

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

RUSSELL SCOTT FARIA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 SERGEANT RYAN J. McCARRICK, )  
 *in his individual capacity only,* )  
 )  
 DETECTIVE MICHAEL MERKEL, )  
 *in his individual capacity only,* )  
 )  
 DETECTIVE PATRICK HARNEY, )  
 *in his individual capacity only,* )  
 )  
 PROSECUTING ATTORNEY LEAH ASKEY, )  
 *in her individual capacity only,* )  
 )  
 Defendants. )

Case No.

**PLAINTIFF DEMANDS  
JURY TRIAL**

**INTRODUCTION - NOT PART OF PETITION**

Betsy Faria, Wife of Plaintiff Russell Faria, was brutally murdered. Four days earlier she had changed the beneficiary of her life insurance policy to one Pamela Marie Hupp.

Defendants are (a) three investigators of the murder, and (b) the Prosecuting Attorney for Lincoln County. In the course of investigating, charging and prosecuting Plaintiff the Defendants fabricated evidence, ignored exonerating evidence and failed to investigate the other obvious suspect. (The Prosecuting Attorney acted as an investigator while still developing alleged probable cause). Plaintiff was acquitted of the murder.

Plaintiff sues under 42 U.S.C. 1983 for false arrest, due process violations, etc.

**PETITION FOR DAMAGES – CIVIL RIGHTS  
DENIAL OF LIBERTY WITHOUT DUE PROCESS**

Comes now Russell Scott Faria, by counsel W. Bevis Schock, Joel J Schwartz and Nathan T. Swanson, and states for his Petition for Damages, Civil Rights:

**PARTIES**

1. Plaintiff Russell Scott Faria is an individual residing in the County of St. Charles, Missouri.
2. Defendant Sergeant Ryan J. McCarrick was at all relevant times a Sergeant with the Lincoln County Sheriff's Department (although he is now with the City of Florissant Police Department in St. Louis County).
3. Defendant Detective Michael Merkel is and at all relevant times was a Detective with the Lincoln County Sheriff's Department.
4. Defendant Detective Patrick Harney is and at all relevant times was a detective with the Lincoln County Sheriff's Department.
5. Defendant Prosecuting Attorney Leah Askey is and at all relevant times was the duly elected Prosecuting Attorney of Lincoln County, Missouri
6. Plaintiff sues each Defendant in his or her individual capacity only.

**SUBJECT MATTER JURISDICTION**

7. Plaintiffs bring this action pursuant to 42 U.S.C. §1983 and §1988 and the Fourth and Fourteenth Amendments to the United States Constitution.

**VENUE**

8. The vast majority of relevant events occurred in the County of Lincoln, Missouri, in the Eastern District of Missouri, in the Eastern Division.

**COLOR OF STATE LAW**

9. At all relevant times all Defendants, including the Prosecuting Attorney of Lincoln County, acted under color of state law. Particularly, at all relevant times all those persons were acting under color of the laws, statutes, ordinances, regulations, policies, customs and usages of the State of Missouri, and its political subdivisions.

**JURY DEMAND**

10. Plaintiff demands a jury trial on his claims for damages.

**FACTS**

**Marriage of Betsy Faria - Murder of Betsy Faria**

11. Mr. Faria and Elizabeth “Betsy” Faria, were married on January 21, 2000.
12. On December 27, 2011 Betsy Faria and Mr. Faria were living in their home at:  

130 Sumac Drive  
Troy, MO 63379
13. On that date at that home Betsy Faria was stabbed with a knife approximately 55 times.
14. Betsy Faria died at the scene.

**Location of Mr. Faria at Relevant Times – Consistent Story**

15. At approximately 7:05 p.m. on the evening of her death Betsy Faria spoke in her own voice into the cell phone of one Pamela Marie Hupp in order to leave a voice mail holiday greeting on Pamela Marie Hupp’s husband, Mark Hupp’s cell phone.
16. Approximately 48 hours after the murder, at approximately 8:00 p.m. on December 29, 2011, Officers Donald Thurmond and Michael Reiter then of the City of St. Louis and St. Louis County Police Departments respectively, heard that voice mail.
17. Those officers confirmed the time of the message by the phone’s internal computerized time keeping system.
18. Those officers did not save that message.

19. At 7:05 p.m. on December 27, 2011, Betsy Faria was alive.
20. Between approximately 5:00 p.m. and 9:39 p.m. that evening Mr. Faria had gone to the following places and done the following things, pursuant to the following evidence (with some times approximate because of drift of the merchant's time clocks):
  - a. Mr. Faria spoke to Betsy Faria by cell for two minutes at 5:11 p.m. - according to Mr. Faria's cell phone records.
  - b. Mr. Faria went to a Conoco station at 2 Merlin Drive, Troy, Mo from 5:16 p.m. to 5:20 p.m. and purchased gas - according to Conoco's merchant video.
  - c. Mr. Faria called his mother on his cell phone at 5:22 p.m. - according to Mr. Faria's cell phone records.
  - d. Mr. Faria went to "U-Gas" at 1235 Wentzville Parkway, Wentzville, MO 63385 from 5:31 p.m. to 5:32 p.m. and purchased cigarettes - according to U-Gas's merchant video.
  - e. Mr. Faria went to "Green's Country Store" at 8621 Highway N, Lake St. Louis, MO 63367 at 5:52 p.m. and purchased dog food - according to a receipt in Mr. Faria's car and the credit card receipt in possession of the store.
  - f. Mr. Faria went to a QuickTrip at 8334 Highway N, O'Fallon, Mo from 5:56 p.m. to 5:58 p.m. and purchased two bottles of iced tea - according to QuickTrip's merchant video.
  - g. Mr. Faria went to his friend Michael Corbin's house arriving at approximately 6:00 p.m., and he stayed there with four other persons until approximately 9:00 p.m., which was pursuant to a customary arrangement with him and those persons under which they would regularly meet on Tuesday nights play a board game,

sometimes “Role Masters” and sometimes “Talisman,” although that night they watched movies - according both to Mr. Faria and the four other persons who were at Mr. Corbin’s at that time and cell site data.

- h. After leaving Mr. Corbin’s Mr. Faria purchased two junior cheddar melt sandwiches at an Arby’s near Mr. Corbin’s house at 9:09 at 909 Robert Raymond Drive, Lake St. Louis, MO 63376 - according to the receipts which were in Mr. Faria’s car when he arrived at his home, and
  - i. After purchasing the sandwiches at Arby’s Mr. Faria drove the 24.6 miles from Arby’s to his house, with almost all the journey on Hwy 61 for which the speed limit varies between 60 and 65 miles per hour - trip to Arby’s according to cell site records.
21. All the above evidence, except the cell site records, was available to Defendants within a few hours of the murder.
  22. Within a few days after the murder Defendants issued an investigative subpoena to obtain various cell site records, including Mr. Faria’s cell site records, for the drive from the Arby’s to his home the night of the murder.
  23. Defendants received those records reasonably promptly thereafter.
  24. Those records confirmed that Mr. Faria’s phone traveled to the Corbins’ house, was present at that house, and then traveled to his home on Sumac Drive all at the above stated times.
  25. During his interrogations by law enforcement on the night of the murder and on the ensuing days Mr. Faria described that set of activities and locations in a consistently correct manner.

26. Mr. Faria's one error during his interrogations was to confuse the order of the gas stations he went to before he went to Mr. Corbin's house.
27. Mr. Faria corrected that error soon after he made it.
28. A few moments before 9:40 p.m. the evening of the murder Mr. Faria arrived at the family home and discovered his Wife's body.
29. At 9:40:10 p.m. Mr. Faria called 911.
30. During the 911 call Mr. Faria:
  - a. Was hysterical, crying and despondent, and
  - b. Said that he thought his Wife had committed suicide.
31. First responding police officers and firefighters arrived at the scene at approximately 9:49 p.m.
32. First Responders found:
  - a. Betsy Faria's body to be stiff and cold, and
  - b. The blood on the carpet and the blood on her clothes to have begun to dry and "set up."
33. The condition in which First Responders found the body and blood indicates that Betsy Faria had been deceased at least an hour and very likely more.
34. All witnesses and all evidence corroborated Mr. Faria's story of his whereabouts the evening of the murder.
35. Mr. Faria could not have committed the murder because he was elsewhere at the time Betsy Faria died.

**Story of Criminal Litigation: Mr. Faria Jailed, Tried, Found Guilty, Appellate Remand**

36. The night of the murder Officers took Mr. Faria from the house on Sumac Drive to the station.
37. Mr. Faria initially went to the station consensually.
38. Officers released Mr. Faria at approximately 4:30 p.m. on December 29, 2011, almost two days after the murder.
39. On January 4, 2012, six days after that initial release of Mr. Faria, Prosecuting Attorney Askey filed charges against Mr. Faria for:
  - a. First degree murder of his Wife, Betsy Faria, and
  - b. Armed criminal action.
40. Mr. Faria was arrested approximately five hours later.
41. The court set bail at \$1,000,000.00.
42. On Defendant's Motion the court reduced the bond to \$250,000.00.
43. Mr. Faria was still unable to make bail.
44. On January 24, 2012 the Lincoln County grand jury indicted Mr. Faria.
45. Mr. Faria's case came on for his first trial the week of November 18, 2013, almost two years after the murder.
46. Mr. Faria had by then been in the Lincoln County jail awaiting the trial for approximately 22 months.
47. That week the Circuit Court of Lincoln County tried Mr. Faria on the two charges.
48. The trial judge excluded from the trial all of Defendant's proffered evidence that someone else had committed the crime.
49. The jury in that trial found Mr. Faria guilty on both charges.
50. Mr. Faria filed timely appeal.

51. During his appeal, after the first few days, Mr. Faria was in the custody of the Missouri Department of Corrections.

52. On February 24, 2015 pursuant to a “Mooney Motion,” the Court of Appeals remanded Mr. Faria’s case to the trial court for consideration of whether to order a new trial.

**Order for New Trial, Bail, Second Trial, Not Guilty Verdict**

53. In June of 2015 the trial court ordered a new trial.

54. The trial court set bail at \$500,000.00 secured.

55. Mr. Faria hired a bondsman to secure his bail.

56. On June 16, 2015 Mr. Faria made bail.

57. As of that date Mr. Faria had been incarcerated for 41 months and 12 days, almost three and one half years.

58. In November of 2015 the case against Mr. Faria again came on for trial, this time without a jury.

59. The Court found Mr. Faria not guilty on both charges.

60. As of that finding of not guilty on the two charges the State lost all further legal right to prosecute Mr. Faria for those charges.

**Night of the Murder Investigation — Timing**

61. During the call to 911 Mr. Faria stated words to the effect of:

- a. I just arrived home,
- b. My wife has a knife in her neck, and
- c. My wife killed herself.

