified he smoke the cigarette found in the unused upstairs bedroom. T.342–43. Investigators collected two prophylactics or condoms from the first floor bedroom. T.496, 500, 590.

f. Shoeprints & Gait Analysis

At trial, Anton demonstrated the path he followed using State Exhibit 275, an aerial photo of the homeplace. T.1380. Anton testified that in the farmyard, he saw a trail of 35–40 shoeprints that went from the machine shed to the south porch door and around the camper. T.1381–83.

Anton testified he had sent investigators to shoe stores looking for a specific tread pattern. T.1494–95. Anton opined that a 12-inch shoe sole length made the prints and should fit Jerry. PCR #69121 T.520. Waterloo Police Sergeant Steven Witt purchased a size 11 pair of “Indy 500” shoes on November 5th. T.1395, 1407. Anton took newly bought pair of shoes to the shed and made one shoeprint next to one of the preserved prints. T.1395–96. Anton opined that the two prints were identical. T.1397. Anton opined that the prints were made by a Converse tennis shoe in the style “Indy 500.” T.1395. Jerry did not own or possess any footwear that ‘matched’ or had the same tread pattern. T. 1497–98.

On December 18th, Dr. William Gronen observed Jerry Mark in his office at the request of investigators. T.1405, 1564. He observed Jerry walking up and down a hallway in the size 11 shoes that law enforcement had purchased. T.1564–65. The size 11 shoes were too small and investigators bought a second pair, this time in size 11.5. T.1407–08; PCR #69121 T.520. On April 27, 1976, Anton arranged for two podiatrists, Dr. Gronen and Dr. Larry Lichty, to watch Jerry walk in the size 11.5 shoes. T.1406–08. The podiatrists opined at trial that Jerry’s gait was similar to the shoeprints at the Mark farm.. T.1569.

These shoeprints were impressions of a right shoe and a left shoe, plus a third shoe impression of a right shoe about ten feet ahead of the first two shoe prints. T.1381–83, 1349–51, 1535. Dr. Lichty testified that Jerry’s “gait of walking” matched the perpetrator’s alleged shoeprints. T.1604–06.

g. Fingerprints

Neither Anton, Simpson, or any BCI analyst concluded that any of the fingerprints in the farmhouse belonged to Jerry, instead, they concluded that several prints belonged to law enforcement, Les, and one belonged to Dorothy Mark.³⁰ T.1305–06.

Fingerprints from law enforcement and family were obtained for comparison purposes, including: the victims Les and Jorjean Mark, Wayne Mark, Thomas Colthurst, George Colthurst, Richard Mark, Peggy Mark, Victor Mark, Margaret Colthurst, and Jerry Mark. T.1813–14. Reference prints were also gathered for alternative suspects, including: Clayton Abkes, Jan DeYoung, James Schnepf, and Steve Fitkin.³¹ T.1813–14. Notably, law enforcement did not collect fingerprints from people who were also in the home after the murders, such as: Clark Renner and his wife, Ronnie Malone, William Sindlinger, David Dutton, and the Mark family’s pastor. T.1815; Attach. 60, Handwritten Notes of Charles Simpson (undated). In 1975, there were no fingerprint databases to

³⁰ The prints taken by Anton and Simpson are State’s Exhibits 61, 146, 164, 194, 371, 414, & 419. T.1302–06, 1311–18, 1798–1800.

³¹ Fingerprint cards for others were found in the sheriff’s file, but were not mentioned at trial.

search for matches. Attach. 61, Petitioner's Motion for Order Direction Respondent to Compare Fingerprints at Crime Scene (07/27/1992).

h. Route of Travel/Sightings/Timeline

Investigators searched for any witnesses that might have seen Jerry in Iowa or close to the Mark homeplace. T.1949. The State asked multitudes of random people at restaurants, gas stations, truck stops, and rest areas and found a few people, who when presented with Jerry's photo, thought they remembered seeing him around the time of the murders. T.85, 535, 538–39, 2339–40.

Jerry made phone calls home utilizing pay phones during his trip. T. 2028; 2451–60. Jerry was interviewed about his trip and whereabouts by law enforcement in front of his girlfriend Mimi and her parents on November 3, 1975. T.2579. Jerry told investigators that he spent Halloween night at a rest area in Chappell, Nebraska and woke there the morning of November 1st. T.2019–20.

The State argued that Jerry arrived at his childhood home during the early morning hours of November 1, 1975 and then snuck into the house and murdered the two adults and two children between 1:00 a.m. and 3:00 a.m. T.3057. The State witnesses testified that: (1) Jerry was in Chappell, Nebraska (631 miles from homeplace³²) between 9:00 a.m. and noon on October 31st, T.74–75, 2112–19; (2) Jerry was at a the Shamrock Cafe in Atlantic, Iowa (199

³² <https://truckmap.com/map/3525bce1-3bd5-4f3d-9447-99d00a30aa14> (last visited May 30, 2024).

miles from the homeplace³³) at suppertime (6:30–7:30 p.m.), T.77, 2205, 2238; and also in Newton at Stuckey’s Shop and Ackley, Iowa (168 miles and 45 miles respectively from the homeplace³⁴) around 7:00 and 8:00 p.m. on October 31st, T.76–77, 2216; and (3) Jerry was seen at 7:00 a.m. near Stuart, Iowa (166 miles from the homeplace³⁵) on November 1st. T.85–86. This speculative theory required that Jerry began his return trip immediately after the murders, but he was seen in Stuart, Iowa at 7:00 a.m. on November 1st (only 166 miles from the homeplace) despite the alarm clock at the homeplace stopping at 3:03 a.m.,³⁶ and then Jerry only got as far as Cheyenne, Wyoming on November 1st at 10:00 p.m. only 591 miles from Stuart, Iowa.³⁷ Jerry was then picked up by the Mimi and the Callenbergs in Carson City on November 2nd. T.2034, 2460–61.

i. Theory of Attack

The State argued in closing arguments that the circumstantial evidence at the Mark farm showed that Jerry was the culprit because he had motive, only he knew the farm layout and his way around the house and staged a break-in because:

³³ <https://truckmap.com/map/f02b392e-035a-4368-9cc2-b69fde2e89b5> (last visited May 30, 2024).

³⁴ <https://truckmap.com/map/5a7e2120-1315-49ed-8cfa-706e621e6d03> and <https://truckmap.com/map/626cbbff-047d-472b-be7d-9bfb58a0c8a7> (last visited May 30, 2024).

³⁵ <https://truckmap.com/map/40519232-84b4-45c9-9404-f65109b8bc4b> (last visited May 30, 2024).

³⁶ Anton testified the alarm clock showed 3:03 a.m. when he turned the power on to the homeplace on November 1, 1975. T.1346–47.

³⁷ <https://truckmap.com/map/c05ec35e-d4c4-4b5c-b62a-3f06230093f2> (last visited May 30, 2024).

- (1) The perpetrator entered the premises between 1:00 and 3:00 a.m. because lights were seen on by a passing trooper and Jerry was seen in Iowa in Newton and Ackley, 168 and 45 miles from the homeplace around 8:00 p.m. T.76–77, 2216, 2295–98.
- (2) The perpetrator unlocked the Mark house with a key hanging by the door while wearing gloves because the lack of fingerprints supported that it was Jerry, who knew about the spare key and used it to enter the house without being detected or leaving a trace and had motorcycle gloves with him. T.1295–96, 3058, 3092; Attach. 62, Report of John Dolan (11/06/1975).
- (3) The perpetrator disconnected the phone wires at the junction box, fell in the ditch and dropped two bullets, because he removed his motorcycle suit. T.3092.
- (4) The perpetrator walked around the shed and camper because shoeprints and gait analysis pointed to Jerry having walked around the property before entering the farmhouse—looking for Les in the camper, and the specific prints made by the Converse shoes and connected to Jerry by the podiatrists. T.1380–92, 1484, 1589, 3057; see State Trial Exs. 154–157. Jerry brought the Converse shoes with him, changed to be quieter and then destroyed them. T.3092.
- (5) Jerry knew Les and Jorjean were in the downstairs bedroom, so he woke them up and shot both multiple times after making them lay

on the floor and then left closing the door behind him, killing both of them. T.3058.

- (6) The perpetrator went upstairs, leaving a glove palmprint in the stairwell, went into each child's bedroom and shot each child twice. T.1312 (glove print on the wall), 3058–59.
- (7) The perpetrator went downstairs and flipped the circuit breakers because he left cigarette butts on the floor. T.3057–59.
- (8) The perpetrator went back to the office to search for something and fired additional shots at Les and Jorjean and broke out the glass in the grandfather clock. T.3058–59.
- (9) The perpetrator left through the south porch door where he had entered—throwing a potted plant back in through the glass in the door to stage a break-in or robbery. T.3059–60.

Attach. 26, Report of Robert Anton RE Crime Scene (11/21/1975).

Dutton argued this was a calculated killing by someone who had motive to kill Les' family, not a break-in gone wrong. T.3063. When discussing motive, Dutton mentioned the Cain and Abel theory from the Old Testament. T.3066. Dutton analogized this story to Les and Jerry, claiming Jerry killed Les because he felt inferior to Les and that he was less favored by his dad Wayne. T.3067. Dutton further attacks Jerry's route on his motorcycle trip, trying to use telephone records to poke holes in his story, despite eyewitnesses seeing Jerry during the murders. T.3080–81. Dutton lastly insinuated that Jerry changing

his license plate, trimming his beard, and bought rare ammunition in California for Alga's old .38 long colt revolver, so that he would not be recognized. T.3070.

5. Defense Trial Evidence

a. Alternate Suspects.

The defense presented evidence that an unknown perpetrator murdered Les and his family because a suspicious blue car was seen at the homeplace during the night of the murders by several different people. T.2812, 2849, 2870. The defense presented testimony from three separate sightings—all of a blue car. T.2812–17, 2835, 2849, 2870–73. First was Elmer and Sharon Neinkark, who noticed a dark blue near the Mark homeplace around 9:25 p.m. and 10:15 p.m. T.2812, 2814, 2817. Sharon was with her husband and corroborated his testimony. T.2835. Second, Wilbur Murray testified that shortly after 5:00 a.m. on November 1st, he saw a blue car pull out of the Mark homeplace, at a high rate of speed and headed south. T.2849. Third, Larry Huffman noticed a dark blue 1965 Chevy parked on the right side of the gravel road in the early morning hours of November 1st, which drove north on North Union Road. T.2870–73.

b. Jerry Was Not in Iowa on October 31, 1975.

Jerry's defense team offered evidence that he never entered Iowa on October 31st, and that on his road trip he only went as far as Chappell, Nebraska where he camped near a rest area. T.2019–22. On November 1st, Jerry was seen

by two eyewitnesses: Mark Van Housen in Aurora, Nebraska around 10:00 a.m. and Larry Rauch in Cheyenne, Wyoming around 9:30 p.m. T.2736–37, 2398.

Van Housen worked at a gas station in Aurora, Nebraska. T.2727–28. He testified that the morning of November 1st around 10:00 a.m., a motorcycle came and filled up with gas. T.2731, 2736. Van Housen identified Jerry Mark at trial as the man he saw the morning of November 1st. T.2739. Aurora, Nebraska is 380 miles from the Mark homeplace in Cedar Falls, Iowa.