62. Officer Hollingsworth was the first police officer to enter the house.

63. When Officer Hollingsworth entered the house he observed that Mr. Faria was crying.

64. Officer Hollingsworth took Mr. Faria outside the house and gave him a blanket for warmth.
65. Officer Hollingsworth attempted to establish rapport with Mr. Faria by:
  - a. Using words to calm him,
  - b. Diverting his attention by giving him a cigarette, and
  - c. Talking about other topics such as where Mr. Faria grew up, etc.
66. Officer Hollingsworth placed Mr. Faria in the back of a patrol car.
67. First Responder then Fire Captain now Fire Chief Robert Shramek touched the body at approximately 9:51 p.m., and
  - a. Found the body cold and stiff, and
  - b. Observed that the blood outside the body was “setting up,” or drying.
68. The next morning Shramek confirmed that condition of the body and blood to City of St. Louis Major Case Squad Detective Mark Kurkowski.
69. At approximately 9:51 p.m. the night of the murder an EMS Supervisor, Michael Quattrocchi, examined the body. He later:
  - a. Stated at the scene to Corporal Michael Pirtle that the “victim was stiff,”
  - b. Stated within hours of the murder to Kevin Altman, a fire department subordinate who was writing a report, that he had found that the “[patient] had rigor mortis,”
  - c. Stated during an interview on December 28, 2011 with Detective Kurkowski and City of St. Louis Major Case Squad Detective Donald Thurmond that he had “approached the female and felt her arm and determined that the body was stiff and medical personnel were not needed,” and

- d. On December 30, 2011 during an interview by Michael Lang of the Lincoln County Sheriff's Department EMS Supervisor Quattrocchi stated that when he first examined the body it was:
  - i. Stiff and cool through his gloves,
  - ii. Cold, and
  - iii. Stiff and moderately firm.
- 70. Fire Captain Shramek and EMS Supervisor Quattrocchi stated in deposition and at trial that when they arrived at the scene at approximately 9:51 p.m. they each promptly reached the conclusion that Betsy Faria had been deceased for more than one hour.
- 71. Police officers remained in the Faria home investigating the crime continuously, well into the daylight hours of December 28, 2011, the day after the murder.
- 72. No officers who saw Mr. Faria the night of the murder saw any:
  - a. Blood or injuries on his body, or
  - b. Blood or signs of struggle on his clothes.

**Mr. Faria as Law Enforcement's Immediate and Only Suspect**

- 73. From the very beginning of the investigation both the officers investigating the crime and Defendant Prosecuting Attorney Askey considered Mr. Faria to be the only suspect.

**Questioning of Mr. Faria at Station – All Evidence Consistent with Alibi**

- 74. Approximately one hour after First Responders arrived at the scene Defendant Detective Merkel transported Mr. Faria to the Lincoln County Sheriff's Department.
- 75. When Officer Hollingsworth had first asked Mr. Faria to get in the patrol car to go to the Lincoln County Sheriff's Department:
  - a. Mr. Faria was not in custody, and

- b. Mr. Faria's agreed to go to the Sheriff's Department voluntarily.
76. At the Sheriff's Department Defendant Detective Merkel placed Mr. Faria in an interview room and began questioning him about the murder in a way that hinted to Mr. Faria that Defendant Detective Merkel thought Mr. Faria had committed the murder.
77. At that point, taking into account all of the circumstances surrounding the situation, Mr. Faria:
- a. As a reasonable person would have thought he was no longer free to leave, and
- b. Was therefore seized within the context of the Fourth Amendment.
78. The time when a reasonable person in Mr. Faria's position would have thought he was not free to leave was approximately 1:00 a.m. on December 28, 2011.
79. Later that evening Defendant Detective Merkel read Mr. Faria his Miranda Rights including stating that Mr. Faria had the right to remain silent.<sup>1</sup>
80. Early in the morning on December 28, 2011, several hours after the murder, Officer Raymond Floyd also read Mr. Faria his Miranda Rights.
81. As the interrogation proceeded Mr. Faria waived his Miranda Right in writing.
82. Defendant Detective Merkel interrogated Mr. Faria that night and into the next morning off and on for approximately four and a half hours.
83. At the conclusion of Detective Merkel's interrogation Officer Raymond Floyd of the Troy Police Department began a second interrogation of Mr. Faria that continued off and on for approximately six hours. Officer Floyd at times left Mr. Faria alone in the interrogation room.
84. The total interrogation time was approximately ten and a half hours.

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<sup>1</sup> Fifth Amendment to United States Constitution.

85. There was a pinhole camera in the interrogation room.
86. All the time Mr. Faria was in the interrogation room is recorded on video and audio tape.
87. Mr. Faria was cooperative throughout the interrogation.
88. When Mr. Faria was alone in the room he prayed, cried, repeated his wife's name, and asked "how could this have happened?"
89. During his interrogation Mr. Faria stated over and over his whereabouts during the evening and never wavered in his story.
90. The morning of the day of her murder Betsy Faria had sent Mr. Faria a text stating that he was "supposed to get dog food."
91. The next morning law enforcement found a dog food receipt in Mr. Faria's car.
92. When First Responders arrived at the scene a bag of dog food was just inside the entrance to the house.
93. The dog food was at the location where Mr. Faria later consistently stated he had put down the dog food when he first arrived home and before he saw his Wife's body on the floor.
94. Early in the morning after the murder Officers Michael McCann and Dean Frye went to the following places and did the following things:
  - a. Went to the Conoco station and viewed the video of Mr. Faria getting gas from 5:16 p.m. to 5:20 p.m. (time subject to drift), and seized the video.
  - b. Went to the U-Gas and viewed the video of Mr. Faria getting cigarettes from 5:31 p.m. to 5:32 p.m. (time subject to drift), and seized the video.
  - c. Went to the QuikTrip and viewed the video of Mr. Faria getting two bottles of tea from 5:56 p.m. to 5:58 p.m. (time subject to drift), and seized the video.

- d. Went to Green's Country Store and confirmed the accuracy of the dog food receipt and confirmed by clerk identification of photo that it was Mr. Faria who had purchased dog food at 5:52 p.m. (time subject to drift) on the day of the murder.
95. At approximately 6:00 a.m. on December 28, 2011, the morning after the murder, the same two officers, Michael McCann and Dean Frye, went to Mr. Corbin's house and questioned Mr. Corbin and his housemate, Angelia Hulion.
  96. The officers interviewed Mr. Corbin and Ms. Hulion together.
  97. Mr. Corbin and Ms. Hulion each stated that Mr. Faria had been with them at Mr. Corbin's residence the night before from approximately 6:00 p.m. to 9:00 p.m.
  98. Mr. Corbin and Ms. Hulion each further stated that the group at Mr. Corbin's had been one short of the sufficient number of players to play Role Masters, and so they had:
    - a. Watched a new "Conan Movie" instead of playing a board game,
    - b. Had then started to watch another movie called "The Road," and
    - c. Had at approximately 9:00 p.m. all decided to end the evening instead of finishing watching that movie.
  99. During that part of their conversation with the Officers Mr. Corbin and Ms. Hulion did not yet know Betsy Faria was dead.
  100. Mr. Corbin and Ms. Hulion each acknowledged during the interview that everyone at Mr. Corbin's house the prior evening had smoked marijuana.
  101. The same two officers, Michael McCann and Dean Frye then went to the residence of Brandon Sweeney and Marshall Bach, who were themselves roommates and who had

also been at Mr. Corbin's house with the others from approximately 6:00 p.m. to 9:00 p.m.

102. The officers interviewed Mr. Sweeney and Mr. Bach together.
103. Mr. Sweeney and Mr. Bach each confirmed that Mr. Faria had been with them at Mr. Corbin's during that time period.
104. At that point of their conversation with the officers, Mr. Sweeney and Mr. Bach did not yet know Betsy Faria was dead.
105. Mr. Sweeney and Mr. Bach stated that the group at Mr. Corbin's had been one short of the sufficient number of players to play Role Masters, and so they had:
  - a. Watched a new "Conan Movie" instead of playing a board game,
  - b. Had then started to watch another movie called "The Road," and
  - c. Had at approximately 9:00 p.m. all decided to end the evening activities instead of finishing watching that movie.
106. Mr. Sweeney and Mr. Bach each acknowledged during the interview that everyone at Mr. Corbin's house the previous evening had smoked marijuana.
107. In the ensuing days various officers re-interviewed all those people on video tape, each one separately, as follows:
  - a. Brandon Sweeney by Stephanie Kaiser and Perry Smith,
  - b. Marshall Bach by Dean Frye and Michael McCann,
  - c. Michael Corbin by Keith Reiter and Ray Floyd, and
  - d. Angelia Hulion by Roger Mauzy and Steve Queen.
108. The stories told by the subjects during those re-interviews were consistent with their prior statements.

109. On December 29, 2012 Defendant Detective Merkel examined text messages on Mr. Faria and Betsy Faria's respective phones and learned that:
- a. The morning of her murder Betsy Faria had texted Mr. Faria to ask if Mr. Faria would be going to game night that evening,
  - b. Mr. Faria had virtually immediately texted to the usual attendees of game night to determine whether the group would still get together even though Richard May was not available and so they would not have enough people to play Role Masters,
  - c. The usual attendees, except Mr May, then confirmed by text that they would get together anyway,
  - d. Mr. Faria then texted Betsy Faria that game night was on, and that he would pick her up at her mother's.
110. As the investigation continued Defendant Detective Merkel checked on Mr. May's story and confirmed with Mr. May, Mr. May's boss, and Mr. May's friend that indeed Mr. May had been working that night.

**No Blood or Flesh on Clothes or Under Fingernails, No Victim DNA on Foot Swabs**

111. Law enforcement officers were able to see on each of the merchant videos that Mr. Faria had on the same clothes, hat, jackets, and boots before going to Mr. Corbin's house as he had on when he arrived home and when he was eventually taken to the station.
112. CSI Investigators and the pathologist testified truthfully and without dispute at both trials that it would have been virtually impossible for the actual murderer not to have had blood on his body or clothes, or there not to have been some signs of struggle on the body or the clothes.

113. The afternoon after the murder, Officers took away Mr. Faria's clothes and had him put on jail garb.
114. Defendant Detective Merkel sent Mr. Faria's clothes to a lab for a determination of whether there was blood on the clothes.
115. Several weeks later the lab reported that there was no blood on Mr. Faria's clothes.
116. During his interrogation during the hours after the murder Lincoln County Sheriff's Department Civilian Employee Rebecca Mueller, (n/k/a Rebecca Merkel and now married to Defendant Detective Merkel), took nail clippings from Mr. Faria's fingers and "swabs" from Mr. Faria's hands and feet.
117. Law enforcement officers sent those nail clippings and swabs to a police lab for a determination of whether there was any of Betsy Faria's blood or DNA on Mr. Faria's nails, hands or feet.
118. The police lab tests found the nail clippings negative for blood.
119. The report from the lab concluding that the clippings and swabs were negative for blood was properly disclosed to criminal defense counsel.
120. On Thursday, October 29, 2015, four days before the second trial, Defendant Prosecuting Attorney Askey disclosed to criminal counsel that a lab technician named Daniel Fahnstock had very recently conducted additional tests and would testify there was a "weak positive reaction" on a test for hemoglobin on one of the swabs of one of Mr. Faria's feet.
121. The DNA was consistent with the DNA of Mr. Faria.
122. Betsy Faria was excluded as a source of that DNA.

123. At the second trial Mr. Fahnstock, in response to inquiry from Defendant Prosecuting Attorney Askey, stated that the DNA on the sample was consistent with DNA of Mr. Faria.
124. In response to a hypothetical question from Defendant Prosecuting Attorney Askey, Mr. Fahnstock stated that it was theoretically possible that a small amount of DNA from Betsy Faria could have been present on the sample and had just not appeared on the test.
125. Mr. Fahnstock further testified that there was no evidence that this hypothetical had occurred.
126. In swabs of a person's hands or feet it is common to find that person's own blood.
127. Such blood might come from a cut, a mole, or any number of routine physiological factors.

**Late Disclosed Evidence Regarding Kitchen Clean-up, Contradictory Evidence**

128. For the prosecution's theory that Mr. Faria committed the murder to be remotely plausible law enforcement had to show that there had been a clean up of blood.
129. In the early minutes of the investigation Corporal Pirtle "cleared the residence," which means he checked all rooms to assure that there were no other persons or threats at the premises.
130. At the first trial Defendant Prosecuting Attorney Askey argued, without supporting evidence, that Mr. Faria committed the murder and then took a shower to clean up.
131. At the second trial in November 2015 Officer Pirtle offered surprise testimony that as he had cleared the residence he had noted water droplets on the floor of the shower.

132. It is customary in an officer's effort to "clear the residence" for the officer to spend an extremely short amount of time in each room, because the purpose in each room is only to confirm that no one is in that room in order to assure that the premises are empty.
133. The amount of time a reasonable officer would spend clearing a bathroom would be a matter of mere seconds.
134. On inference it would have been impossible for Officer Pirtle to have noticed such a tiny detail as droplets during his presence in the bathroom for mere seconds.
135. On inference it would have been impossible for Officer Pirtle to have independently recalled that detail years later when no report had ever been written about it.
136. Corporal Pirtle was interviewed by Officer Hollingsworth the morning after the murder.
137. Officer Hollingsworth's report mentioned nothing about Corporal Pirtle having information material to the investigation, particularly, nothing about droplets in the shower.
138. Corporal Pirtle never wrote any report of any kind.
139. Before the second trial Defendant Prosecuting Attorney Askey listed Corporal Pirtle as a witness for the state.
140. Before that trial Defendant Prosecuting Attorney Askey did not disclose to criminal defense counsel what information Corporal Pirtle had, if any, which was material to the investigation.
141. Under Missouri law and *Brady v Maryland*, the prosecution in a criminal case has an absolute duty to disclose to criminal defense counsel all exculpatory, inculpatory and contradictory statements of witnesses, and all records and memoranda of witness statements.

142. During the second trial Defendant Prosecuting Attorney Askey elicited testimony from Corporal Pirtle that Corporal Pirtle had first told her about the droplets earlier that summer.
143. Before the second trial Defendant Prosecuting Attorney Askey did not disclose to criminal defense counsel that Corporal Pirtle had stated to her that he had seen droplets.
144. Corporal Pirtle's testimony about the droplets was an attempt to explain why Mr. Faria had no blood on his body, that is, Corporal Pirtle's testimony about the droplets was an attempt to make the fact finder believe Mr. Faria had taken a shower after the murders.
145. A Crime Scene Investigator, Amy Pratt, n/k/a Amy Bittner, arrived at the Faria home at 5:00 a.m. the morning after the murder.
146. CSI Investigator did a full investigation of the scene including the bathroom.
147. Amy Pratt, n/k/a Amy Bittner later testified under oath that she found no droplets in the shower, that the towels were not wet, and there was no other evidence of recent showering or bathroom usage.

#### **Black Leather Gloves**

148. In all the merchant videos of Mr. Faria taken the evening of the murder Mr. Faria was without gloves.
149. First Responders found a pair of black leather gloves on the back of a couch near the body.
150. If there had been a third party's DNA on those gloves that would have been evidence that such a third party had been present, at some point, perhaps during the evening of the murder, and might have been the true perpetrator of the murder.

151. Conversely if there had been DNA from Betsy Faria and/or Mr. Faria on the gloves it would have been meaningless.
152. Any evidence of DNA therefore had potential only to help to Mr. Faria but had no potential to help the State.
153. CSI investigator Tiffany Fisher wanted to test the gloves for DNA and made repeated e-mail requests to Prosecuting Attorney Askey until just before the second trial for that testing.
154. Prosecuting Attorney Askey never responded to those requests until just before the second trial.
155. The prosecution finally tested the gloves a few weeks before the second trial.
156. The gloves came back with Mr. Faria's DNA and no other person's DNA.

**Alleged Dog Print –Prosecuting Attorney Askey Refuses Blood Test on Paw**

157. When law enforcement arrived at the house the night of the murder the Faria family dog, "Sissy," was outside on a lead.
158. During her interview on the morning after the murder Pamela Marie Hupp said that when she had dropped off Betsy Faria at the house on Sumac Drive at 7:04 p.m. Betsy Faria had put the dog outside on the lead.
159. The prosecution asserted at both trials that there was:
  - a. A paw print on Betsy Faria's posterior.
  - b. The paw print was bloody.
  - c. Evidence of the paw print was evidence that the dog had been inside at the moment of the murder and had touched the bloody body of Betsy Faria,

- d. Only Mr. Faria could have let the dog in and then taken the dog back out after the murder, and
  - e. Therefore Mr. Faria was the murderer.
160. The morning after the murder CSI Investigator Pratt requested to Defendant Prosecuting Attorney Askey that the dog's paw be tested for blood.
161. The St. Charles County Crime Lab was at that time prepared to do that test.
162. Detective Harney contacted Defendant Prosecuting Attorney Askey to discuss whether the test would occur.
163. Defendant Prosecuting Attorney Askey overruled the request to test the dog's paw for blood.
164. Defendant Prosecuting Attorney Askey directed CSI Investigator Pratt only to take an ink impression of the dog's paw to see if the impression would match the mark on Betsy Faria's posterior.
165. By refusing to permit a test of the presence of blood, Defendant Prosecuting Attorney Askey caused the investigation to shift from searching for the perpetrator to searching for evidence that would support her chosen theory.
166. At this time Defendant Detective McCarrick was in charge of the investigation but he and other members of the investigating team were deferring to Defendant Prosecuting Attorney Askey.
167. Inside the house when police arrived at the scene there were no paw prints on the floor and there were no dog print impressions in the blood.
168. If the paw had been negative for blood the theory that the paw print was on the body and only Mr. Faria would have been able to let the dog out would have been at least

somewhat discredited, although admittedly there would have been an argument that the blood on the paw had dissipated in the interim.

169. In 2015 Defendant Prosecuting Attorney Askey first retained an investigator named Harry Belcher.
170. At the second trial Mr. Belcher testified that the impression of the dog's paw and the mark on Betsy Faria's posterior matched.
171. On information and belief other investigators had refused to offer such an opinion.
172. There is no forensic integrity to "paw prints," as there is with "finger prints," nor did Mr. Belcher have any expertise or basis for his testimony.

**"Polygraph" of Mr. Faria**

173. In the afternoon of the day after the murder Officers Floyd and Keith Rider told Mr. Faria they were taking him from the Lincoln County jail to the Lake St. Louis police station for a polygraph.
174. On information and belief Defendant Sergeant McCarrick was aware of all the details in the following paragraph regarding the polygraph.
175. At the Lake St. Louis police station Lake St. Louis Officer Gary McIntyre:
  - a. Directed Mr. Faria sit in a chair,
  - b. Put a band or wire around Mr. Faria's chest,
  - c. Put on a blood pressure cuff on Mr. Faria's arm, and
  - d. Put what appeared to be a heart rate monitor on Mr. Faria's finger.
176. Officer McIntyre asserted to Mr. Faria that he was going to administer a polygraph.
177. Officer McIntyre sat at his laptop and asked Mr. Faria questions.

178. At that time Mr. Faria had been awake for approximately 32 hours, and had admittedly smoked marijuana with his friends at approximately 18 hours earlier, both of which Officer McIntyre was aware of.
179. According to customary procedure and for purposes of the scientific relevance of the responses to a polygraph test, it is improper to administer a polygraph to a person who:
  - a. Is sleep deprived, or
  - b. Has smoked marijuana within the prior 24 hours
180. According to proper procedure related to polygraphs:
  - a. A polygraph test is to be recorded by visual and audio means, and
  - b. The administrator of the polygraph is to promptly prepare a detailed report of the polygraph session.
181. Officer McIntyre stated to Mr. Faria that the polygraph was being recorded by both camera and audio recorder.
182. Criminal defense counsel later made several demands on Prosecuting Attorney Askey for copies of the recordings.
183. Defendant Prosecuting Attorney Askey told Defense counsel that the recording equipment which should have recorded the polygraph examination failed and so there was no video or audio.
184. Two days after the alleged polygraph, on December 30, 2011 Officer McIntyre wrote a report which stated that while Mr. Faria was hooked up to the polygraph machine:
  - a. Officer McIntyre asked Mr. Faria Preliminary questions to establish a “zone comparison,”

- b. Mr. Faria told McIntyre he would tell the truth as to whether he had killed Betsy Faria,
  - c. In response to the question: “Did you kill Betsy Faria?” Mr. Faria answered “No,”
  - d. In response to the question: “Did you kill Betsy Faria with a knife?” Mr. Faria answered “No,” and
  - e. In response to the question: “Do you know for sure who killed Betsy Faria?” Mr. Faria answered “No.”
185. In August or September 2012 Prosecuting Attorney Askey turned over that written summation of the polygraph.
186. The summary report stated that when Mr. Faria denied murdering Betsy Faria there were “significant consistent physiological responses indicative of deception.”
187. In response to criminal defense counsel’s request for the raw data from the polygraph:
- a. Before the first trial Defendant Prosecuting Attorney Askey stated that the raw data did not exist,
  - b. Before the second trial criminal defense counsel asked Officer McIntyre and his superior for the raw data,
  - c. Officer McIntyre and his superior stated that the raw data was available for pick-up by the Lincoln County Prosecuting Attorney’s office but that Lake St. Louis would not turn it over unilaterally, and
  - d. Criminal defense counsel never received the raw data.

188. On information and belief and on inference at the Lake St. Louis police station immediately after the alleged polygraph Officer McIntyre gave an oral report about the polygraph to Officers Floyd and Keith Rider.
189. After the polygraph and while they and Mr. Faria were still at the Lake St. Louis police station, Officers Floyd and Rider interrogated Mr. Faria extensively and several times told Mr. Faria that Mr. Faria had failed the polygraph and that they believed he had committed the murder.
190. Over and over they demanded that Mr. Faria confess.
191. Over and over Mr. Faria denied committing the murder.
192. That conversation was recorded on video.
193. Defendant Prosecuting Attorney Askey produced the video of that conversation.
194. In the alternative and on inference the polygraph was only a faux polygraph and no real polygraph was administered.
195. In the alternative and on inference the point of the faux polygraph was to induce Mr. Faria to confess to the murder by telling him he had flunked the polygraph which would then make him fearful and so make him think that if he were truthful he would get better treatment from law enforcement.
196. To the extent the polygraph was only a faux polygraph, Defendants never disclosed to Faria's criminal defense team that the polygraph was only faux.
197. While it may or may not be constitutionally permissible to administer a faux polygraph in order to try to elicit a confession, if a polygraph is faux it is unconstitutional to fail to disclose that fact to criminal defense counsel.

**At Approximately 4:30 p.m. in Lake St. Louis Mr. Faria Placed in Handcuffs**

198. At the conclusion of the interview in Lake St. Louis by Officers Floyd and Keith Rider at approximately 4:30 p.m. Officers Floyd and Rider placed Mr. Faria in handcuffs.
199. Officers Floyd and Rider took Mr. Faria back to the Lincoln County Sheriff's Department.
200. At that time Defendant Prosecuting Attorney Askey was intimately involved in the investigation.
201. On inference at that time Defendant Detective McCarrick was formally leading the investigation and was the decision maker as to whether to release Mr. Faria, although Defendant Detective McCarrick was informally deferring to Defendant Prosecuting Attorney Askey on some issues.
202. At approximately 1:00 in the morning on December 29, 2011, or, more particularly, during Mr. Faria's initial seizure after the expiration of 24 hours after Mr. Faria would not as a reasonable person have believed he was free to leave, Defendant Detective McCarrick did not release Mr. Faria from custody.