Larry Rauch left Des Moines to pick up a horse in Seattle, Washington on November 1st. T.2395–96. He testified that he left Des Moines around 10:00 a.m. on November 1st, and arrived in Cheyenne, Wyoming around 9:30 p.m. the same day. T.2397. When he stopped at a truck stop outside of Cheyenne, Wyoming, he encountered Jerry. T.2397–98. Rauch noticed Jerry was riding a dirty motorcycle, looked cold, and was wearing a black jacket. T.2399, 2401, 2410. Rauch loaded Jerry's motorcycle into his horse trailer and they left Cheyenne around 10:30 p.m. and drove to Ogden, Utah which took them about 9 hours. T.2402–03. Rauch did not notice anything unusual about Jerry's appearance or demeanor. T.2418.

6. Post-Trial Proceedings and Evidence

a. Investigative Documents Were Withheld from the Defense.

During prior post-conviction proceedings, Jerry obtained numerous documents suppressed by the State and those are detailed in the grant of Habeas Corpus in 2006. *Mark v. Burger*, No. 97CV4059, 2006 WL 2556577 (N.D. Iowa

Aug. 31, 2006) (“[T]wenty-four (24) material exhibits, covering fifty-three (53) pages that were never seen by the defendant before or during the original murder trial.”).

b. Unidentified Fingerprints Were Searched and Still Not Matched to Jerry.

At the request of the parties, additional fingerprint testing was done by DCI in 1990. Attach. 63, Letter from Jay Nardini to Timothy McDonald (11/14/1990). A DCI analyst determined seven prints were suitable for comparison, two of these were identified as Les, one was identified as Waterloo Police Lt. Donald Kehoe, and the remaining four were searched in Iowa database with no results. Attach. 64, Report of John Kilgore (12/05/1990). In 1994, the FBI searched AFIS³⁸ for previously unidentified prints from the homeplace with no results. Attach. 65, FBI Fingerprint Report Compilation P.2–21.

c. Jerry was in Nebraska October 31st and the Morning of November 1, 1975.

Leslie Warren

Route of travel witness, Leslie Warren testified falsely at trial that he saw Jerry at the eastbound I-80 rest area in Chappell, Nebraska on October 31st at 9:45 a.m. T.2105, 2108. Suppressed medical records and police reports demonstrated that Warren was actually at a doctor’s appointment at 9:00 a.m. on October 31, 1975. *Mark v. Burger*, No. 97CV4059, 2006 WL 2556577, at *75 (N.D. Iowa Aug. 31, 2006); see PCR #69121 Pet. Ex. 20, 21, 128, 132; T.2112.

³⁸ AFIS stands for the federal Automated Fingerprint Identification System.

Based on the records, Warren could not have encountered Jerry on October 31st and instead it would have been November 1, 1975. *See e.g.*, PCR #69121 Pet. Ex. 20, 21, 128, 132. If Jerry was in Chappell, Nebraska on November 1st in the morning, it was impossible for Jerry to have been in Cedar Falls in the early morning hours of November 1st. *Mark*, 2006 WL 2556577, at *75–77; *see* PCR #69121 Pet. Ex. 20, 21, 128, 132; T.2112. Chappell, Nebraska is approximately 627 miles from Cedar Falls, Iowa.

Dorothy “Jean” Doyle

The jury at Jerry’s criminal trial did not hear that Jean Doyle saw Jerry on November 1, 1975 in North Platte, Nebraska. *Mark*, 2006 WL 2556577, at *118; *see* PCR #69121 Pet. Ex. 32, 37, 45, and 134A. Doyle was interviewed on November 6, 1975, four days before Jerry was arrested, but her sighting was not disclosed to the defense. *Mark*, 2006 WL 2556577, at *108. Doyle’s statements disproved the State’s timeline and made it impossible for Jerry to be in Cedar Falls October 31st into the early morning hours of November 1st, and also be in North Platte, Nebraska by 12:00 p.m. the same day. *Id.* at *110–12. North Platte, Nebraska is approximately 536 miles from Cedar Falls, Iowa.

Other Route of Travel “Proximity” Witnesses/Eyewitness Are Not Credible.

The State also suppressed critical impeaching evidence for witnesses the State presented about Jerry’s alleged route of travel, including: Donald Shearer (impeached by Larry Holmes suppressed interview), Karelyn Kemp (suppressed reports impeached her identification of Jerry), Mary Stinson (suppressed reports impeached her identification of Jerry and impeached her testimony regarding

timing), Barbara Ann Smith (suppressed report contradicted Stinson sighting and she was uncertain at the lineup), Delbert Van Hauen (suppressed report impeached his identification), Jayathan Hurd (suppressed report contained a prior non-identification of Jerry), and Rosalie McGinnis (suppressed reports impeached her identification). *Mark*, 2006 WL 2556577, at *135–58, 164, 178.

d. Forensic Evidence Errors

The Serology Testimony Was False.

At trial, the State argued Jerry smoked all four cigarette butts collected from the homeplace. T.81–82. In 2004, DNA testing of the cigarette butts revealed that Jerry was excluded from two cigarette butts and two cigarette butts were deemed insufficient for comparison. Attach. 66, DCI Lab Report by Maria Sides (12/15/2004). Testing supported Wieser’s testimony at trial that he smoked the cigarette found in the unused bedroom and analyst Harvey’s serology results were incorrect.³⁹ T.2527, 2556, 2576; *Mark*, 2006 WL 2556577, at *64, 69. This evidence was important because it placed the perpetrator in Julie’s bedroom, and in the basement where the electricity was shut off by supporting the argument that Jerry smoked the cigarettes found there during the murders. *Mark*, 2006 WL 2556577, at *57.

³⁹ DNA testing also showed that: cigarette butt AJ from Julie’s bedroom was insufficient to develop a DNA profile, Jerry was eliminated from cigarette butt CO from the unused upstairs bedroom (but was proven to be smoked by Deputy Weiser), cigarette butt DM-1 from the basement was insufficient to develop a DNA profile, and cigarette butt DM-2 from the basement eliminated Jerry and the male DNA profile from cigarette butt CO. Attach. 66, DCI Lab Report by Maria Sides (12/15/2004).

.38 Long Colt Ammunition Was Available in Iowa in 1975.

During habeas corpus proceedings, it was discovered that investigators had purchased a box of .38 long colt ammunition at Olsen's Boat Shop in Waterloo, Iowa. *Mark*, 2006 WL 2556577, at *135–58, 164, 178. This type of ammunition was not rare, as argued at trial. T.67–68, 521–25.

There Is No Link Between Crime Scene Bullets and Any California Bullets.

In 1995, Dr. Vincent Guinn was asked to review the CBLA/NAA analyses done in Jerry's case. Attach. 67, Report of Dr. Vincent Guinn (01/13/1995). During his career, Dr. Guinn critiqued the CBLA/NAA methods, and in his report, he found that Havekost had made a mistake in his analysis and that his testimony did not match the data. Attach. 67, Report of Dr. Vincent Guinn (01/13/1995).

The FBI announced in 2005 that the use of Comparative Bullet Lead comparison analysis (CBLA) was being discontinued because the technique was unreliable. Attach. 68, Affidavit of William Tobin (04/26/2024); *see also* Attach. 69, FBI Press Release (09/01/2005). The testimony at trial that the bullets from the crime scene, the ditch and the ones purchased by investigators in California were chemically similar is now known to be false. T.880–915.

IV. GROUNDS FOR POST-CONVICTION RELIEF

Jerry Mark's conviction was obtained in violation of the United States and Iowa State Constitutions, as well as firmly established state and federal case law and is subject to collateral attack upon grounds of alleged error. Iowa Code §§

822.2(1)(a), 822.2(1)(d). As mentioned above and described more fully below, new scientific evidence establishes that Jerry Mark is innocent of the murders of Leslie, Jorjean, Julie, and Jeffrey Mark. The conviction rests on unreliable forensic science: firearm examination evidence, including comparative bullet lead analysis, shoe print comparison and gait analysis, eyewitness identification procedures and an investigation plagued by cognitive bias. Today, it is accepted by the scientific community that there is no validity to the procedures and disciplines utilized in 1975 and 1976.

Since the 1976 trial, thousands of convictions have been overturned across the United States based on new understandings of forensic science and this list continues to grow.⁴⁰ New scientific evidence also shows that expert analysis and testimony regarding the murder weapon, identification of bullets indicates the investigators incorrectly identified the type of gun and bullets used in the crime. Beyond this, the State improperly sought out witnesses along an assumed route of travel, manufactured shoe print and gait evidence all to support their erroneous belief Jerry was the perpetrator.

Jerry Mark is actually and factually innocent of the murder of his brother Les, his sister-in-law Jorjean, his niece Julie, and his nephew Jeffrey. The new evidence requires the vacation of Jerry's conviction in the interest of justice. Iowa Code § 822.2(1)(d). This action is not time-barred, as grounds and facts detailed in this Application "could not have been raised within the applicable time period."

⁴⁰ See National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

Iowa Code § 822.3. These material facts could not be discovered sooner, and they show: (1) the developments in the scientific community that establish the firearm identification testing, the shoeprint and gait analysis, and the method of eyewitness identification, are false and/or no longer reliable, and (2) new scientific understanding that the statements or testimony by the State were scientifically unreliable.

I. JERRY MARK IS ENTITLED TO A NEW TRIAL UNDER IOWA CODE 822(1)(a) AND (1)(d) AND *SCHMIDT V. STATE* BECAUSE HE IS ACTUALLY INNOCENT.

Jerry Mark was denied his substantive and procedural Due Process rights under the Constitution of the State of Iowa Article I, section 9 and Iowa Code § 822.2(1)(a) and (1)(d) because new material facts that were not previously presented or heard exist that demonstrate that Jerry is innocent of the murders of Les, Jorjean, Julie, and Jeffrey Mark. Jerry's continued imprisonment for the murders violates Article I, section 17 of the Iowa Constitution and Iowa Code § 822.2(1)(a) and (1)(d) because it is cruel and unusual punishment for a human being to be incarcerated for a crime he did not commit and Jerry's conviction infringes upon the interest of justice. Therefore, Jerry's conviction is a manifest injustice and must be overturned. Iowa Const. art. 1, sec. 9, 17; Iowa Code § 822.2(1)(d); *see Schmidt v. State*, 909 N.W.2d 778, 795 (Iowa 2018). The Iowa Supreme Court has delineated that innocence can be claimed based on both statutory subsections. Iowa Const. art. 1, sec. 9, 17; Iowa Code § 822.2(1)(a) and (1)(d); *see Schmidt*, 909 N.W.2d at 795 (Iowa 2018).

A. Timeliness

Iowa Code § 822.3 provides an exception to the statutory time-bar where new evidence exists that could not have been found sooner with due diligence. The evidence surrounding the validity of forensic science disciplines relied upon to sustain this conviction is new, material, has a nexus to the conviction and could not have been found sooner. See Iowa Code § 822.3; *Schmidt*, 909 N.W.2d at 795.

B. Actual Innocence

The Iowa Supreme Court recognized a free-standing claim of actual innocence under the due process clause of the Iowa Constitution and Iowa Code § 822.2(1)(a). *Schmidt*, 909 N.W.2d at 795. “Conviction of an innocent person infringes upon the ‘interest of justice’ precisely because it violates the Iowa Constitution.” *Id.* at 798. In *Schmidt v. State*, the Iowa Supreme Court adopted a clear and convincing evidence standard explaining: “the applicant must show by clear and convincing evidence that, despite the evidence of guilt supporting the conviction, no reasonable factfinder could convict the applicant of the crimes for which the sentencing court found the applicant guilty in light of all the evidence, including the newly discovered evidence.” *Id.* at 797. Jerry Mark is innocent of the murders of Leslie, Jorjean, Julie, and Jeffrey Mark because new evidence contradicts the trial evidence that he was seen in Iowa and further that the firearm and toolmark identifications, comparative bullet lead analysis, shoeprint identifications, and gait analysis no longer supports his guilt and

shows that there is a reasonable alternative suspect not previously known to the parties.

New Evidence of Motive & Theory of the Crime

1. DNA Analysis Proves State Theory was False

The State argued extensively that Jerry murdered his family in cold blood, then smoked and extinguished cigarettes throughout his childhood home. BCI lab criminalist Harvey told the jury that all four cigarettes were smoked by someone with blood type O, like Jerry. T.2528. That was false and DNA testing has now shown that Jerry cannot be linked to any of the four recovered cigarette butts.

Jerry was eliminated from the basement butt (DM-2) and on the upstairs Deputy Wieser's cigarette butt (CO) and insufficient profiles were developed from the other two cigarette butts. Attach. 66, DCI Lab Report by Maria Sides (12/15/2004). Almost 20 years since that testing, current technology could analyze the cigarette butts and develop a suitable profile for searching in federal and state databases. Expert DNA laboratory analyst, Deanna Lankford, opines DNA testing capabilities have continued to improve, even since the 2004 DNA testing. Attach. 70, Expert Report of Deanna Lankford (12/18/2023). Lankford recommends additional testimony of the cigarette butts and other items of evidence, not previously considered for testing. *Id.* The unknown male profiles may be able to be searched in state, national, and international databases. Additional biological material may be detected on items not previously tested due

advances in DNA analysis. *District Attorney's Office v. Osborne*, 557 U.S. 52, 55 (2009) (stating that "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices").

2. These Murders were Committed by Organized Crime Professionals, Not a Crime of Passion by Jerry in Anger at his Youngest Brother.

Within days, investigators eliminated Iowa suspects, such as Jan DeYoung, Clark Renner, motorcycle club members, Halloween partygoers, and Bennie Southworth. And within ten (10) days investigators arrested Jerry and charged him with murder. Jerry was not a skilled marksman and had no interest in farming, instead, Jerry was a draft dodger and a hippie.

Iowa investigators never considered the evidence that this was abnormally clean crime scene committed by professional killers, and not a single intruder. Attach. 71, Affidavit of Scott Roder (04/01/2024); Attach. 72, Report of Michael "Jeff" Salyards (01/23/2024). The investigation did not consider that the murders were committed by more than one person and more than one firearm. Attach. 72, Report of Michael "Jeff" Salyards (01/23/2024). Nor did the investigation consider the Mark family connections to the Latin American drug cartels, nor did investigators look outside of Iowa for the culprits or seek national or international DNA or fingerprint searches. A new investigation has uncovered

additional suspects and evidence that Les Mark and his family were not the intended victims and their murders were not the result of a family dispute.

The Mark family friend and Dorothy Mark's Brazilian son,⁴¹ Renato Balestra, was a key witness in the largest prosecution of an international Drug Cartel at the time. Attach. 13, Paul L. Montgomery, *U.S. Opens Case Against Alleged Kingpin of Heroin Ring and Outlines Smuggling Route*, N.Y. Times (Dec. 6, 1972).

In 1970, Renato, along with others, were arrested for drug conspiracy involving a big Latin American kingpin Auguste Joseph Ricord. *Id.* Renato had flown a small plane with Cesar Bianchi that was carrying heroin when it landed in the United States. *Id.* Authorities learned that Ricord was based in Argentina and oversaw a drug operation, mostly focused on smuggling heroin into the United States via small planes. *Id.* Ricord had ties to European drug trafficking (the "French Connection"), and was thought of as the head of the "Latin-American Connection"—a drug smuggling ring. Attach. 75, Drug Cartel Compilation P.2; Attach. 14, Ricord Case New Articles Compilation P.11–12.

Jerry's father, Wayne, posted Renato's bail and Renato returned to Iowa while the charges were pending. Attach. 10, Personal Recognizance Bond for Renato Balestro, Case No. 70-cr-994 (01/20/1971). Renato testified against

⁴¹ Renato was a beneficiary of Wayne Mark's will. Attach. 74, Jack Hovelson, *Wayne Mark's Estate Worth \$1 Million*, Des Moines Register (July 23, 1977).

Ricord at his federal trial in New York on December 5, 1972. Attach. 13, Paul L. Montgomery, *U.S. Opens Case Against Alleged Kingpin of Heroin Ring and Outlines Smuggling Route*, N.Y. Times (Dec. 6, 1972). Ricord was called the kingpin of a heroin smuggling operation in his New York trial.⁴² *Id.*; see Evert Clark & Nicholas Horrock, *Contrabandista!*, 213, 225 (1973).

Renato's charges were dismissed after he testified against Ricord. Attach. 9, Letter from US Att'y Walter Phillips (02/08/1973). His co-pilot, Cesar Bianchi also testified at Ricord's federal trial. Attach. 13, Paul L. Montgomery, *U.S. Opens*

⁴²On November 23, 1970, five Paraguayans and a Frenchman were charged for conspiring to bring 94 pounds of heroin (worth \$10 million) into Florida. Attach. 14, Ricord Case News Articles Compilation P.2–3. Auguste Joseph Ricord, a French-born Argentine citizen and a master-mind of a “complex heroin-smuggling conspiracy” and an “overlord of drug trafficking in the Western Hemisphere” was prosecuted in the Federal District Court in Manhattan. Attach. 13, Paul L. Montgomery, *U.S. Opens Case Against Alleged Kingpin of Heroin Ring and Outlines Smuggling Route*, N.Y. Times (Dec. 6, 1972). At the time of the trial, there was proof of three different shipments of heroin, totaling 290 pounds that occurred in 1970. *Id.* The drugs moved from Uruguay through many intermediaries over to Ricord in Paraguay where he had Cesar Bianchi and the co-pilot Renato Balestra to fly to Miami with numerous stops in Chile, Peru, Ecuador, and Jamaica. *Id.* This particular flight had about 66 pounds of heroin stored within two suitcases in the plane. *Id.* Once customs were cleared the plane flew to Opa-Locka where the suitcases were taken to New York via commercial airlines. *Id.* Bianchi, Gahou, and Becker were key witnesses at trial, one who is awaiting trial, and the other two are serving sentences. *Id.* Renato, who testified at trial, said that he was informed by Bianchi that the suitcases carried “uranium sand.” *Id.* Ricord was convicted of conspiring to smuggle narcotics. Attach. 14, Ricord Case News Article Compilation, P.11–12. It is believed that Ricord was “responsible for half the heroin smuggled into the United States in the last five years—a total of perhaps 15 tons.” *Id.* Ricord was involved with the Nazis during WWII where he “was sentenced to death in absentia in France for the collaboration, and also to a 20-year term for robbery,” although the “statute of limitations on both charges has expired.” *Id.* He also faced charges in Argentina and Venezuela. *Id.* Ricord was sentenced to the maximum 20 years in prison. Attach. 75, Drug Cartel Compilation P.3–5.

Case Against Alleged Kingpin of Heroin Ring and Outlines Smuggling Route, N.Y. Times (Dec. 6, 1972). The arrest and conviction of Ricord and his collaborators was a major drug bust. See Evert Clark & Nicholas Horrock, *Contrabandista!*, 154 (1973). Some co-defendants escaped from custody before trial in 1971 and have not been accounted for.⁴³ Renato Balestra died in a plane crash in 1993. Attach. 75, Drug Cartel Compilation P.6. Coincidentally, his co-pilot and fellow informant Bianchi died in a plane crash in December of 1988, while smuggling drugs and authorities learned that he was wanted in Brazil for murder as Roberto Gallucci. *Id.* at 7–9. Investigation has revealed that the drug cartel and organized crime or gangs commonly retaliated against those that testified against them.⁴⁴ It is now commonly understood that those who testify against organized crime figures suffer retaliation. See Tarik Abdel-Monem, *Foreign Nationals in the United States Witness Security Program: A Remedy for Every Wrong?*, 40 Am. Crim. L. Rev. 1235, 1235 (2003) (describing the reach of Latin American drug cartels into the United States).⁴⁵

⁴³ On January 24, 1971, Enio Anibal Varela-Segovia and Aron Muravnik, co-defendants in this heroin drug trafficking conspiracy and considered to be Ricord's lieutenants in the operation, along with six others who were involved in the drug trafficking ring, escaped from the Federal House of Detention in New York. Attach. 14, Ricord Case Compilation P.5–7; Evert Clark & Nicholas Horrock, *Contrabandista!* 1.

⁴⁴ See *Timeline: America's War on Drugs*, NPR (Apr. 2, 2007), <https://www.npr.org/2007/04/02/9252490/timeline-americas-war-on-drugs>.

⁴⁵ "John Harold Mena was a Colombian drug dealer who helped organize the assassination of a journalist in New York City. He was arrested by federal authorities in 1992, and he bargained a life sentence down to eighteen years in

At the time that Renato testified against Ricord, and Wayne posted his bond, Wayne and Dorothy lived at the Mark homeplace. See Attach. 10, Personal Recognizance Bond for Renato Balestro, Case No. 70-cr-994 (01/20/1971). There is a connection between Renato, his involvement with drug smuggling, and the Mark family farm because large farms in the Midwest were used to move drugs and grow marijuana in the 1970's.⁴⁶ Further, the nature of the crime scene and the manner in which Les and his family were shot support the premise that their deaths were retaliation for Renato's testimony against Ricord. See *e.g.*, Tarik Abdel-Monem, *Foreign Nationals in the United States Witness Security Program: A Remedy for Every Wrong?*, 40 Am. Crim. L. Rev. 1235, 1235 (2003). Investigation also shows that the use of a .38 caliber weapon was not rare, nor was murder unexpected retaliation for informants and their families. Attach. 75, Drug Cartel Compilation P.10–16.

a federal prison by testifying against his Colombian drug mafia bosses. As part of his agreement with the Drug Enforcement Administration (DEA), agents allegedly promised Mena that his family members in Colombia would be protected from retaliation. However, since Mena's testimony, five of his family members have been violently killed. In 1994, his uncle was shot twenty times, and his aunt was shot in the head and killed. His father was killed a year later, and two of his cousins were also murdered. In addition, there have been other assaults on his family including an attempted kidnapping and a bomb attack. When one cousin was shot and killed at a restaurant, the assassins reportedly shouted, '[t]his is for that rat Mena!' Tarik Abdel-Monem, *Foreign Nationals in the United States Witness Security Program: A Remedy for Every Wrong?*, 40 Am. Crim. L. Rev. 1235, 1235 (2003).

⁴⁶ "[D]ata from the Drug Enforcement Agency in 1985 shows 'high occurrence' of marijuana farming across the South, Midwest, and West Coast." Nick Johnson, *American Weed: A History of Cannabis Cultivation in the United States*, 48 *EchoGéo* 1, 13 ¶ 48 (2019).

For instance, another professional murder connected to the drug cartels or organized crime occurred in Iowa near the same time as the Mark family. In early December of 1974, three individuals living in Sioux City, Iowa were murdered. See *Horror of Triple Murder Lingers 30 Years Later*, Iowa Cold Cases (05/20/2004), <https://iowacoldcases.org/case-summaries/jesse-hanni-fretabostic-and-billy-isom/>. The case is unsolved, but resembles the Mark family crime scene, the three victims were shot with a .38 caliber weapon accurately and the scene did not reflect a crime of passion. *Id.* One of the Sioux City victims, Jesse Hanni, testified against a kingpin drug dealer in federal court in Colorado. *Id.* Here, the similarities are striking, Renato Balestra testified against Ricord and then his Iowa family was murdered with a .38 caliber weapon with precision and accuracy.