**Pursuant to Warrant Clothing and Fingernail Clippings Seized**

203. After Mr. Faria's return to Lincoln County Defendant Detective Merkel obtained a warrant to seize Mr. Faria's clothing and fingernail clippings.
204. Detective Merkel seized those things.

**Release of Mr. Faria, Askey Seeks More Evidence in Order to Charge Mr. Faria**

205. On December 29, 2011, at approximately 4:30 p.m., 24 hours after Mr. Faria's handcuffing, and approximately 41 hours after the murder, and approximately 39½ hours into the time period during which Mr. Faria had been under arrest, the Lincoln County Sheriff's Department released Mr. Faria from custody.

206. After Mr. Faria's release Prosecuting Attorney Askey informed the following persons that she would need additional evidence in order for her to charge Mr. Faria with a crime:
- a. On inference Defendant Detective McCarrick and Defendant Detective Merkel,  
and
  - b. Mike Rush of KSDK,

**Nature of a "Blue Star" Test**

207. "Blue Star" is a chemical which when applied to a surface on which there is blood (or certain other substances) will glow or create "luminescence."
208. Under conditions of darkness the luminescence from Blue Star's interaction with blood is:
- a. Easily detected with the naked eye,
  - b. Readily visible in a photograph.
209. Blue Star normally reacts with even small amounts of blood, including traces in areas where a person has used a rag or similar item to clean up blood, but also reacts to common household cleaning products, proteins from meat such as dog food and beet juice.
210. The Blue Star test works well on flat hard surfaces such as tile floors, cabinets, cabinet door handles, etc.
211. If a Blue Star test is negative, that is, if there is no luminescence, one may conclude that there is no blood in the tested area.
212. If a Blue Star test is positive, that is, if there is luminescence, one must engage in additional testing to determine whether the source material which has caused the luminescence is blood or is some another substance which is also reactive.

213. If further testing after an initial positive result fails to show the presence of blood and only shows the presence of other non-blood reactive substances, then the Blue Star test is deemed a “false positive.”

#### **Search for Blood Clean-Up**

214. During the investigation at the Faria home immediately after the murder there was no visible blood at the Faria house except:
- a. At the location of Betsy Faria’s body,
  - b. On a light switch plate, and
  - c. On a pair of slippers in the bedroom closet.
215. On January 3, 2012 Defendant Prosecuting Attorney Askey submitted to the court an application for a search warrant for the Faria home to search for evidence of clean up of human blood.
216. Defendant Detective McCarrick signed an affidavit in support of the application for the search warrant.
217. The Court issued the warrant.
218. Defendant Detective Merkel, Lincoln County Sheriff’s Department Civilian Employee Rebecca Mueller (n/k/a Rebecca Merkel), and Defendant Merkel’s then Supervisor, Detective Ryan McCarrick:
- a. Went to the home pursuant to the warrant,
  - b. Applied Blue Star to areas of the kitchen,
  - c. Observed the area where they had applied the Blue Star,
  - d. Took pictures, and
  - e. Seized certain tiles and cabinet faces from the kitchen.

**No Blood on the Tiles**

219. On January 30, 2012, 27 days after the execution of the search warrant, law enforcement submitted the tiles and cabinet faces to the St. Charles Sheriff's Department Crime Lab for determination of whether they had blood on them.
220. Daniel Fahnstrock at the crime lab conducted tests for human blood on the cabinet faces and tiles.
221. The crime lab delivered its report back to the detectives on or about March 22, 2012.
222. All the tests were negative for human blood.
223. On August 20, 2012 Prosecuting Attorney Askey mailed to Mr. Faria's criminal defense team a copy of the crime lab report confirming that the seized cabinet doors and tiles from the kitchen floor were negative for human blood.

**Testimony and Evidence Regarding the Search and Luminescence Test**

224. During the first trial Defendant Detective Merkel began testifying about the January 3, 2012 search for blood at the house on Sumac Drive pursuant to the warrant.
225. At that time criminal defense counsel:
  - a. Was aware that the search had occurred because the probable cause statement in the original charge stated that the search had occurred, but
  - b. Did not know who had conducted that search, and
  - c. Had received no formal report of that search.
226. Criminal defense counsel had received a report from Mr. Fahnstrock of the St. Charles County Crime Lab that the tiles and cabinet faces seized during the search were negative for blood.

227. As Defendant Detective Merkel began to testify criminal defense counsel immediately objected to the testimony of Defendant Detective Merkel about that search because Defendant Prosecuting Attorney Leah Askey had not previously:
- a. Identified Defendant Detective Merkel as the person who conducted the search, or
  - b. Provided a report on the original search.
228. With Defendant Detective Merkel on the stand Defendant Prosecuting Attorney Askey handed to Defendant's criminal counsel an undated report prepared by Defendant Detective Merkel, (the "Merkel Luminescence Report"), which described the search and mentioned photographs of luminescence.
229. The Court overruled criminal defense counsel's objection.
230. Defendant Merkel then testified on direct exam:
- a. "It's just like following a trail of breadcrumbs," and
  - b. There were "spots,"
  - c. "I would call it more a path. It wasn't as finite as a specific trail, but there seemed to be a general direction."
  - d. (While looking at a picture of the interior of the house) "maybe in front of this rug and extending into the kitchen."
  - e. "The only area that showed the luminescence was this cabinet to the left of the stove, and not even the lower portion but the upper portion... the face of the drawer."
  - f. "[In the drawer] were hand towels."
231. Defendant Merkel then testified on cross:
- a. That he had taken pictures,

- b. Those pictures showed “absolutely nothing” because of a “malfunction in our camera that we have had since been repaired,” but
  - c. That he had visually observed luminescence during the test.
232. The relevant paragraph of the Merkel Luminescence Report stated:
- The blue color luminescence was present in several areas of the kitchen and dining room. Areas where luminescence was present were photographed and subsequently seized for further forensic examination. Other areas indicating the presence of blood with a blue color luminescence were portions of the cabinet facings in the kitchen. These areas too were photographed and seized for further forensic examination.
233. Before the second trial in October 2015 criminal defense counsel deposed Defendant Detective Merkel.
234. During that deposition criminal counsel attempted to elicit testimony from Defendant Detective Merkel regarding the Blue Star test, any luminescence he had seen, and the content of the Merkel Luminescence Report.
235. Defendant Detective Merkel testified that because the subpoena for the deposition had not provided specifics about what he was to review for the deposition,
- a. He had reviewed nothing,
  - b. So he remembered nothing,
  - c. Would answer nothing, and
  - d. Would not take a break in the deposition to review his reports.
236. Defendant Prosecuting Attorney Askey asserted for the record during that moment of the deposition that Defendant Detective Merkel’s inability to recall was “fair” because of the lack of specificity in the subpoena.
237. During the deposition Defendant Detective Merkel did testify that he recalled that during the luminescence test the camera had malfunctioned.

238. Criminal defense counsel did not re-depose Defendant Merkel.
239. The box on the Merkel Luminescence Report labeled “Date & Time” is blank.
240. Words at the bottom of the Merkel Luminescence Report state:
- Entered By: Michael Merkel/Lincoln County MO on 04/03/2013 08:46 AM*
- (italics in original)
241. The date “04/03/2013” was over fifteen months after the murder.
242. The box on the Merkel Luminescence Report labeled “Report Approval” reads:
- Approved 9Apr13 09:51:30 AM Approved: Ryan McCarrick
243. Reading “9” as the day of month and “13” as the year is the only reasonable explanation of how to read the date.
244. The date April 6, 2013 is six days after the above computer entry date.
245. On inference Defendant Detective Merkel created the report during or soon before April 2013 and not a time close to the search itself.
246. Before the second trial, after many requests from criminal defense counsel, Prosecuting Attorney Askey produced a disk which contained 132 photos taken during the luminescence test.
247. Those photographs showed slight luminescence in one or two places.
248. The luminescence locations were not in any “path” “extending to the kitchen.”
249. The photos showed no luminescent swiping patterns.
250. The fact that there were photographs at all contradicted Defendant Detective Merkel’s testimony in the first trial that the photographs showed “absolutely nothing.”
251. Although very minor luminescence was visible such luminescence was inconsistent with a cleanup of blood in the home.

252. During the first trial Defendant Prosecuting Attorney Askey's theory of the case, as stated in closing, was that:
- a. Mr. Faria had cleaned up after the murder,
  - b. No other person would be concerned about cleaning up after the murder,
  - c. Only Mr. Faria would know a direct path to the towels and where the towels were stored,
  - d. Therefore Mr. Faria had been home at the time of the murder,
  - e. Therefore all the alibi witnesses were lying, and
  - f. Therefore Mr. Faria was the murderer.
253. On inference before that trial Defendant Prosecuting Attorney Askey concealed from criminal defense counsel the photographs which were inconsistent with Defendants' assertions about the luminescence test.
254. At crime scenes where there has been a cleanup it is almost always obvious that the cleanup has occurred, due to the presence of other evidence.
255. At the second trial CSI agent Amy Bittner, f/k/a Amy Pratt, who had been in the house the morning after the murder, testified that she had concluded that there had been no clean up because:
- a. She smelled no odor of cleaning solutions, and
  - b. The floor was noticeably dirty.
256. On inference the luminescence test failed to reveal evidence of a clean up and at the conclusion of the luminescence test any reasonable officer would have known that fact.

**Details of Probable Cause Statement - Para. G**

257. Under Missouri Rule 22.02(e) a Prosecuting Attorney's formal charge against a criminal Defendant must have attached to it a probable cause statement.

258. On January 4, 2012 eight days after the murder Detective Sgt. McCarrick signed under penalty of perjury a Probable Cause Statement related to this prosecution asserting:

I have probable cause to believe that Russell Faria, 02/12/1970, XXX-XX-0286, W/M 130 Sumac Drive, Troy, Missouri (Lincoln County), committed the criminal offense of Murder in Lincoln County, Missouri (2011 -26081).

259. The Probable Cause Statement contained eight subsequent paragraphs labeled "A" – "H." Of those eight subsequent paragraphs, only Para. G contained evidence obtained after:

- a. The initial release of Mr. Faria,
- b. Prosecuting Attorney Askey's demand to the officers that they develop more evidence before she could charge Mr. Faria with the murder, and
- c. Prosecuting Attorney Askey's statement to reporters for KSDK that she was "fast tracking" testing in hopes that it was "only a matter of time before she charge [Mr. Faria] with murder."

260. Para. G states in total:

On 01/03/2012, Detectives from the Criminal Investigations Division of the Lincoln County Sheriff's Office obtained a second search warrant for 130 Sumac Drive. **This search warrant was obtained to find any additional blood evidence, through the use of illuminating materials, which may have been cleaned away from the crime scene prior to the first responding Deputies.** It should be noted, Russell said the dog was outside when he arrived at the residence to find Betsy, and the dog was outside when Deputies responded to the scene at approximately 2149 hours. After extensive review of the original crime scene, and the crime scene photographs, it was determined that a blood pattern found on Betsy's pants matched that of the family dog's paw. **Lincoln County Crime Scene personnel illuminated blood evidence, which had been cleaned from the crime scene, on the vinyl floor between the area Betsy was found, and the patio door used by Betsy and Russell Faria to let the dog outside. In addition, blood evidence, which had been cleaned from the crime scene, was also illuminated on the vinyl floor in the galley area of the kitchen and on the kitchen sink. Furthermore, blood evidence, which had been cleaned from the**

**crime scene, was illuminated on the handle of the kitchen drawer used by Betsy and Russ Faria to hold towels.** It should be noted, the remaining drawers in the kitchen did not illuminate blood evidence, suggesting prior knowledge of the towels location, without the need for a search. These items, along with the kitchen sink trap and a mop head found in the laundry room, were seized by Lincoln County Sheriff's Office personnel for DNA matching. (Emphasis added.)