Now, decades later, investigators recognize the hallmarks of murder by organized crime, drug cartel or professional killers—there are many TV shows depicting organized crime operations and retaliation.⁴⁷ Recent investigation has revealed that “this crime scene is notable for the clean, professional nature of the gunshot wounds for each victim.” Attach. 72, Report of Michael “Jeff” Salyards (01/23/2024).

⁴⁷ A search of any streaming service or website will reveal multiple movies, shows, documentaries surrounding drug smuggling, organized crime and depict common retaliation.

Julie and Jeffrey Mark were both shot twice in their beds. T.3058–59. One shot to the heart/chest and one shot to the head—a classic execution style shooting utilized by trained professionals in organized crime, drug cartels, and other professional killers.⁴⁸ Salyards explains that “[t]he shooting pattern on each victim is very similar to the Mozambique Drill, which is characterized by two shots to the body and one to the head. This type of firing suggests a shooter who is highly proficient with not only firearms but also the lethal practices of a professional killer.” *Id.* Investigators failed to consider or investigate whether Les Mark and his family were killed in a professional assassination and not a crime of passion. *Id.* Investigators interviewed Balestra⁴⁹ on November 5, 1975, but did not ask him about his prior drug cartel activities or any retaliation for turning state’s evidence. Attach. 5, Interview of Renato Balestra (11/5/1975).

3. Investigators Ignored Suspects with Motive because of Fraudulent Real Estate Deals by Wayne and Les Mark

Wayne and Les were involved in real estate fraud. Wayne’s brokerage firm, Vi-Vim with William Sindlinger, Leo Baker, and Les was defrauding small family farms and reselling or developing the farm land. *Comm. on Prof. Ethics & Conduct of Iowa State Bar Ass’n v. Baker*, 269 N.W.2d 463, 463–64 (Iowa 1978); Attach.

⁴⁸ *Double Tap*, Dictionary.com, <https://www.dictionary.com/browse/double-tap>.

⁴⁹ At the time of the murders, Renato lived in Norfolk, Nebraska, was a pilot and owned a small airport/flight company. T.2025.

18, Letter from William Sindlinger to Wayne Mark with Quit Claim Deed Documents (10/31/1973).

In 1975, the scandal came to light when Vi-Vim⁵⁰ purchased the Nettie Miller farm. *Baker*, 269 N.W.2d at 464. Nettie Miller was 95 years old, and Audrey Zeiger was Miller's niece. *Id.* at 463. Zeiger and Sindlinger were co-conservators of Miller's affairs. *Id.* at 464. Miller continuously refused to sell the land to Wayne Mark, but she did eventually sell her farm to Vi-Vim without realizing the connection to Wayne Mark. *Id.* Richard Doerfer was used as a third party, or "strawman" in the transaction, and the Miller farm was purchased in his name and later sold for more than triple of what Doerfer bought it for. *Id.* Baker was disbarred and convicted for his involvement in the fraudulent transaction. *Id.* at 466; *State v. Baker*, 293 N.W.2d 568, 569 (Iowa 1980). As a result of this scandal, Sindlinger relinquished his law license in January of 1978. Attach. 52, Vi-Vim Compilation P.9.

The Miller farm had been sold without an appraisal, which Baker had requested to be waived and was approved by Judge Carroll Engelkes, who also served as a witness at Baker's trial. *Id.* Engelkes was also Jerry's trial judge and ruled on the discovery issues discovered in previous PCR proceedings and detailed in the grant of federal habeas relief. *See Mark v. Burger*, No. 97CV4059, 2006 WL 2556577 (N.D. Iowa Aug. 31, 2006).

⁵⁰ Vi-Vim had a history of scamming community members, including Clarissa Howard. Attach. 52, Vi-Vim Compilation P.7-8.

The Kaae family were long-term tenant farmers for Nettie Miller and lived on the farm. Attach. 52, Vi-Vim Compilation P.4. The farm was sold to Vi-Vim despite their interest in purchasing it. *Id.* Les notified them to move off the farm by March 1, 1976. Attach. 51, Letter from Steve Petersen to Raymond Walton (04/01/1994).

4. Investigators' Cognitive Bias Precluded Objective Investigation and Erroneously Identified Jerry as the Perpetrator.

The State's entire theory and motive were unsupported assumptions and speculation about the events that transpired at the Mark homeplace the night of October 31, 1975. Attach. 72, Expert Report of Michael "Jeff" Salyards (01/23/2024). There are blatant examples of cognitive bias⁵¹ throughout the investigation into the Mark family murders and subsequent conviction of Jerry Mark. *Id.* The report of Anton lists a majority of unsupported claims about the events that transpired at the Mark family farm the night of October 31, 1975. *Id.*

⁵¹ Cognitive bias is an umbrella term that encompasses various mental processes that can engender inaccurate interpretations of information. Confirmation bias—a type of cognitive bias—is the tendency to seek out and interpret information such that it conforms to a particular theory or belief one has adopted. See Barbara O'Brien & Phoebe C. Ellsworth, *Confirmation Bias in Criminal Investigations*, 1st Annual Conference on Empirical Legal Studies Paper, 6 (2006). One of the perils associated with confirmation bias is the discounting or discrediting of information that may conflict with one's original and/or tightly held theory. *Id.* Discounting or discrediting alternative theories is an effective means to mitigate or prevent a state of psychological discomfort referred to as cognitive dissonance. Jill Klein & Geoff McColl, *Cognitive Dissonance: How Self-Protective Distortions Can Undermine Clinical Judgement*, 53 Med. Educ. 1178 (2019). When cognitive dissonance arises, a change in one's initial theory can abate this state of psychological discomfort. *Id.*

There are not only feasible alternative propositions for each of Anton's conclusions that Jerry was the perpetrator. *Id.* Investigators ignored the "clean, professional nature" of the crime and gunshot wounds, instead focusing on a hypothetical motive of a "crime of passion by a vengeful family member" rather than the possibility of a "professional assassination." *Id.*

Additionally, the State only interviewed witnesses that supported their version of the facts, ignoring countless other witnesses who challenged and questioned their timeline or suppressed evidence that contradicted it.⁵²

Investigators only sought forensic evidence that supported the proposition that Jerry was the sole perpetrator. The misleading forensic evidence, 'identical matches' attested to by the lab and Anton, are the product of cognitive bias. *Id.* Since the time of Les, Jorjean, Julie, and Jeffrey's deaths, the scientific community has recognized the serious threat to scientific reliability posed by the influence of cognitive bias. The National Commission on Forensic Science, for example, issued a document explaining that examiners "should rely solely on task-relevant information when performing forensic analyses." See Nat'l Commission on Forensic Science, *Ensuring That Forensic*

⁵² One of those key witnesses who's suppressed doctor's reports challenged the State's theory was Leslie Warren. *Mark*, 2006 WL 2556577, at *28–40; PCR #69121 Pet. Ex. 20, 21, 128, & 132. Additionally, the identification by Dorothy Jane Jean Doyle that she saw Jerry at North Platte, Nebraska which was 540 miles from the Mark homeplace and would have made it impossible for Jerry to have committed the murders. *Mark*, 2006 WL 2556577, at *40–49; PCR #69121 T.62–89, 1311–19.

Analysis Is Based Upon Task-Relevant Information (2015),

<https://www.justice.gov/ncfs/file/818196/download>.

The State spent only ten (10) days investigating a quadruple murder with no eyewitnesses. During those ten (10) days, they searched the farm, they talked to family members, they decided that Jerry was the main suspect and found evidence to support his arrest, while discrediting any alternate theory or suspect. After Jerry was arrested on November 10, 1975, the State released the Mark homeplace and ceased their investigation into alternate suspects. Attach. 73, Report of John Sewick (11/10/1975); Attach. 76, Report by Charles Simpson and John Myers (11/11/1975). Today, we know that investigators are not immune to cognitive bias and the phenomena of tunnel vision.

Cognitive bias is an unavoidable product of human decision making—it cannot be “willed away.” See National Research Council, Committee on Identifying the Needs of the Forensic Science Community, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (“NAS Report”), Available at: <https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf> (“[C]ognitive biases are not the result of character flaws; instead, they are common features of decision-making, and they cannot be willed away.”). Cognitive bias was prevalent in the investigation into the Mark family murders, and in the subsequent arrest and prosecution of Jerry. During the investigation, law enforcement quickly narrowed in on Les’ siblings and targeted Jerry as the prime suspect, ignoring exculpatory evidence, lack of legitimate forensic evidence, and other viable and more compelling alternative suspects. This is an example of classic tunnel vision

caused by cognitive bias. A person will only see what they expect to see and ignore facts that do not support their accepted theory. This is evidenced by the fact the State only interviewed witnesses that supported their version of the facts, ignoring countless other witnesses⁵³ who challenged and questioned their timeline presented at trial. For example, Mark Van Housen worked at a DX gas station at the Aurora, Nebraska interchange on Interstate 80. T.2728. On the morning of November 1st around 9:30 a.m., he observed a motorcyclist exit off the Interstate and pull into the gas station pumps. T.2730–31. Van Housen identified the motorcyclist as Jerry Mark, but the State did not credit his sighting and its disruption to the State’s timeline of Jerry’s travel. T.2739.

Cognitive bias is prevalent in forensic science disciplines and is demonstrated here by the eyewitness canvass using only Jerry’s photo, matching bullets from California while ignoring the same type of bullets found in Cedar Falls, the matching of the shoeprints and gait analysis to Jerry after his arrest, and the toolmark matches regarding the license plates only to support the theory Jerry was in Iowa but concealed his California plate.

⁵³ The grant of *habeas corpus* ruling details these witnesses and their potential testimony. *Mark v. Burger*, No. 97CV4059, 2006 WL 2556577 (N.D. Iowa Aug. 31, 2006) See Jean Doyle, p.5; Warren, p.6; Kemp, Stinson, Shearer, p.9.

5. Firearm Identification Evidence

The ammunition found at the crime scene and in the ditch cannot be connected to ammunition bought by Jerry in California.⁵⁴ CBLA or NAA was conducted under the premise that all the bullets in a box of bullets would have homogeneity in their metal composition. This, however, is inaccurate for numerous reasons: (1) the foundational belief of the concept of “compositional uniqueness (that each ‘pot’ of lead was compositionally unique)” has been disproven, and (2) the foundational belief of the concept of “compositional homogeneity within each pot (that each pot of lead was uniform in composition (homogeneous) throughout)” has been disproven. Attach. 68, Expert Affidavit of William Tobin (04/26/2024). Expert William Tobin surmises that the testimony at Jerry’s trial is now known to be false. *Id.*

Michael “Jeff” Salyards, a firearms expert, corroborates Tobin’s opinion and explains that as a former law enforcement officer and firearms examiner that there is no evidence remaining to support that these bullets were rare .38 caliber long colt or connected in any way to other ammunition. Attach. 72, Expert Report of Michael “Jeff” Salyards (01/23/2024). Salyards opines that modern scientific understandings shows how this evidence is, in fact, exculpatory because (1) the

⁵⁴ National Research Council, *Forensic Analysis: Weighing Bullet Lead Evidence*, The National Academies Press (2004), <https://doi.org/10.17226/10924>; William A. Tobin, *Comparative Bullet Lead Analysis: A Case Study in Flawed Forensics* (Mar. 1, 2004). The Champion, National Association of Criminal Defense Lawyers at 12-22 (July 2004), <https://ssrn.com/abstract=2186718>.

bullets analyzed were not owned by Jerry, (2) there were ten possible composition groups through Havekost's analysis, and "it is feasible that any bullet manufactured around this time by Winchester Western is highly likely to 'match' one of the compositional groups," and (3) Chapman's results contradict Havekost's results. *Id.* This is new evidence of Jerry's actual innocence because the crime scene bullets are not similar to ones purchased in California.

There are four types of .38 caliber cartridges: .38 Short Colt, .38 Long Colt, .38 Special, and .357 Magnum. *Id.* And depending on the type of .38 caliber gun, the firearm can likely fire multiple types of these bullets. *Id.* Today's understanding of firearms and their tool marks dictates that the crime scene bullets cannot be connected to a specific type of cartridge and a given cartridge can be loaded into a variety of firearms. *Id.*

Salyards explains that the trial testimony that .38 long colt ammunition was rare and that it was shot by an older firearm, such as Alga's missing firearm is not scientifically supported today. *Id.* The bullets at the crime scene cannot be connected to Jerry based on new evidence. *Id.*

Alga's missing firearm cannot be linked to the crime scene. Attach. 77, Addendum Report of Andrew Smith (04/30/2024). The "lineup" of the firearms is not reliable, not acceptable, and did not provide evidence that Jerry had it in his possession. *Id.* Law enforcement never located the murder weapon, so the "firearm lineup" that the Forrests participated in to make an identification did

not contain any weapon that could have or would have been used during the commission of the murders. *Id.*; T.990–94, 1000–19.

The “fundamental assumptions” underlying toolmark examination, including the claimed uniqueness of all striae, have not been proven; the theory of toolmark identification—*i.e.*, “individualization” or matching any particular tool to a particular mark—is “not a scientific theory”; the method is subjective; and there is insufficient empirical evidence establishing either the scientific validity of the field or even estimating the reliability of toolmark examinations.⁵⁵

The scientific community understands today what it did not—and the trial court therefore could not have understood—in the 1970s: the toolmark examination field has not shown, through empirical research rather than unsupported assertions, either that an examiner can follow a scientifically proven methodology to declare a “match,” or that its examiners produce reliable, accurate results when applying that methodology.

⁵⁵ See National Research Council, Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database, *Ballistics Imaging* (2008), available at: <https://nap.nationalacademies.org/read/12162/chapter/1>; NAS Report (2009), available at: <https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf>; President’s Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring the Validity of Feature-Comparison Methods* (2016) (“PCAST Report”), available at: https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf; President’s Council of Advisors on Science and Technology, *An Addendum to the PCAST Report on Forensic Science in the Criminal Courts* (2017), available at: https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensics_addendum_finalv2.pdf.

6. Shoeprints and Gait Analysis Testimony is Meaningless.

Recently, the scientific community accepted new standards for conducting a footwear examination. Attach. 78, ANSI/ASB Standard 137, *Standard for Examination and Documentation of Footwear and Tire Impression Evidence* (1st ed. 2023). These standards cover specifics for how to inventory the evidence, how to analyze the evidence, how to compare the evidence to known test impressions, and how to ultimately make an evaluation. *Id.*

It is important to note that “match” and other similar language is not considered to be scientific or accepted in modern shoeprint and footwear analysis. Analysts typically compare the size, tread design, and any other characteristics in order to “make a match” to a suspect’s shoes to infer that the suspect who made the print was present at the scene of the crime. Attach. 78, ANSI/ASB Standard 137, *Standard for Examination and Documentation of Footwear and Tire Impression Evidence* (1st ed. 2023). Shoe print analysis is unique as it is only used in the criminal legal system and the objective criticism or standardization of the field has only recently garnered attention. See PCAST Report (2016); NAS Report (2009).

Utilizing modern scientific understandings, there is no evidence that any shoeprint at the homeplace was made by Jerry, nor were police able to find shoes matching the prints within Jerry’s possession. Attach. 79, Expert Report of Alicia McCarthy (10/21/2024). Despite this Jerry was taken to a park in Waterloo where he was made to wear purchased shoes which were photographed without evidence identifiers. *Id.* Police noted that Victor Mark did have that could match

the impressions at the scene, but failed to test, collect, or document these shoes. *Id.* There have been so many improvements in forensic science standards and procedures since the investigation in 1975 that the errors and omissions which occurred in this case would likely not happen today. *Id.*

Since 1976, we have learned more about how people walk and how a person's gait is analyzed. See Attach. 80, Expert Report of Dr. Michael S. Nirenberg (10/24/2021). Dr. Michael Nirenberg, the president of the American Society of Forensic Podiatry and an expert in forensic gait analysis, has explained in his report that three shoeprints are insufficient to conduct any gait analysis and there is no evidence Jerry made the prints at the homeplace. *Id.* Thus, the testimony of Dr. Lichty at trial is false. T.1407–09, 1544–50, 1604–06.

7. Jerry Was Not Seen in Iowa on October 31 or November 1, 1975⁵⁶ and It Was Physically Impossible for him to Have Committed These Murders.

Today's understanding of memory and the limits of eyewitness identifications would not allow any of the alleged 'eyewitness' testimony to be admitted under Iowa Rules of Evidence because they are suggestive and highly prejudicial under Rule 403. Attach. 81, Expert Report of Andrew Smith (07/28/2022). Since 1975, the field of eyewitness identification has drastically

⁵⁶ Since 1989, there have been 918 exonerations across the United States involving mistaken identification. Nat'l Registry of Exonerations, *Interactive Data Display*, (last visited Oct. 2, 2023), <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

changed, from this type of show-up, to line-ups, to photo arrays, to double-blind sequential photo lineups. *See, e.g., Id.* No witnesses actually saw or viewed a perpetrator leaving the homeplace. The methods used by the investigators are highly suggestive and not accepted by the scientific, law enforcement or legal community. *Id.* Here, the investigators used a technique of canvassing or trolling for eyewitnesses with a single photo of the suspect. *Id.* That procedure is inherently suggestive and unreliable and even more so than the eyewitness identifications made by show-up, photo array and in-person line-ups. *Id.*

As such, Mark Van Hauen's testimony that he saw Jerry in Ackley, Iowa on October 31, 1975 between 7:30 and 8:00 p.m. was false. T.2268-69, 2274-76. Rosalie McGinnis was mistaken when she testified she saw Jerry at 7:30 a.m. in Stuart Iowa on November 1, 1975. T.2352-54, 2358-60. Jaythan Hurd, III testified falsely that he saw Jerry in Williams, Iowa at the Boondocks truck stop between 3:30 and 5:00 a.m. on November 1, 1975. T.2309, 2312, 2322-23, 2326-27.

None of the witnesses found and shown pictures of Jerry can be relied upon, since all of their testimony and identifications were tainted and corrupted by the suggestive procedure used by investigators. Attach. 81, Expert Report of Andrew Smith (07/28/2022). Science has now demonstrated that the investigators used a guilt-biased procedure which does not allow for the witness to disconfirm whether they saw the suspect. *Id.* The witness trolling procedure cannot establish a suspect's innocence and will always generates some evidence of guilt. *Id.*

Dr. Andrew Smith explains in his report that eyewitness memory is incomplete and generally captures only gist information and fades over time. *Id.* This results in missing gaps being filled in “by erroneous information that was acquired since witnessing events in question.” *Id.* An eyewitness does not have stagnant memories that can be recalled. *See, e.g., Jackie Wilson, Trust your Memory? Maybe you Shouldn’t*, CNN (May 18, 2013), <https://www.cnn.com/2013/05/18/health/lifeswork-loftus-memory-malleability/index.html>; Mark L. Howe & Lauren M. Knott, *The Fallibility of Memory in Judicial Processes: Lessons from the Past and Their Modern Consequences*, 23(5) *Memory* 633–56 (2015). Memory is malleable and influenced by facts and events after the sighting.⁵⁷ Attach. 81, Expert Report of Andrew Smith (07/28/2022).

⁵⁷ It is important to consider the misinformation that can occur in eyewitness reports. Gary Wells, Iowa State University Digital Repository, *Eyewitness Testimony*, at 664 (Jan. 1, 2002), <https://dr.lib.iastate.edu/entities/publication/5846eea0-f8e3-4492-901b-2d945f72ee54> (“False memories of various types can be held with very high certainty, thereby making it difficult to prove that the testimony of an eyewitness is wrong. The implications of this for criminal and civil trials can be enormous if the critical elements of proof rely on the testimony of eyewitnesses, especially if the eyewitnesses have been exposed to considerable amounts of new information (which may or may not be accurate) after the witnessed event.”). “Usually unbeknownst to the observer, bias quietly fills informational gaps left by uncertainty – we see what we expect to see and are none the wiser.” Thomas D. Albright and Jed S. Rakoff, *A Clearer View: The Impact of the National Academy of Sciences Report on Eyewitness Identification*, Bolch Judicial Institute, Duke Law School (May 2, 2023), <https://judicature.duke.edu/articles/a-clearer-view-the-impact-of-the-national-academy-of-sciences-report-on-eyewitness-identification/>.

Based on the make and model of the 1973 Honda 450 that Jerry owned and operated, even a motorcycle in good condition would be physically impossible to drive across the country in the quick timeframe the State alleges. *See e.g.*, Attach. 82, Affidavit of Charlie O'Hanlon (04/16/2024). The State's timeline requires that Jerry drove 1,899 miles, in the cold on a small vibrating motorcycle that required constant gas and maintenance between the morning of October 29th and early morning hours of November 1st.

Charlie O'Hanlon, a skilled and knowledgeable mechanic who specializes in vintage Honda motorcycles from the 1960s and 70s, in both repairs and use, indicates the significant limitations of the 1973 Honda 450. *Id.* Honda 450s are a smaller bike, not designed for long-distance travel. *Id.* While possible to travel long distances on a Honda 450, there are numerous limitations that would substantially impact the speed of travel. *Id.* Significant considerations that a rider needed to consider are (1) the motorcycle uncomfortable to ride for an extended period of time, due to the continuous vibrations of the motorcycle, (2) the Honda 450's gas tank is small, requiring frequent refueling, (3) the motor will get hot quickly, requiring regular maintenance, (4) the transmission system of points and condensers needs regular resetting and adjusting, and (5) other general maintenance is required for being able to ride the motorcycle. *Id.*

The State's theory that Jerry left California on October 29, 1975 around 10:00 a.m. PST and traveled nearly 2,000 miles, arriving in Cedar Falls, Iowa between 1:00 and 3:00 a.m. CST on November 1, 1975, is physically and logically

impossible, due to the physical limitations of the Honda 450 motorcycle that Jerry rode.

8. Toolmark Identification.⁵⁸

The trial evidence that Jerry removed his license plate, modified his odometer based on tool marks is meaningless and unscientific and does not support Jerry's guilt. Attach. 72, Expert Report of Michael "Jeff" Salyards (01/23/2024). Since trial in 976, there have been substantial changes in the reliability and acceptance of tool marks as a forensic science. Firearm and toolmark examination, though for years proffered and accepted by the forensic and legal communities, is now understood by the general scientific community to be both unreliable and invalidated. This consensus within the scientific community is demonstrated by the arc of reports between 2008 and 2017 authored by two committees—the National Academy of Sciences and the President's Council of Advisors on Science and Technology.⁵⁹

There is no evidence that Jerry removed the California license plate and replaced it with an Iowa license plate and there are no scientific basis upon which

⁵⁸Since 1989, there have been 804 exonerations across the United States involving bad forensic evidence, which includes toolmark evidence. Nat'l Registry of Exonerations, *Interactive Data Display*, (last visited Oct. 2, 2023), <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

⁵⁹ See National Research Council, Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database, *Ballistics Imaging* (2008), available at: <https://nap.nationalacademies.org/read/12162/chapter/1>; NAS Report (2009); PCAST Report (2016); President's Council of Advisors on Science and Technology, *An Addendum to the PCAST Report on Forensic Science in the Criminal Courts* (2017).

to base the opinion he was seeking to avoid detection. Attach. 72, Expert Report of Michael “Jeff” Salyards (01/23/2024).