261. The false statements in Para. G include but are not limited to that:
  - a. Blood evidence "had been cleaned from the crime scene," and
  - b. Blood evidence "was illuminated on the handle of the kitchen drawer used by Betsy and Russ Faria to hold towels."
262. The evidence in the Probable Cause Statement excluding Para. G was insufficient to create probable cause for a belief that Mr. Faria murdered Betsy Faria.
263. In the alternative, including Para. G with the Probable Cause Statement and assuming Para. G to be truthful, the evidence described was insufficient to create probable cause for a belief that Mr. Faria murdered Betsy Faria.

**On inference, Prosecuting Attorney Aware Luminescence Inconsistent with Clean Up**

264. On inference, at the stage of the investigation when the search warrant had been issued and the police had completed the luminescence test and so knew it showed no evidence of a cleanup, Prosecuting Attorney Askey, Detective Sgt. Ryan McCarrick, author of the probable cause statement, and or Defendant Detective Merkel had a meeting of the minds to fabricate evidence against Mr. Faria by stating that the luminescence test did show evidence of a cleanup.
265. Detective Sgt. McCarrick fabricated evidence by describing luminescence in Para. G of the probable cause statement.

266. Para. G of the probable cause statement was false because as shown by the finally produced photographs there was no luminescence consistent with blood in any relevant area or with a clean up of blood.

**Mr. Faria Not Released Even When Defendants Knew Para G. to be False**

267. The only material additional evidence allegedly developed by law enforcement between Mr. Faria's release on December 29, 2011 and his re-arrest on January 4, 2012 pursuant to the probable cause statement and the filing of a formal charge by Defendant Prosecuting Attorney Askey was whatever evidence law enforcement learned from the luminescence test.

268. In March 2012 after the return of the report that tiles and cabinet faces were without blood Defendants failed to promptly:

- a. Provide this evidence to Faria's criminal defense team, and
- b. Drop the charges and release Mr. Faria.

269. In the alternative by on or about March 22, 2012 the return of the tiles and cabinet faces negative for human blood informed detectives working on the case and Prosecuting Attorney Askey that their theory in Para. G of the probable cause statement was wholly false and could not be the basis for probable cause to believe Mr. Faria had committed the crime.

**Nature of Faria Marriage – Cruise, Improving**

270. The marriage of Mr. Faria and Betsy Faria had ups and downs, including affairs by each for which each had forgiven the other.

271. In the years and months before the murder Mr. Faria and Betsy Faria had begun attending a new church and Mr. Faria believed the marriage was improving.

272. In 2010 Betsy Faria contracted cancer.
273. In 2011 Betsy Faria was declared cancer free.
274. In October 2011 Betsy Faria relapsed, and was then expected to live three years.
275. In November of 2011 Mr. Faria and Betsy Faria took a week-long cruise with several friends.
276. The cruise had been planned before the relapse but on the cruise they called it a “survival cruise.”
277. Mr. Faria and Betsy Faria were very happy together during the cruise.

**IGNORING OBVIOUS SUSPECT - PAMELA MARIE HUPP**

**Betsy Faria Makes Pamela Marie Hupp Beneficiary of Life Insurance Policy**

278. On or about December 23, 2011 Betsy Faria executed a Change of Beneficiary form for a \$150,000 State Farm life insurance policy on her life changing the beneficiary from Mr. Faria to Pamela Marie Hupp.
279. On December 23, 2011 Laura Mangenelli, a librarian at the Wing Haven Branch of the St. Charles County Public Library, witnessed Betsy Faria execute the Change of Beneficiary form.
280. Pamela Marie Hupp was present when Betsy Faria executed the Change of Beneficiary form.
281. As to the mailing of the Change of Beneficiary Form to State Farm:
- a. Pamela Marie Hupp stated to police officers Perry Smith and Stephanie Kaiser on December 28, 2011, the morning after the murder, in response to the question as to whether the Change of Beneficiary form was ever mailed that “I have no idea, I have no idea,”

- b. Pamela Marie Hupp stated to Carol Walker, an official from State Farm on January 17, 2012 that “after the form was witnessed she, [Pamela Marie Hupp], and insured [Betsy Faria] went to the post office in O’Fallon, and insured went inside to mail the Change of Beneficiary request because she [the insured] wanted to be sure it was postmarked.”
  - c. Pamela Marie Hupp stated during her deposition on March 20, 2013 “We went to the post office later that day. She went one way I went the other. I wasn’t holding her hand, so I don’t know.”
282. State Farm recorded receipt of the Change of Beneficiary form after the death of Betsy Faria.

**Whereabouts of Betsy Faria and Pamela Marie Hupp – Cell Phone Records**

283. The morning after the murder Officers Smith and Kaiser reviewed text messages on Pamela Marie Hupp’s phone and Betsy Faria’s phone and learned the following.
- a. Betsy Faria was to have chemotherapy the morning of December 27, 2011, the day of the murder,
  - b. Betsy Faria stated that she wanted “one on one” time with Bobbi Wann, a friend of Betsy Faria’s mother who was in from out of town,
  - c. Bobbi Wann went with Betsy Faria from Betsy Faria’s mother’s house to chemo,
  - d. Before the time chemotherapy was to begin Pamela Marie Hupp went to Betsy Faria’s mother’s house to look for Betsy Faria and then went to the Siteman Cancer Center in St. Charles where Betsy Faria was by then receiving her chemotherapy, and

- e. At chemotherapy Pamela Marie Hupp offered and Betsy Faria accepted Pamela Marie Hupp's offer to take Betsy Faria home later in the evening,
284. At the second trial Betsy Faria's daughter stated that Betsy Faria and Bobbi Wann were surprised and "disappointed" that Pamela Marie Hupp had showed up at chemotherapy.
285. Medical records indicate that chemotherapy ended at approximately 2:30.
286. According to undisputed deposition and trial testimony:
- a. After chemotherapy Bobbi Wann took Betsy Faria to Betsy Faria's mother's house,
  - b. Betsy Faria remained at Betsy Faria's mother's house until approximately 6:30 p.m.
  - c. While Betsy Faria was at Betsy Faria's mother's house Pamela Marie Hupp arrived there, waited with Betsy Faria and her mother for a period of time, and then left with Betsy Faria.
287. At 3:43 p.m. on December 29, 2016, two days after the murder, law enforcement received and reviewed copies of texts from Mr. Faria's phone which indicated that between 3:46 and 3:57 p.m. on the afternoon of the murder Mr. Faria and Betsy Faria exchanged texts in which:
- a. Betsy Faria indicated Pamela Marie Hupp "wanted to bring" Betsy Faria home from Betsy Faria's mother's house and that Betsy Faria had accepted the offer of Pamela Marie Hupp to drive Betsy Faria from Betsy Faria's mother's house, and
  - b. Mr. Faria confirmed that he understood that Pamela Marie Hupp would be driving Betsy Faria home.
288. It was at least an hour round trip for Pamela Marie Hupp to take Betsy Faria home.

289. It would have been an approximately five minute detour from game night for Mr. Faria to drive to Betsy Faria's mother's house and to pick up her up there so he could take Betsy Faria home.
290. The morning after the murder on December 28, 2011 Officers Smith and Kaiser learned from Pamela Marie Hupp's phone that the evening of the murder at 7:04 p.m. there had been a phone call from the phone of Pamela Marie Hupp's to the phone of Pamela Marie Hupp's Husband, Mark Hupp at 7:05 p.m.
291. On December 29, 2011 Officers Michael Reiter and Donald Thurmond interviewed Pamela Marie Hupp and Mark Hupp together.
292. The officers listened to the voice mail which had been left during the 7:05 cell phone call.
293. As stated above, those officers did not seize the phone or record the voice mail.
294. According to those Officers' later written reports:
- a. Pamela Marie Hupp stated in the voice mail that she was getting ready to leave Betsy Faria's, and
  - b. Betsy Faria took the phone and stated "Merry Christmas and Happy New Year."
295. According to the report of Officers Smith and Kaiser, the morning after the murder Pamela Marie Hupp:
- a. Initially told them that she had not gone into the house, but then
  - b. Immediately changed her story and told them that she had gone into the house.
296. During her deposition on March 20, 2013, Pamela Marie Hupp acknowledged that she had first told investigators that she had not gone into the house, but she then testified in that deposition that in fact she had indeed gone into the house and had remained 45 minutes.

297. During her testimony during the first trial she again acknowledged that she had first told investigators that she had not gone into the house, but she then testified in that trial testimony that in fact she had indeed gone into the house, but this time she stated on cross examination that it was correct that she had remained “10, 20, 30 minutes who knows how long?”
298. The morning after the murder Officers Smith and Kaiser examined Betsy Faria’s phone and it showed that Pamela Marie Hupp had called Betsy Faria’s phone at 7:27 p.m. and that Betsy Faria did not answer.
299. It is an approximately 30 minute drive from the Faria home to the Hupp home.
300. During her first interview the morning after the murder by Officers Smith and Kaiser Pamela Marie Hupp:
- a. First stated regarding the 7:27 phone call “I called to tell her I was home,”
  - b. Then immediately changed her story and stated that she made the call when she was “almost home,” and
  - c. Later in the interview stated that she “had driven toward her house for 10 or 15 minutes and then called Betsy Faria when she reached a point during the drive that she recognized.”
301. During the first trial she testified that “what she meant by ‘almost home’ was that she had called Betsy Faria to state that she was on the interstate and was ‘home free.’”
302. Almost immediately after the murder law enforcement officers issued an emergency request to cell phone service providers pursuant to 18 U.S.C. 2703, which allows acquisition of cell phone electronic communication records, for Mr. Faria’s cell phone

records to determine his whereabouts the evening of the murder according to the phone's electronic footprint.

303. Law enforcement officers did not issue an equivalent subpoena for Pamela Marie Hupp's cell phone records.
304. Cell phone records later obtained by criminal defense counsel later showed that at the time of the call Pamela Marie Hupp was still in the vicinity of the Faria home.
305. Had law enforcement officers issued the subpoena immediately for Pamela Marie Hupp's records law enforcement officers would have known almost immediately after the murder that Pamela Marie Hupp's story of her whereabouts during the 7:27 call was false and that she was then still in the immediate vicinity of the Faria home.

**Suggestion of Story to Pamela Marie Hupp about Mr. Faria Being Present at Scene**

306. On June 17, 2015 during a recorded interview of Pamela Marie Hupp by Defendant Detective Merkel and Defendant Detective Harney those officers told Pamela Marie Hupp that it was their belief that Mr. Faria had entered the house and seen Pamela Marie Hupp there.

We believe (Merkel and I) is that you were present, that Russ was not there when you and Betsy got there. And that prior to you leaving, somehow or other, Russ knew that you were there, either by phone call or just the sheer presence of your car, or that he walked in and saw you there and that it was that particular moment motivating factor for you to leave was him coming into the house that is what we discussed amongst ourselves. Is any part of that correct, and it is in fact, did you see Russ that night, in that house?

307. Pamela Marie Hupp denied that.
308. Those officers then asked Pamela Marie Hupp if she saw someone driving in the subdivision.
309. Pamela Marie Hupp denied seeing someone driving in the subdivision.