Conclusion

Considering the totality of all the evidence shown at trial and what is now known about the reliability of that evidence—CBLA/NAA, toolmarks, firearm identification, fingerprints, eyewitness identifications, route of travel, cognitive bias, shoeprints, gait analysis, serology, and new evidence of a professional hit—it is clear that Jerry is actually and factually innocent of the crimes he has been convicted of. Cumulatively, all of the evidence presented at Jerry’s criminal trial in 1975 has been shown to be unreliable, and there is no evidence remaining that incriminates Jerry. Therefore, this Court cannot have confidence in this verdict in light of all of the evidence. There is no reliable evidence that Jerry murdered his family. Justice requires that Jerry’s conviction be vacated and that he be granted a new trial.

II. JERRY MARK IS ENTITLED TO A NEW TRIAL BECAUSE THERE IS NEWLY DISCOVERY EVIDENCE UNDER *MORE V. STATE*.

A. Newly Discovered Evidence

Iowa Code § 822.2(1)(d) provides an avenue for post-conviction relief if there is “evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” The chapter continues to require a post-conviction relief application be filed within three years of the date of conviction or when the writ of procedendo is issued,

whichever is later. Iowa Code § 822.3. In order to prevail on a newly-discovered-evidence claim, Jerry must show the proffered evidence (1) was discovered after the verdict, (2) could not have been discovered “earlier in the exercise of reasonable diligence,” (3) “is material to the issues in the case and not merely cumulative or impeaching,” and (4) “probably would have changed the result of the trial in which [he] was convicted.” See *State v. Weaver*, 554 N.W.2d 240, 246 (Iowa 1996); *Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003); see also *Aguilera v. State*, 807 N.W.2d 249, 252 (Iowa 2011); *DeSimone v. State*, 803 N.W.2d 97, 103 (Iowa 2011); *State v. Romeo*, 542 N.W.2d 543, 550 (Iowa 1996).

The newly discovered evidence since Jerry’s conviction that will establish his actual innocence includes, but is not limited to: (1) he was not seen in Iowa on the day of the murders; (2) the ammunition used at the crime cannot be connected to him or any weapon available to him; (3) the shoeprints are not evidence that Jerry was at the farm; (4) cognitive bias in the investigation ignored plausible alternate suspects and theories for the murder of Les and his family; and (5) these murders were professionally planned and executed and it is impossible for Jerry to have traveled from California, commit the crimes, and return to California alone.

Since Jerry’s trial in 1976, there has been substantial changes and developments in forensic sciences and the understanding of their reliability. To prevail in a petition for post-conviction relief based on newly discovered evidence, an applicant must show that the evidence:

(1) was discovered after the verdict; (2) could not have been discovered earlier in the exercise of due diligence; (3) is material to the issues in the case and not merely cumulative or impeaching; and (4) probably would have changed the result of the trial.

More v. State, 880 N.W.2d 487, 499 (Iowa 2016) (citing *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991); accord *Harrington*, 659 N.W.2d at 516; *State v. Smith*, 573 N.W.2d 14, 21 (Iowa 1997)); see also *State v. Romeo*, 542 N.W.2d 543, 550 (Iowa 1996); *State v. Weaver*, 554 N.W.2d 240, 246 (Iowa 1996).

The Iowa Supreme Court has recognized that significant advances in science constitute new evidence for purposes of post-conviction relief. *More*, 880 N.W. 2d at 509–10 (stating that watershed developments in science constitute new evidence and finding that the relevant scientific community’s recent discreditation of compositional bullet lead analysis was, in fact, new science, but denying petition because of the existence of other inculpatory evidence), see also *Romeo*, 542 N.W.2d at 550, *Weaver*, 554 N.W.2d at 246

As the *More* court concluded, these types of scientific developments constitute newly discovered evidence that satisfies the first two prongs of the *Weaver* test. See 880 N.W.2d at 509–10; see also *Romeo*, 542 N.W.2d at 550; *Weaver*, 554 N.W.2d at 246. Indeed, scientific progress in the understanding of forensic science has been the basis for granting new evidentiary hearings—and trials—in courts throughout the country. See, e.g., *People v. Genrich*, 471 P.3d 1102, 1111–13 (Colo. App. 2019) (finding that change in scientific consensus on handheld toolmark examination entitled defendant to a hearing); *State v. Behn*, 868 A.2d 329, 344 (N.J. Super. Ct. App. Div. 2005) (new research on comparative

bullet lead analysis entitled defendant to a new trial); *People v. Bailey*, 144 A.D.3d 1562, 1564 (N.Y. App. Div. 2016) (“In general, advancements in science and/or medicine may constitute newly discovered evidence.”); *Commonwealth v. Perrot*, 2016 WL 380123, at *37 (Mass. Super. Ct. Jan. 26, 2016) (“[N]ew consensus on the limitations and nature of hair analysis evidence constitutes newly available evidence.”); *Smith v. State*, 23 So. 3d 1277, 1278 (Fla. Dist. Ct. App. 2010) (finding “evidence that [comparative bullet lead analysis] has been discredited” constitutes newly discovered evidence); *State v. Edmunds*, 746 N.W.2d 590, 593–95 (Wis. Ct. App. 2008); (holding that newly developed (post-conviction) scientific consensus regarding “shaken baby syndrome” constituted newly discovered evidence and noting that over the past decade “a shift has occurred in the [scientific] community” such that “the fringe views posited in 1997 are [now] recognized as legitimate”).

The emergence of a new scientific consensus show that the opinions offered by the State’s experts at Jerry’s criminal trial lack scientific foundation and are unreliable. *See Edmunds*, 746 N.W.2d at 593–95; *see also Behn*, 868 A.2d at 344 (“Science moves inexorably forward and hypotheses or methodologies once considered sacrosanct are modified or discarded. The judicial system, with its search for the closest approximation to the ‘truth’ must accommodate this ever-changing scientific landscape.”).

The Due Process Clauses of both the United States and Iowa Constitutions “requires fundamental fairness in a judicial proceeding,” so a trial that is fundamentally unfair violates the guarantees of due process in the United States

and Iowa Constitutions.” *More*, 880 N.W.2d at 499 (citing *State v. Becker*, 818 N.W.2d 135, 148 (Iowa 2012) (quoting *In re Det. of Morrow*, 616 N.W.2d 544, 549 (Iowa 2000)); see also *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (“The Constitution guarantees a fair trial through the Due Process Clauses.” (citation omitted)). “[S]ome evidence may be so unreliable that its admission violates due process.” *More*, 880 N.W.2d at 499 (citing *Foster v. California*, 394 U.S. 440, 449 (1969); *Manson v. Brathwaite*, 432 U.S. 98, 117 (1977)). Indeed, “when evidence is so extremely unfair that its admission violates fundamental conceptions of justice’ Due Process, like the sleeping giant, awakens ... and courts must step in to prevent injustice.” *United States v. Sanders*, 708 F.3d 976, 983 (7th Cir. 2013); see, e.g., *Genrich*, 471 P.3d at 1124 (Berger, J., concurring) (“multiple courts have concluded that the admission of such unreliable [individualization] testimony can constitute a due process violation.”).

1. Newly Discovered Evidence of the Use of Firearm and Toolmark Analysis.

As elaborated in arguments IV.I.B.5 and 8 there has been new scientific advancements in the areas of toolmark and firearm identification evidence. Attach. 72, Expert Report of Michael “Jeff” Salyards (01/23/2024).

This evidence meets the newly discovered evidence standards under *More v. State*, because: (1) the new scientific evidence was established after the verdict at Jerry’s criminal trial in 1976; (2) this evidence could not have been discovered sooner; (3) this evidence is material to the conviction of Jerry, since it was used at trial to tie Jerry to the scene of the crime; and (4) this newly discovered

evidence would have proven that Jerry was not the perpetrator, and therefore would have changed the jury's verdict. *More*, 880 N.W.2d at 499; Attach. 72, Expert Report of Michael "Jeff" Salyards (01/23/2024).

2. Newly Discovered Evidence of the Use of CBLA

As addressed above in argument IV.I.B.5, since Jerry's trial in 1976, CBLA/NAA forensic analysis has been completely discredited across the nation. Attach. 72, Expert Report of Michael "Jeff" Salyards (01/23/2024); Attach. 68, Expert Report of William Tobin (04/26/2024). Since even Jerry's arguments at his prior PCR in 1987 regarding CBLA/NAA, the national consensus has continuously voided the whole method and not utilized it for any scientific or probative value. Attach. 72, Expert Report of Michael "Jeff" Salyards (01/23/2024); Attach. 68, Expert Report of William Tobin (04/26/2024).

This evidence also satisfies *More*'s newly discovered evidence standards since: (1) the new scientific evidence was established after the verdict at Jerry's criminal trial in 1976; (2) this evidence could not have been discovered sooner; (3) this evidence is material to the conviction of Jerry, since it the original trial evidence "connected" Jerry to the scene of the crime and the supposed murder weapon; and (4) this newly discovered evidence would have proven that Jerry is innocent of these crimes, and therefore would have changed the jury's verdict. *More*, 880 N.W.2d at 499; Attach. 72, Expert Report of Michael "Jeff" Salyards (01/23/2024); Attach. 68, Expert Report of William Tobin (04/26/2024).

3. Newly Discovered Evidence of Faulty Methods of Eyewitness Identification.

Argued above, in argument IV.I.B.7, there has been new developments into the area of eyewitness identification and how identifications can be faulty and contaminated. Attach. 82, Expert Report of Andrew Smith (07/28/2022).

This evidence meets the newly discovered evidence standards, as: (1) these scientific developments are new, since 1976; (2) this evidence could not have been discovered sooner; (3) this evidence is material to the conviction of Jerry, since it helped the State prove its theory of Jerry's route of travel from California to Iowa; and (4) this newly discovered evidence would have proven that Jerry is innocent of these crimes, since he was never in Iowa on the days of the murders, and therefore would have changed the jury's verdict. *More*, 880 N.W.2d at 499; Attach. 82, Expert Report of Andrew Smith (07/28/2022).

4. Newly Discovered Evidence of Shoeprint and Gait Analysis

As laid out in argument IV.I.B.6, the science of shoeprint comparison and gait analysis has developed over the years since Jerry's trial in 1976, and the processed applied has been found to be unscientific Attach. 79, Expert Report of Alicia McCarthy (10/21/2024); Attach. 80, Expert Report of Dr. Michael S. Nirenberg (10/24/2021).

This evidence fulfills *More's* newly discovered evidence standards because: (1) the new scientific evidence was established after the verdict at Jerry's criminal trial in 1976; (2) this evidence could not have been discovered sooner; (3) this

evidence is material, since it no longer connects Jerry to the scene of the crime; and (4) this newly discovered evidence would have proven that Jerry is innocent of these crimes, since he was not at the crime scene the day of the murders, and therefore would have changed the jury's verdict. 880 N.W.2d at 499; Attach. 79, Expert Report of Alicia McCarthy (10/21/2024); Attach. 80, Expert Report of Dr. Michael S. Nirenberg (10/24/2021).