310. Before that Ms. Hupp had made no such statement and had stated the opposite earlier in that same interview.
311. It is never proper law enforcement practices to suggest a story to a witness.
312. Pamela Marie Hupp later changed her story to state she had left the Faria home after the phone call to Mark Hupp and sat in her car for 15 minutes at a fork in the road in the vicinity of the Faria home.
313. On October 6, 2015, one month before the second trial, Pamela Marie Hupp told Defendant Detective Merkel and Defendant Detective Harney that she had had a “recovered memory,” and that as she drove away from the Faria home the night of the murder she had seen Mr. Faria in a car near the house.
314. Pamela Marie Hupp stated that she knew it was Mr. Faria because she recalled that he was in a “light silverish” car.
315. All evidence from the night of the murder indicated that the light silverish car was parked in the driveway the entire time, and as stated above:
  - a. All the merchant video indicated that Mr. Faria was driving a blue Explorer that night,
  - b. He gassed up that vehicle and not the silverish car, and
  - c. The merchant receipts were found in the Explorer.
316. Pamela Marie Hupp had implied in interviews with Detective Kaiser and Detective Perry Smith at the beginning of the investigation that Mr. Faria was driving the Explorer that night.
317. Pamela Marie Hupp also said as part of her “recovered memory” that she saw Mr. Faria duck low in the car as she left the house.

318. The recovered memory was in opposition to Pamela Marie Hupp's several prior statements that she never saw Mr. Faria nor any suspicious activity or persons at the scene the night of the murder.
319. The recovered memory was wholly consistent with the suggestions made by Defendant Detective Merkel and Defendant Detective Harney.

**Whereabouts of Betsy Faria and Pamela Marie Hupp – Family Members Stories**

320. On January 28, 2011 Officer Paul Barish of the Chesterfield Police Department and Jana Walters of a St. Charles law enforcement agency interviewed Betsy Faria's daughter, Leah Day.
321. Leah Day is Mr. Faria's step-daughter.
322. Leah Day told those officers that at "7:15" she had talked to her mother by phone and during the call the following exchanges occurred.
- a. Betsy Faria stated that she and Pamela Marie Hupp were driving home,
  - b. Betsy Faria was to be sure and answer her phone later in the evening because Leah Day was on her way to US Cellular to upgrade her phone plan and Betsy Faria would have to get on the line to authorize the change.
  - c. Leah Day stated to the officers that a few minutes later she had tried to reach her mother from the US Cellular store three times but that all calls went unanswered.
323. The "7:15" time is not in the forensic image of Leah Day's phone.
324. On inference Leah Day made that first call from another phone.
325. Due to a technical problem all parties have been unable to get exact times of calls on Betsy Faria's phone.

326. On December 29, 2011 Detective Todd Roth of the City of St. Peters Police Department examined Leah Day's phone.
327. Based on a forensic analysis Detective Todd Roth confirmed that the night of the murder Leah Day had called her mother's cell phone at 7:21, 7:26 and 7:30 for approximately 30 seconds each.
328. None of those calls was answered.
329. On inference, because Betsy Faria had promised to keep her phone on, Betsy Faria was already dead by the time of those calls.

**Inconsistent Statements by Pamela Marie Hupp about her Relationship with Betsy Faria**

330. Pamela Marie Hupp made inconsistent statements regarding her relationship with Betsy Faria as follows, all known to law enforcement and Defendants:
- a. Pamela Marie Hupp stated that she saw Betsy Faria almost every day, stated in interview with Detective Kaiser and Detective Perry Smith on December 28, 2011.
  - b. Pamela Maria Hupp was more of an acquaintance of Betsy Faria's than a close friend, stated in civil deposition of Pamela Marie Hupp July 21, 2014 in Leah E. Day, *et al.* v. Pamela Marie Hupp, Circuit of St. Charles County, 1411-CC00329.
  - c. Betsy Faria was in love with Pamela Marie Hupp and their relationship had proceeded from a friendship to one in which Pamela Marie Hupp was a surrogate Husband to Betsy Faria and that they had had sexual relations, stated in recorded interview of Pamela Marie Hupp to Defendant Detective Merkel and Detective Harney on June 17, 2015, a few months before the second trial.

**Inconsistent Statements by Pamela Marie Hupp about Mr. Faria**

331. Pamela Marie Hupp made inconsistent statements regarding her relationship with Mr. Faria and her opinions of him as follows, on inference all statements shared among all Defendants:

- a. “He’s kind of pompous. I mean, he seems nice enough. I just don’t know him that well. I saw him – the last time I saw him was at the 40<sup>th</sup> birthday party he had for her,” (Betsy Faria’s 40<sup>th</sup> birthday was on March 24, 2009, approximately 21 months before her death), stated by Pamela Marie Hupp in interview with Detective Stephanie Kaiser and Detective Perry Smith, December 28, 2011, and
- b. Six weeks to a month before Betsy Faria’s death Pamela Marie Hupp was at Betsy Faria’s home in Lincoln County and she, Pamela Marie Hupp, was confronted by Mr. Faria, “so I just went to go up the stairs, and he caught me because he was in front of me. Pushed me up against the wall and he said, ‘If you ever come over here again,’ he goes, ‘it’ll be the last time.’ So we go to leave, and that’s when he said, he goes, you know, if you two fucking muff bumpers – I do believe that’s the term he used, ‘if I ever catch you guys again I am going to bury you in the back yard’,” formal recorded interview with Defendant Detective Merkel and Detective Harney, June 17, 2015.

**Pamela Marie Hupp’s Inconsistent Statements About Her Own Memory**

332. Pamela Marie Hupp made the following inconsistent statements about her own memory, on inference all statements shared among all Defendants:

- a. Question: “Do you have any memory problems, Ms. Hupp?”

Answer: “No, No,” stated in civil deposition of Pamela Marie Hupp July 21, 2014 in Leah E. Day, *et al.* v. Pamela Marie Hupp, Circuit of St. Charles County, 1411-CC00329,

- b. “I have a little bit of a memory problem,” testimony of Pamela Marie Hupp, first trial,
- c. I have “documented memory issues from my accident,” recorded interview with Detective McCarrick, June 25, 2012,
- d. “I know I have huge lapses of memory. So my brain has been almost like a boxer’s brain. Severe head injuries, three accidents in a row,” recorded interview with Defendant Detective Harney and Prosecuting Attorney’s Office Investigator Harry Belcher on October 6, 2015.

#### **Inconsistent Statements about Own Finances**

333. Pamela Marie Hupp made the following inconsistent statements about her finances, on inference all statements shared among all Defendants:
- a. “My insurance was out. My Medicare hadn’t kicked in. So I didn’t have enough money. I paid my last visit out of pocket and that was all I could afford,” deposition of Pamela Marie Hupp in criminal case, p. 18, March 20, 2013,
  - b. “To me, in my world, \$150,000.00 is not that much,” recorded interview with Detective McCarrick, June 25, 2012.

#### **Computer Letter Allegedly Written by Betsy Faria - Really Written by Pamela Hupp**

334. In an interview the morning after the murder with Detectives Stephanie Kaiser and Perry Smith of the Missouri State Highway Patrol Pamela Marie Hupp made several references

to a “letter” or “document” which Pamela Marie Hupp said Betsy Faria had created “at tennis last week.” Pamela Marie Hupp stated:

a. The letter was on Betsy Faria’s laptop “in a form somewhere; I don’t know what that means,”

b. The letter stated: “she was going to talk about changing her beneficiary to me, the thing about the pillow and she didn’t want to be alone in Troy with him[Mr. Faria],”

c. “It wasn’t an e-mail; it was a document,”

d. “She wanted me to have it. I never saw it,”

e. Betsy Faria had brought the computer to Pamela Marie Hupp’s house to print the letter but “we never could print it,” and

f. “Russ was bragging about how much money he would get when I die’.”

335. Pamela Marie Hupp had, at different points, either stated or implied first, the letter had been drafted while Betsy Faria was at tennis, and that Pamela Marie Hupp was a companion at Betsy Faria’s tennis games (although as a spectator, not a player).

336. Approximately two weeks before the second trial Defendant Prosecuting Attorney Leah Askey informed criminal defense counsel that they had found the referenced document or letter on Betsy Faria’s computer. (Hereafter that document shall be referred to as “p.doc,” as was the custom of criminal defense counsel and the Prosecuting Attorney during the criminal litigation).

337. Defendant Prosecuting Attorney Leah Askey turned p.doc over to criminal defense counsel.

338. Despite Pamela Marie Hupp's statements the morning after the murder that she had never seen p.doc, Pamela Marie Hupp had described with absolute specificity the contents of p.doc.
339. Criminal defense counsel then demanded that Defendant Prosecuting Attorney Leah Askey produce a forensic copy of the hard drive on which p.doc had been located.
340. Defendant Prosecuting Attorney Leah Askey produced a copy of that hard drive.
341. Criminal defense counsel moved for a continuance to complete an analysis of the hard drive. The court denied the Motion.
342. Criminal defense counsel's computer expert, Greg Chatten analyzed the hard drive and determined the following information:
- a. The computer's log showed that Betsy Faria's computer had at some time been connected to a WiFi network whose name was consistent with that of a tennis club,
  - b. Except for p.doc, every document on Betsy Faria's computer either had a creator's name appended to the document as part of the document's metadata, or had a blank in that field (or in other words had no entry whatsoever in that field),
  - c. For p.doc in the field normally reserved for the name of the creator was the word: "unknown,"
  - d. p.doc was the only document on Betsy Faria's computer having as its creator the word "unknown,"
  - e. A file fragment located on the computer which had the same text as p.doc was associated with the software program known as "Word97."

- f. No version of the software program known as Word97 was on Betsy Faria's computer.
343. One may conclude either that p.doc was not created on Betsy Faria's computer or that p.doc's author field had been intentionally modified to read "unknown."
344. One may also conclude that the file fragment with the same text as p.doc was not created on Betsy Faria's computer.
345. Defendants failed to do any inquiry on p.doc to determine the authenticity of the document.
346. On inference Pamela Marie Hupp wrote p.doc and put it on Betsy Faria's computer by a thumb drive or some other method.

**Pamela Marie Hupp Putting Money in Trust - Briefly**

347. The morning after the murder Pamela Marie Hupp stated to Detectives Stephanie Kaiser and Perry Smith words to the effect that that Betsy Faria had told Pamela Marie Hupp that she, Betsy Faria, was making Pamela Marie Hupp the beneficiary of the State Farm life insurance policy so that Betsy Faria would be sure that in the event of her death the money was used for the benefit of her two children from her prior marriage.
348. After Betsy Faria's death Pamela Marie Hupp filed a claim on the State Farm life insurance policy for the \$150,000 death benefit.
349. Pursuant to Missouri case law a beneficiary of a life insurance policy is disqualified from receiving the proceeds of the life insurance proceeds if that person has murdered the insured.
350. On January 17, 2012 Sgt. McCarrick responded to an inquiry by a representative of State Farm by stating to that representative that Pamela Marie Hupp was not a suspect in the

murder of Betsy Faria and so there was “no concern” with paying Pamela Marie Hupp the death benefit.

351. State Farm paid Pamela Marie Hupp the \$150,000 death benefit on Betsy Faria’s life.
352. In July 2012 Detective McCarrick stated to Pamela Marie Hupp words to the effect of “how helpful it would be to the prosecution to have the trust for the children set up and funded prior to the first trial.”
353. Approximately one week before the first trial Pamela Marie Hupp placed approximately \$100,000 of the life insurance proceeds in a trust for Betsy Faria’s children.
354. Approximately two to three weeks after the first trial Pamela Marie Hupp removed that money from that trust and put it back in her own name.
355. On information and belief Pamela Marie Hupp has ever after kept those life insurance proceeds for herself.

**No Polygraph of Pamela Marie Hupp - Doctor’s Note**

356. Within a day or two of the murder Officer Gary McIntyre scheduled Pamela Marie Hupp for a polygraph to occur at 5:00 p.m. December 30, 2011.
357. When the polygraph equipment was ready Detective Sgt. McCarrick called Officer McIntyre and it appears he stated that Pamela Marie Hupp had told him that her attorney had:

[A]dvised her to postpone the examination until he can be with her.

Upon further examination it was revealed Hupp has suffered a head injury in the past and may possibly be taking various medications as well as being prone to seizures.

Upon further consideration I have decided to request that Hupp obtain a notice from her Physician stating that she is medically capable of being administered the examination.

358. On January 20, 2012 Pamela Marie Hupp wrote her doctor, Ronald Fischer, M.D. asking Dr. Fischer to write a letter to Detective Kaiser stating that “I was not able to do my polygraph due to medical reasons.”
359. On January 25, 2012 Dr. Fischer wrote a “to whom it may concern” letter stating:
- Pamela Hupp is unable to undergo a polygraph due to her medical condition. This was discussed with Pamela when she was last seen in the office on January 3, 2012.
360. On February 12, 2012 Dr. Fischer faxed that letter and Pamela Marie Hupp’s letter to the Lincoln County Sheriff’s Department.
361. No polygraph of Pamela Marie Hupp occurred.
362. Criminal defense counsel subpoenaed Dr. Fischer for a March 20, 2013 deposition.
363. Pamela Marie Hupp appeared at that deposition.
364. Pamela Marie Hupp did not waive her rights under either HIPAA or the doctor patient privilege.
365. Dr. Fischer cited HIPAA and the doctor patient privilege and refused to answer questions.
366. Criminal defense counsel was therefore unable to get information from Dr. Fischer regarding the medical condition of Pamela Marie Hupp which made her unable to take a polygraph.
367. On information and belief before the first trial Detective Kaiser and Defendants made no material effort to persuade Pamela Marie Hupp to waive HIPAA or the doctor patient privilege and/or take a polygraph as law enforcement had done for Mr. Faria.
368. On information and belief law enforcement treated Mr. Faria and Pamela Marie Hupp differently with regard to a polygraph test.

**Interview of Mark Hupp - Pamela Marie Hupp Answers Questions For Him**

369. On December 29, 2011, two days after the murder, Officers Mike Reiter and Donald Thurmond went to Pamela Marie Hupp's home to interview Pamela Marie Hupp's Husband, Mark Hupp.

370. The purposes of the interview were to cross check Pamela Marie Hupp's previously stated time line and her version of events.

371. Pamela Marie Hupp was present during the interview.

372. It is generally consistent with proper law enforcement practices to conduct an interview of that nature with the subject of the interview alone and not with anyone present, particularly the subject's spouse.

373. During the interview, according to those officers' report:

While interviewing Mark, Pam would begin to speak and engage us in conversation.

374. During the interview, according to those officers' report:

While speaking to us, Pam advised that she was with Betsy's family during the day. She was informed by her family members that Leah advised them she forgot to tell Detectives about the abuse that Russell would inflict on them.

Pam was advised by Betsy's family that Russell had thrown cups of water on Leah and Mariah and pull them out of bed to wake them up. She went on to say that Russell was very demeaning towards Betsy and the girls. Pam further advised that Betsy was afraid of Russell because of his actions in the past.

...

Pam advised that on December 27, 2011, she took Betsy to her chemotherapy appointment along with Bobbie. While there, Betsy advised her that she found a two family residence, that her parents own, for her, Leah, Mariah, her mother, and Bobbie to move into. Pam stated that Betsy advised her Russell would never live with Betsy's mother and refused to leave the house in Troy. He told Betsy that he wanted to live there 20 more years and then move to Florida. Betsy advised her that she did not care that Russell would not move with her and that she would leave him. Betsy appeared to be extremely happy to be leaving Russell and moving into the new house.

It should be noted that Betsy told Pam that within the last two weeks Russell has tried to hack into her computer.

375. Officers never attempted to interview Pamela Hupp and her Husband separately.
376. Once Pamela Marie Hupp began intervening in the conversation and answering for Mark Hupp it was improper law enforcement procedure to continue the interview of Mark Hupp while Pamela Marie Hupp was present.
377. In the alternative, it is consistent with proper law enforcement practices to find the statements attributed to Pamela Marie Hupp in that report, particularly in light of other statements she made regarding Mr. Faria, as suspicious and consistent with statements a true perpetrator would make in an attempt to frame another person.
378. In the alternative, it is consistent with proper law enforcement practices at least to consider the possibility that Pamela Marie Hupp was framing another person and so to investigate all statements made by Pamela Marie Hupp during the interview.
379. Law enforcement failed to investigate all those statements

**Failure to Investigate and Prosecute Pamela Marie Hupp for Murder of Betsy Faria**

380. Despite Ms. Hupp's obvious financial motive, presence at the scene of the murder at the time of the murder, conduct with the insurance proceeds by funding and then unfunding a trust, and the inconsistent stories on the subjects outlined above, the Prosecuting Attorney never made any attempt to investigate or prosecute Pamela Marie Hupp for the murder of Betsy Faria.

**DEFENDANT DETECTIVE MCCARRICK TALKS TO MR. FARIA  
ABOUT STATE FARM BENEFICIARY CHANGE -  
AFTER MR. FARIA REPRESENTED BY COUNSEL**

381. In January 2012 after Mr. Faria had been formally charged and obtained counsel a letter from State Farm to Mr. Faria arrived at either at the house on Sumac Drive or at the jail.

382. Defendant Detective McCarrick came into possession of that letter.
383. Soon after that letter's arrival Defendant Detective McCarrick removed Mr. Faria from his cell and placed Mr. Faria in an interview room.
384. Defendant Detective McCarrick had previously arranged for audio and video recording of the room.
385. At that time law enforcement was developing a theory that Mr. Faria had murdered Betsy Faria out of greed, because it was their belief that Mr. Faria had seen a copy of a Change of Beneficiary form to some other policy, had thrown away or otherwise disposed of that form, and then murdered Betsy Faria before she could execute any other Change of Beneficiary form.
386. At the beginning of the interview Defendant Detective McCarrick stated to Mr. Faria:
- Just so we're up front and clear and everything, I understand that you have an attorney and I am not here to ask any guilt seeking questions. So I'll just get that out of the way right away.
387. Defendant Detective McCarrick then stated:
- Just so you are aware we do have pretty good information that Betsy had forgotten and left a letter to one of the insurance policies that she was going to change you from the beneficiary and that letter has never been found and that policy didn't get changed however apparently unbeknownst to you, obviously you know all your mail is being monitored, unbeknownst to you, she got one off before you managed [bangs letter on table twice] to deal with her so you might want to take a look at that real quick.
388. Defendant Detective McCarrick then gave Mr. Faria the letter.
389. Mr. Faria then read the letter.
390. In reading the letter Mr. Faria learned that State Farm:
- a. Had accepted the Change of Beneficiary form from Pamela Marie Hupp, and
  - b. Would pay Pamela Marie Hupp and not Mr. Faria the \$150,000 proceeds.

391. Defendant Detective McCarrick then stated to Mr. Faria:

I would say that's a good time to have conversation with counsel to let him know that whatever you were intending on using for a retainer is maybe not going to be there. But other than that, sorry. If you have any other questions have a seat. If you have any other questions let me know or let your attorney know."

392. Defendant Detective McCarrick walked out.

393. On inference Defendant Detective McCarrick's intention in the interview was to shock and scare Mr. Faria by:

- a. Propounding a motive to Mr. Faria which law enforcement believed to be true,
- b. Accusing Mr. Faria of "deal[ing]' with Betsy Faria," with the banging of the mail on the table for emphasis), and
- c. Making Mr. Faria think Mr. Faria would not have money to pay counsel.

394. In attempting to shock and scare Mr. Faria, Defendant Detective McCarrick intended to get Mr. Faria to confess or to admit or acknowledge that Mr. Faria knew something about a Change of Beneficiary form.

395. Defendant Detective McCarrick's statement that he would not ask any guilt seeking questions was disingenuous in that he fully intended by the interaction to get Mr. Faria to confess or to admit or acknowledge that Mr. Faria knew something about a Change of Beneficiary form.

396. In making that contact Defendant Detective McCarrick violated Mr. Faria's right to counsel by:

- a. Having any conversation with Mr. Faria without counsel present, and
- b. Engaging in conduct with the intent of getting Mr. Faria to confess.

**Public Commitment of Prosecuting Attorney to Mr. Faria as the Murderer**

397. On or about December 30, 2011 Defendant Prosecuting Attorney Askey stated to Mike Rush of KSDK that she “hopes it’s only a matter of time before she can charge [Mr. Faria] with murder.”

### **DAMAGES**

398. During his seizures and during his prosecution Plaintiff suffered:
- a. Garden variety emotional distress including terror, stress, fear, anxiety, humiliation, embarrassment, and disgrace,
  - b. Loss of personal reputation in the community,
  - c. Loss of trust in law enforcement generally and the law enforcement community of Lincoln County particularly,
  - d. Loss of physical liberty for the initial two days and then for another 41 months and 12 days,
    - a. Loss of liberty interest in being free from facing a wrongful criminal charge,
    - b. Suffering through a false finding of guilt in the first trial,
    - c. Suffering through the fear of being found guilty during the second trial,
    - d. Loss of income during incarceration, and
    - e. Loss of insurance proceeds (currently subject to litigation).

### **PROXIMATE CAUSE**

399. Mr. Faria’s arrest and prosecution, as well as all his damages, were the natural and proximate results of the actions of Defendants and each of them.

### **RECKLESS DISREGARD - PUNITIVE DAMAGES**

400. The action of Defendants and each of them were:
- a. Malicious or recklessly indifferent to the Plaintiff’s constitutional rights, and

b. Taken in the face of a perceived risk that they would violate federal law.

401. Plaintiff is entitled to awards of punitive damages against Defendants and each of them in their individual capacities, in order to punish them and to deter others.

#### **ATTORNEY'S FEES AND COSTS - 42 U.S.C. 1988**

402. Plaintiffs' substantive claims for all Counts are brought under the Civil Rights Act, 42 U.S.C. 1983.

403. In pursuit of his federal civil rights claims, Plaintiff is incurring reasonable attorney's fees and costs, including taxable and non-taxable costs.<sup>2</sup>

404. Plaintiff seeks his reasonable attorney's fees and costs under 42 U.S.C. 1988 for the pursuit of those claims.

#### **NO QUALIFIED IMMUNITY**

405. The conduct of the Defendants was not based only on a mistaken but objectively reasonable belief that there was probable cause to hold, arrest or prosecute Mr. Faria and therefore Defendants are not entitled to qualified immunity.<sup>3</sup>

406. There was no conflicting information that could not be immediately resolved.<sup>4</sup>

407. All of the Defendants were plainly incompetent and/or all of the Defendants knowingly violated the law.<sup>5</sup>

408. Falsification of evidence and related dishonest practices disqualify police defendants from invoking the affirmative defense of qualified immunity.<sup>6</sup>

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<sup>2</sup> 42 U.S.C. 1988; *Lefemine v. Wideman*, 133 S. Ct. 9, 10 (2012).