5. Newly Discovered Evidence of a Professional Crime

Since 1976, the concept of drug cartels and professional hits have become more known.⁶⁰ There is new evidence that the murder of Jerry's family was actually a professional hit, and not a crime of passion, as shown above in argument IV.I.B.2. Professional hits are clean crime scenes, leaving behind little to no trace of their presence, besides dead bodies. See Brolan L., Wilson D., Yardley E., *Hitmen and the spaces of contract killing: the doorstep hitman*, J. Investigative Psychol. Offender Profiling, DOI: 10.1002/jip.1453 (2016). The lack of fingerprints that are connected to the perpetrator at the crime scene points to a professional hit. *Id.* The lack of shoeprints at the crime scene that could be connected to the perpetrator points to a professional hit. *Id.* No casings were found at the crime scene, indicating a professional hit. *Id.* Additionally, the bullets that were found in the ditch, are not significant and should not have been

⁶⁰ DEA, Organized Crime Drug Enforcement Task Group, <https://www.dea.gov/operations/ocdetf>; Scott A. Bonn, *Understanding hitmen vs. serial killer*, Psychology Today (Jan. 27, 2020), <https://www.psychologytoday.com/us/blog/wicked-deeds/202001/understanding-hitmen-versus-serial-killers>

connected to the crime, since it is not usual to find casings and bullets in ditches, since the end of October and the beginning of November are deer hunting seasons.

This evidence satisfies the standards for newly discovered evidence because: (1) the new evidence was discovered after the verdict at Jerry's criminal trial; (2) this evidence could not have been discovered sooner; (3) this evidence is material, since it points to different perpetrators than Jerry; and (4) this newly discovered evidence proves that Jerry is innocent of these crimes, and therefore would have changed the jury's verdict. *More*, 880 N.W.2d at 499

Conclusion

"One of the roles of this court is to protect defendants from wrongful convictions when subsequently discovered evidence shows that an error has probably occurred." *More*, 880 N.W.2d at 512. As such, Jerry's conviction was fundamentally unfair and procured in violation of due process, and he is entitled to a new trial. *See Ege v. Yukins*, 485 F.3d 364, 375 (6th Cir. 2007) (The "improper admission of certain evidence injurious to the defendant" violates due process when it "deprive[s] a defendant of her right to a fair trial" (emphasis omitted)).

III. JERRY MARK IS ENTITLED TO A NEW TRIAL BECAUSE THE STATE PRESENTED FALSE TESTIMONY IN VIOLATION OF *NAPUE V. ILLINOIS*.⁶¹

A criminal defendant has a constitutional right under the Fourteenth Amendment due process clause not to be convicted on the basis of false evidence. *Napue v. Illinois*, 360 U.S. 264, 268 (1959) (noting that “it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment . . .”). This is true regardless if “the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Id.* at 269 (citing *Alcorta v. Texas*, 355 U.S. 28 (1957); *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir. 1955); *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1952); *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382 (N.D. Ill. 1949)).

In a *Napue* claim, one must show that (1) the testimony or evidence was false, (2) the false testimony was material, and (3) the prosecution had knowledge, or should have known of the falsity of such testimony and did nothing to correct it. See 360 U.S. at 269–71; see also *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003) (citing *Napue*, 360 U.S. at 269–71) (noting the elements for a *Napue* claim). “Effect on the trial, not culpability of the prosecutor, is the critical issue.” *Hamann v. State*, 324 N.W.2d 906, 910 (Iowa 1982) (citing

⁶¹Since 1989, there have been 2,151 exonerations across the United States involving perjury or false accusations. Nat’l Registry of Exonerations, *Interactive Data Display*, (last visited May 28, 2024), <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

Smith v. Phillips, 455 U.S. 209, 210, n.10 (1982)). Here, this Court must review the false testimony and consider the weight of the alleged independent evidence of guilt. *See Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976).

The case against Jerry was entirely circumstantial, which makes witness testimony and credibility even more essential to the case. The false testimony from Alga Forrest that Jerry was jealous of Les and had been cut out of his father's will was necessary to the prosecution's "Cain and Abel" theory that Jerry committed the murders. T.3066–68. The ban against false evidence to gain a criminal conviction is implied in the criminal justice system. *Napue*, 360 U.S. at 269. This implicit concept continues to apply even if the false testimony only goes towards witness credibility as a jury's evaluation of a witness' truthfulness and reliability can persuade their determination of guilt. *Id.* For example, in *Swartz v. State* the Iowa Court of Appeals held that a rebuttal witness stating no deals had been made for his testimony, when in fact such a deal had been made, denied the defendant a fair trial. 506 N.W.2d 792, 799 (Iowa Ct. App. 1993).

Jerry is not required to demonstrate the false evidence did have an effect on the outcome of his trial. *See Napue*, 360 U.S. at 272. He is merely required to demonstrate the testimony may have had an effect. *See id.* ("[O]ur own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial. Accordingly, the judgement below must be reversed.").

The State presented false testimony and did not correct the testimony despite having knowledge of its falsity in clear violation of Jerry's rights under

the Fourteenth Amendment. *See id.* at 268. This false testimony was presented by the prosecution to bolster their case against Jerry at the expense of him receiving a fair trial. *See Swartz*, 506 N.W.2d at 799.

A. The State Presented False Testimony by DCI Agent, John Jutte

BCI agent, John Jutte, who discovered the unspent rounds at the telephone junction box near the crime scene, has been found to have lied in another murder case. Agent Jutte was implicated in a lawsuit in connection with the investigation surrounding the death of a University of Iowa student in 1974. Attach. 83, Jutte involvement in Hall Case Compilation P.2–7. On March 13, 1974, Sarah Ann Ottens was found strangled in her dormitory room *Id.* at 8–9. Jutte was in charge of investigating the case. *Id.* at 10. As a result of his investigation, James Hall was convicted of second-degree murder. *Id.* at 11–12. Nine years later, a district court judge overturned the trial based on misconduct from both the prosecutor and Jutte. *Id.* at 13.

Jutte obtained a search warrant for Hall's room, but it was determined that Jutte lied on the search warrant application. *Id.* at 14–15. The Court held that Jutte knowingly and intentionally presented false testimony to a magistrate in support of an application for a search warrant. *Id.* at 2–7. During trial, Jutte (1) lied and claimed two witnesses picked Hall out of a lineup when the witnesses did not, (2) falsely testified that Hall told him he did not know the victim, when Hall had just said he never dated the victim, and (3) falsely testified that Hall

had retained an attorney implying that obtaining representation during the investigation inferred guilt. *Id.* at 2–7.

The integrity of Jutte’s credibility and trustworthiness in Jerry’s case was clearly tainted as he was found to have lied in other cases. Jutte’s misconduct which led to the wrongful conviction of Hall must be considered when reviewing his actions, decisions, and testimony as an investigator in Jerry’s case. The jury’s reliance on Jutte’s testimony may have had an impact on their perception of Jerry’s guilt or innocence, and therefore his history of untruthfulness violates *Napue v. United States*.

Notably, none of Jutte’s credibility issues were disclosed to Jerry before, during or after his criminal trial and his credibility is material because Jutte is the only one to find the unspent .38 bullets in the ditch after others had searched.

**B. The State Presented False Testimony by Proximity Witness
Leslie Warren**

The State’s theory of the crime required a specific timeline for Jerry to feasibly arrive at the Mark family farm between 1:00 and 3:00 a.m. on November 1st—the window that the State contends Les and his family were murdered. In order to do this, as explained above, the State trolled for proximity witnesses along Jerry’s alleged route of travel. *See supra* argument IV.I.B.7. It is undisputed that Jerry rode his motorcycle East from California towards Iowa, but it is disputed if he entered Iowa and the timeline of his specific stops. *See supra* argument IV.I.B.7.

One of the State's key witnesses for placing Jerry and his motorcycle at a specific location along I-80 was Leslie Warren. T.2100–60.

1. False Testimony

At trial, Leslie Warren testified that he worked for the Department of Roads in Nebraska and that he maintained the rest areas in the State. T.2101. Warren further testified that he saw Jerry at the rest stop in Chappell, Nebraska on October 31st. T.2112–15. He was confident that this was correct, since he was adamant that he went to his doctor's office on November 1st, and did not see Jerry that day when he was at the Chappell rest stop between 8:00 and 9:00 a.m. T.2105–07.

However, the State knew that Warren had a doctor's appointment on October 31st, since they had obtained a copy of Warren's doctor's report from this visit. See PCR #69121 Pet. Ex. 20 and 21, Warren's Medical Records from Dr. Calvin Cutright. Warren's testimony is factually impossible, based on this doctor's report, as he clearly swapped the date he had seen Jerry with the date he went to the doctor's office. *Id.* However, the State allowed Warren to testify that he saw Jerry on October 31st, despite that this medical document indicating a contradictory date to what Warren testified existed. See PCR #69121 Pet. Ex. 20 & 21, Warren's Medical Records from Dr. Cutright. The State argued Jerry's guilt based on false evidence. *Mark*, 2006 WL 2556577, at *75–77. Not only did the State present this false testimony and evidence, but the State failed to correct this false testimony, despite knowing the truth.

2. Materiality

The case against Jerry was completely circumstantial, which makes witness testimony and credibility even more essential to the case. The ban against false evidence to gain a criminal conviction is implied in the criminal justice system. *Napue*, 360 U.S. at 269. This implicit concept continues to apply even if the false testimony only goes towards witness credibility as a jury's evaluation of a witness's truthfulness and reliability can persuade their determination of guilt. *Id.*; see also 506 N.W.3d at 799.

Dr. Elizabeth Loftus has testified that it is “virtually impossible without independent corroboration” to distinguish an accurate memory from a false memory. *Commonwealth v. Shanley*, 919 N.E.2d 1254, 1262 (Mass. 2010).

Dr. Loftus described memory as involving the construction or reconstruction of experiences where a person may blend later occurring details into the memory of an event. She explained that many things could affect the accuracy of a memory, including factors related to the perception of an event as it occurs, such as lighting and distance and the exposure to post event information such as leading questions or media coverage, which can distort or supplement a memory. Dr. Loftus also explained that the passage of time made memories weaker and thus more vulnerable to post event contamination. She explained that a false memory is a false belief accompanied by sensory detail.

Shanley, 919 N.E.2d at 1262.

Without the false testimony from Leslie Warren that he saw Jerry before the murders on October 31st and not the early morning of November 1st (which would be impossible, if Jerry was 631 miles away from Chappell, Nebraska four hours before Warren saw him), the jury would undoubtedly have had reasonable doubts that Jerry murdered his brother and family.

3. Knowledge

The State elicited testimony that it knew to be false because it is contradicted impartial, objective documentary evidence it possessed.

Jerry is not required to demonstrate the false evidence did have an effect on the outcome of his trial, only that it may have had an effect. *See Napue*, 360 U.S. at 272. The State presented false testimony, and its failure to correct this testimony is a clear violation of Jerry's rights under the Fourteenth Amendment. *See id.* at 268. This false testimony was presented by the State at the expense of Jerry receiving a fair trial. *See Swartz*, 506 N.W.2d at 799.

C. The State Presented False Evidence of Jerry's Route of Travel

The State interviewed hundreds of people in attempting to find witnesses to positively identify Jerry along the route he traveled on his motorcycle from California to Iowa to match the State's timeline of events in order to place Jerry in Iowa at the time of the murders. T.534; PCR Case No. 69121 Hrg. T. 1380–81. The method by which the State asked people to identify Jerry was through an identification procedure called a "show up" or "trolling." Attach. 81, Expert Report of Andrew Smith (07/28/2022). This highly suggestive identification procedure tainted the identification of the witnesses who were interviewed and who ultimately provided false positive identifications of Jerry. *Id.* The witnesses who testified for the State in regards to Jerry's alleged route of travel were: (1) Barbara Ann Smith from Newton, Iowa; (2) Mary Ann Stinson and Karelyn Kemp from Atlantic, Iowa; (3) Delbert Van Hauen from Ackley, Iowa; (4) Jayathan Hurd

from Williams, Iowa; (5) Rosalie McGinnis from Stuart, Iowa; (6) Richard Gavert from Wendover, Utah; and (7) Donald Shearer from Brady, Nebraska.

- **Barbara Ann Smith:** Smith was a manager at Stuckey's service station in Newton, Iowa. T.2215–16. She was shown two photos of two different people, one with a mustache, and one without—she identified the man without a mustache as Jerry. T.2233, 2245. She told officers that she saw a motorcyclist between 6:30 and 7:30 p.m. the night of October 31st. T.2228.⁶² She also identified Jerry in an in-person lineup, after she knew Jerry was in custody and that he was the man she had previously identified. T.2236, 2251. Her previous exposure to a photographic show up of Jerry Mark biased her identification in the in person lineup because her memory had seen Jerry before regardless of whether she actually saw him on October 31, 1975. Attach. 81, Expert Report of Andrew Smith (07/28/2022).
- **Mary Ann Stinson:** Stinson worked as a cook at Shamrock Café in Atlantic, Iowa. T.2474. Investigators only showed her a picture of Jerry and asked if she had seen him before. T.2485. Stinson told officers that she saw someone matching Jerry's description around 7:00 p.m. on

⁶²Barbara Ann Smith originally indicated that she was a motorcyclist at Stuckey's service station between 5:00 p.m. and 6:00 p.m. PCR #69121 Petitioner Ex. 52, PCR #69121 Petitioner Ex. 53. However, in order to comply with the State's alleged route of travel, at trial, Smith testified that she saw Jerry in Newton on October 31st between 6:30 p.m. and 7:30 p.m. T.2228.

October 31st at her cafe. T.2491.⁶³ She identified Jerry in an in-person lineup later on. T.2488. Her identification is unreliable. Attach. 81, Expert Report of Andrew Smith (07/28/2022).

- **Karelyn Kemp:** Kemp was a high school student, working as a waitress at Shamrock Café in Atlantic, Iowa. T.2205. She was shown a picture of Jerry and she said she had seen him the night of October 31, but could not remember what time. T.2204, 2206. She also picked Jerry from a 5-person photo array, explaining that the photo “vaguely” looked like the man she saw. T.2207, 2212–13. This is clear demonstration of a relative judgement by a witness, picking the person who most closely matches the last photo shown to her by law enforcement, not a reliable identification of Jerry. Attach. 81, Expert Report of Andrew Smith (07/28/2022).
- **Delbert Van Hauen:** Van Hauen worked at a gas station in Ackley, Iowa. T.2274. Officers asked him if he had seen any motorcyclists on October 31, and if Van Hauen could describe them. T.2274. He told officers he saw someone matching Jerry’s description between 7:30 and 8:00 p.m. the night of October 31st. T.2273.⁶⁴ He was then shown one photo of a motorcycle and the cyclist, and he identified Jerry. T.2275. He then

⁶³Mary Ann Stinson originally told law enforcement that she saw a motorcyclist around 7:00 p.m. or between 7:00 p.m. and 8:00 p.m. PCR #69121 Petitioner Ex. 98 at 2, PCR #69121 Petitioner Ex. 70. She also recalled that the motorcyclist “had coffee and stayed thirty to forty-five (30-45) minutes” before leaving Shamrock Café. PCR #69121 Petitioner Ex. 70.

⁶⁴In Delbert Van Hauen’s original statement to the police, he did not recall the time that he saw a motorcyclist come through Ackley, Iowa. PCR #69121 Petitioner Ex. 122. However, at trial, he recalled seeing Jerry between 7:30 p.m. and 8:00 p.m., complying better with the State’s alleged route of travel. T.2273.

identified Jerry in an in-person lineup, where he assumed Jerry was present. T.2276, 2286. This identification is unreliable. Attach. 81, Expert Report of Andrew Smith (07/28/2022).

- **Jayathan Hurd:** Hurd worked at Boondocks Truck Stop in Williams, Iowa. T.2309-2310. He was asked if he had seen any motorcyclists late October 31 or early November 1st. T.2323. After giving the description of a Honda motorcycle he saw, Hurd was shown a picture of Jerry and a picture of a motorcycle, and he identified Jerry. T.2325-26. He claimed he saw Jerry between 3:00 and 5:00 a.m. on November 1st. T.2321. He also identified Jerry in an in-person lineup, where he said that no one else looked like Jerry. T.2344-45. This identification is unreliable. Attach. 81, Expert Report of Andrew Smith (07/28/2022).
- **Rosalie McGinnis:** McGinnis was working at Conoco Gas Station in Stuart, Iowa. T.2347-48. She was shown a photograph of Jerry and asked if she had seen him before. T.2359. McGinnis claimed she saw Jerry at 7:30 a.m. the morning of November 1st. T.2357-58. She also identified Jerry in an in person line-up. T.2360. This identification is unreliable. Attach. 81, Expert Report of Andrew Smith (07/28/2022).
- **Richard Gavert:** Gavert worked at Husky Truck Stop in Wendover, Utah. T.2422A few weeks after the murders, investigators showed Gavert a picture of Jerry. T.2433. He told officers he saw the man in the picture on November 2nd at 10:00 a.m. at the truck stop. T.2432. This identification is unreliable. Attach. 81, Expert Report of Andrew Smith (07/28/2022).

- **Donald Shearer:** Shearer was the manager of Stucky's Pecan Shop in Brady, Nebraska. T.2162. Two weeks after the murders, officers showed Shearer a picture of Jerry and asked if he had seen him. T.2169. He told officers he saw Jerry around noon on October 31st. T.2166. Shearer also claimed that when he saw Jerry, his motorcycle had an Iowa license plate. T.2166. Shearer later picked out Jerry in a line-up. T.2170. This identification is unreliable. Attach. 81, Expert Report of Andrew Smith (07/28/2022).

Professor Andrew Smith further opines that every lineup identification of Jerry Mark is unreliable and should be disregarded by investigators because it was contaminated when the witness was shown a photo of Jerry before the lineup. *Id.*

Discovered after the trial, the State had evidence for an alibi that supported Jerry's claim that he was actually in Nebraska during the murders: Leslie Warren from Chappell, Nebraska and Jean Doyle from North Platte, Nebraska. Their sightings of Jerry considered with Mark Van Housen in Aurora, Nebraska, place Jerry 600 miles from where the murders occurred on November 1, 1975.

Had the State not used suggestive identification procedures, presented false witness testimony, and suppressed the alibi witnesses, the jury would have found it impossible to place Jerry in Iowa on November 1, 1975. Even if the State had used proper non suggestive and reliable identification procedures, their proposed route of travel was still an assumption.

Conclusion

The testimonies of Jutte and Warren were unreliable, biased, and inconsistent. Warren's testimony is demonstrably false, Jutte's investigation and testimony are objectively incorrect, the route of travel evidence is physically impossible and procured in a manipulative manner, and the opening and closing statements of the State were not supported by the facts in evidence, and in bad faith. Since these witnesses are the key witnesses against Jerry at trial, in the interest of justice, Jerry is entitled to a new trial.

IV. A VIOLATION OF DUE PROCESS EXISTS WHEN A CONVICTION IS BASED ENTIRELY ON FALSE, MISLEADING, UNRELIABLE FORENSIC SCIENCE.

An individual's Fourteenth Amendment Due Process right is violated when the State presents evidence that was misleading or "gave the jury [a] false impression" about a material issue. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957). In a case featuring numerous variations of forensic and "scientific" evidence, the use of any unreliable or misleading science violates a defendant's Due Process rights. *Ege*, 485 F.3d at 375–77 (holding that misleading testimony about statistical probability of a bite-mark match violated Due Process); *see also Lee v. Glunt*, 667 F.3d 397, 407–08 (3d Cir. 2012) (finding a Due Process violation established where new experts showed that the State's expert testimony at trial was fundamentally unreliable); *Ex Parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012) (overturning conviction and death sentence in SBS/AHT case where

experts presented at postconviction hearing repudiated the State's "abuse-and-only-abuse" theory).

As in *Ege v. Yukins*, *Lee v. Glunt*, and *Ex Parte Henderson*, the one-sided and grossly misleading and inaccurate expert testimony presented at trial: shoeprint comparison, gait analysis, eyewitness identification, serology analysis, CBLA/NAA, and toolmark analysis violated Jerry's right to Due Process and rendered his trial fundamentally unfair. *See also In re Yarbrough Minors*, 885 N.W.2d 878 (Mich. App. 2016) (finding that due process was violated at parental rights termination proceedings where only one side of SBS/AHT debate is presented).

In this case, the State's experts cobbled together circumstantial evidence to place Jerry in Iowa at the time of the murders, connect him to the scene tangentially and based motive on a biased witness. Today, advances in technology, science and an understanding of cognitive bias demonstrates that Jerry did not receive a fair trial. The evidence that the State presented at trial substantially misled the jury and constitutes a Due Process violation under *Alcorta*. *See also Ege*, 485 F.3d at 375–77 (concluding that irresponsible testimony by State's bite mark expert violated Due Process even under deferential federal habeas corpus standard). This Court must vacate the convictions and grant Jerry Mark a new trial.

V. EXHIBITS, DOCUMENTS, AND RECORDS ATTACHED TO THIS APPLICATION

The documents, records or other evidence supporting this application are attached to this application as indicated on the index of Attachments.

The following documents, exhibits, affidavits, records, or other evidence supporting this application are not attached to the application (list):

These items are not attached for the following reason(s):

1. The Trial Transcript and trial exhibits because Iowa Code § 822.6A requires that the clerk provide it electronically.
2. The PCR Hearing Transcripts and exhibits because Iowa Code § 822.6A requires that the clerk provide it electronically.
3. Scientific Texts and publications that are available electronically as indicated or available upon request.

VI.

WHEREFORE, the Applicant respectfully requests that the Court, upon hearing, find that there exists new evidence of actual innocence of Jerry Mark, that the state presented and relied upon false testimony, relied on junk science, and violated Jerry's due process rights to a fair trial, then requiring the court to vacate Applicant's conviction, order a new trial and such other relief as the Court deems just and equitable herein.

VII.

Jerry is not able to pay court costs and expenses of representation and desires to have counsel appointed to represent him concerning this application under Iowa Code § 822.5. A motion to appoint counsel and an affidavit of indigency is filed simultaneously with this Application.

VERIFICATION

I, Jerry Mark, applicant, by and through my attorney, Erica Nichols Cook, certify under penalty of perjury to the laws of the State of Iowa that the information in this application, including the facts within my personal knowledge set out in division III and the items listed in division VI, is true and correct.

Signed on this 28th day October, 2024.

/s/Erica Nichols Cook, AT0013189

/s/Elaina Steenson, AT0014912

Wrongful Conviction Unit

State Public Defender

6200 Park Avenue, Suite 100

Des Moines, Iowa 50321

Phone: (515) 412-0570

enicholscook@spd.state.ia.us

esteenson@spd.state.ia.us

DIRECTIONS TO CLERK OF COURT

The clerk of court shall docket this application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the county attorney and the attorney general. See Iowa Code § 822.3.