<sup>3</sup> *Dowell v. Lincoln County*, 762 F.3d. 770, 777 (8th Cir. 2014)

<sup>4</sup> *Borgman v. Kedley*, 646 F.3d. 518, 522 (8th Cir. 2011)

<sup>5</sup> *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)

<sup>6</sup> *Coggins v. Buonora*, 776 F.3d 108, 114 (2d Cir. 2015)

409. The probable cause statement of Defendant Sergeant McCarrick was so lacking in indicia of probable cause as to render official belief in its existence unreasonable.<sup>7</sup>

**COUNT I**  
**FOURTH AMENDMENT**  
**INITIAL SEIZURE OF MR. FARIA FOR MORE THAN 24 HOURS,**  
**WITHOUT PROBABLE CAUSE,**  
**AGAINST DEFENDANT SERGEANT MCCARRICK**

410. Plaintiff incorporates by reference all prior paragraphs.

411. For approximately the first two days after the murder Defendant Detective McCarrick was formally leading the investigation, although Defendant Detective McCarrick was then conferring with and informally deferring to Defendant Prosecuting Attorney Askey on some issues.

412. On inference at that time Defendant Sergeant McCarrick was the decision maker as to whether to release Mr. Faria.

413. Under RSMo. 544.170 law enforcement may hold a suspect under arrest for no more than 24 hours on suspicion that the person has committed a crime.

414. Under RSMo. 544.170 after the expiration of the 24 hours law enforcement may continue the seizure of a suspect pursuant to such arrest only if such person shall be charged with a criminal offense by the oath of some credible person.

415. It is well settled that the Fourth Amendment requires a judicial determination of probable cause before an individual arrested without a warrant may be subjected to an extended restraint of liberty.<sup>8</sup>

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<sup>7</sup> *Bates v. Hadden*, 576 F.App'x 636, 640 (8th Cir. 2014), citing *Malley v. Briggs*, 475 U.S. 35 (1986).

<sup>8</sup> *Gerstein v. Pugh*, 420 U.S.103, 113-114 (1975)

416. At approximately 1:00 a.m. on December 28, 2011, soon after Plaintiff arrived at the Lincoln County Sheriff's Department immediately after the murder, Plaintiff was seized in the context of the Fourth Amendment, in that taking into account all of the circumstances surrounding the encounter, including Defendant Detective Merkel asking Mr. Faria questions in such a way that a reasonable person in Mr. Faria's position would have developed the belief that Defendant Detective Merkel believed Mr. Faria had committed the murder, Plaintiff was not free to leave.
417. The police's conduct at that time would have communicated to him - in the position of a reasonable person - that he was not at liberty to ignore the police presence, leave, and go about his business<sup>9</sup>.
418. Defendant Sergeant McCarrick continued the seizure of Mr. Faria for more than 24 hours after he had been seized, ("the 24 hour period"), even though Defendant Sergeant McCarrick did not have knowledge of facts and circumstances sufficient to warrant a prudent person to believe Mr. Faria had committed an offense,<sup>10</sup> and/or Mr. Faria had not been charged with a criminal offense by the oath of some credible person.
419. During the time period after the 24 hour period and until Mr. Faria's release it was not objectively reasonable for Defendant Sergeant McCarrick to believe he had probable cause to arrest Mr. Faria for the murder of Betsy Faria.
420. During Mr. Faria's initial seizure Defendant Sergeant McCarrick did not have even arguable probable cause Mr. Faria had murdered Betsy Faria, that is, any belief

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<sup>9</sup> *Livers v. Schenck*, 700 F.3d 340, 358 (8th Cir. 2012).

<sup>10</sup> *Livers v. Schenck*, 700 F.3d 340, 357 (8th Cir. 2012), indicating this right clearly established before 2006, and see *Gerstein v. Pugh*, 420 U.S. 103, 112 (1973), *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

Defendant Sergeant McCarrick had that Mr. Faria had murdered Betsy Faria was not objectively reasonable.<sup>11</sup>

421. During the time period after the 24 hour period and until Mr. Faria's release Defendant Sergeant McCarrick knew of the following initial evidence exonerating Mr. Faria ("the initial evidence exonerating Mr. Faria"):

- a. Mr. Faria was elsewhere at the time of the murder based on the condition of the body as it was found by the First Responders and the evidence of his whereabouts being elsewhere, and
- b. Mr. Faria's alibi was consistent as he told it over and over,
- c. Mr. Faria's alibi was consistent when compared to the other evidence such as the merchant videos, the receipts, the testimony of the four persons at Mr. Corbin's house, and the time of death based on the observations of the First Responders,
- d. Mr. Faria had not confessed,
- e. The whereabouts of Mr. May, who had not attended game night, was confirmed by all with knowledge thereof, and
- f. Mr. Faria's texting with the regular attendees of game night appeared routine, and
- g. Mr. Faria had no blood on his clothes or body.

422. The facts in the above paragraph are material in that it would have had a reasonable likelihood of affecting the incarceration of Mr. Faria and/or the outcome of the case.

423. During the time period after the 24 hour period and until Mr. Faria's release Defendant Sergeant McCarrick continued to hold Mr. Faria in custody without:

- a. Considering all the circumstances,<sup>12</sup>

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<sup>11</sup> *Greenman v. Jessen*, 787 F.3d 882, 888 (8th Cir. 2015), *Copeland v. Wicks*, 468 S.W.3d 886, 891 (Mo. 2015).

- b. Making proper reasonable further inquiry, and
- c. Considering facts tending to dissipate probable cause.<sup>13</sup>

424. During that period Defendant Sergeant McCarrick purposefully ignored evidence suggesting Mr. Faria's innocence.
425. During the time period after the 24 hour period and until Mr. Faria's release Defendant Sergeant McCarrick violated Mr. Faria's Fourth Amendment constitutional right to be free of unlawful seizure of his person.
426. During that time period Mr. Faria was thereby damaged as stated above.

#### **Recklessly**

427. Defendant Sergeant McCarrick acted recklessly.
428. A state actor acts recklessly in this context when he or she:
- a. Attempts to coerce or threaten a subject,
  - b. Purposefully ignores evidence suggesting the defendant's innocence, and/or
  - c. Uses systematic pressure to implicate the defendant in the face of contrary evidence.<sup>14</sup>
429. The actions of Defendant Sergeant McCarrick as described in this Count were objectively unreasonable under the Fourth Amendment.

#### **Punitive Damages**

430. The actions of Defendant Sergeant McCarrick described in this Count were:
- a. Malicious or recklessly indifferent to the Plaintiff's constitutional rights, and
  - b. Taken in the face of a perceived risk that they would violate federal law.

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<sup>12</sup> *Illinois v. Gates*, 462 U.S. 213, 230-231 (1983).

<sup>13</sup> *Bigford v. Taylor* 834 F.2d 1213, 1218 (5<sup>th</sup> Cir. 1988)

<sup>14</sup> *Winslow v. Smith*, 696 F.3d 716, 732 (8th Cir. 2012)

**PRAYER**

WHEREFORE, Plaintiff prays for judgment under the Fourth Amendment and pursuant to 42 U.S.C. 1983 and 1988 against Defendant Detective Ryan McCarrick, in his individual capacity, for initial seizure of Plaintiff Russell Faria for more than 24 hours without probable cause, for compensatory damages in excess of \$25,000.00 and for punitive damages, for reasonable attorney's fees and non-taxable expenses, for costs, and for such other relief as the court finds to be just, meet and reasonable.

**COUNT II  
FOURTH AMENDMENT  
SECOND SEIZURE AND INCARCERATION OF MR. FARIA  
WITHOUT PROBABLE CAUSE,  
AGAINST DEFENDANT SERGEANT MCCARRICK**

431. Plaintiff incorporates by reference all prior paragraphs.
432. On January 4, 2012 Defendant Sergeant McCarrick signed under penalty of perjury a Probable Cause Statement in support of a charge against Mr. Faria for the murder of Betsy Faria.
433. As a result on that date Mr. Faria was arrested and jailed.
434. The Probable Cause Statement's Para. G was based on the Blue Star testing conducted by Defendant Sergeant McCarrick and others.
435. The only evidence in the Probable Cause Statement which was developed after Mr. Faria's initial release on December 29, 2011 to support probable cause that Mr. Faria had murdered Betsy Faria was the evidence described in Para. G regarding the luminescence test.
436. The description of the luminescence test in Para. G contained the following statements which were false:

- a. Blood evidence had been cleaned from the crime scene, and
  - b. Blood evidence was illuminated on the handle of the kitchen drawer used by Betsy and Russ Faria to hold towels.
437. The 132 photos prove that the alleged luminescence evidence showing a clean up of blood was false.
438. The luminescence alleged in Para. G of the Probable Cause Statement was fabricated evidence.
439. The purpose of the fabrication of the evidence was to formulate the pretext of probable cause.
440. On January 4, 2012, the date Defendant Sergeant McCarrick signed the Probable Cause Statement, Defendant Prosecuting Attorney Askey filed a murder charge against Mr. Faria using the Probable Cause Statement as the basis of the charge.
441. On June 4, 2012 Mr. Faria was arrested and incarcerated in the Lincoln County jail.
442. On June 16, 2015 Mr. Faria was released.
443. Defendant Sergeant McCarrick signed the Probable Cause Statement even though he knew:
- a. The statements in Para. G regarding luminescence were false, and
  - b. Without the statements in Para. G regarding luminescence there was insufficient evidence against Mr. Faria to create probable cause to arrest him for the murder of Betsy Faria.
444. At the time of the filing of the Probable Cause Statement Defendant Sergeant McCarrick did not have:

- a. A truthful factual showing sufficient to constitute probable cause for Mr. Faria's arrest.<sup>15</sup>
  - b. Even arguable probable cause Mr. Faria had murdered Betsy Faria.
445. Any belief which Defendant Sergeant McCarrick had that Mr. Faria had murdered Betsy Faria was not objectively reasonable.<sup>16</sup>
446. In the totality of the circumstances Defendant Sergeant McCarrick's affidavit would not have established probable cause if the allegedly false information was ignored or the omitted information was supplemented.<sup>17</sup>
447. During the time period after Mr. Faria's initial release until January 4, 2012 Defendant Sergeant McCarrick failed to consider the initial evidence exonerating Mr. Faria as well as the additional follow up exonerating evidence as stated above.
448. During that time period Defendant Sergeant McCarrick also failed to consider the following evidence implicating Pamela Marie Hupp (the evidence implicating Pamela Marie Hupp):
- a. Four days before the murder Pamela Marie Hupp had worked in concert with Betsy Faria for Betsy Faria to change the beneficiary of Betsy Faria's life insurance from Mr. Faria to her, thereby creating a financial incentive for Pamela Marie Hupp to murder Betsy Faria,

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<sup>15</sup> *Livers v. Schenck*, 700 F.3d 340, 357 (8th Cir. 2012), indicating this right clearly established before 2006.

<sup>16</sup> *Greenman v. Jessen*, 787 F.3d 882, 888 (8th Cir. 2015), *Copeland v. Wicks*, 468 S.W.3d 886, 891 (Mo. 2015).

<sup>17</sup> *Dowell v. Lincoln Cty., Mo.*, 762 F.3d 770, 777 (8th Cir. 2014), citing to *United States v. Mashek*, 606 F.3d 922, 928 (8th Cir. 2010), *Copeland v. Wicks*, 468 S.W.3d 886, 891 (Mo. 2015).

- b. Pamela Marie Hupp was by her own admission alone with Betsy Faria at the location of the murder and at the time of murder based on rigor mortis and body cooling,
  - c. Pamela Marie Hupp kept telling a suspicious story to investigators about a letter on Betsy Faria's computer which would implicate Mr. Faria,
  - d. Pamela Marie Hupp refused to consent to a polygraph,
  - e. The fact that Betsy Faria did not answer the expected phone calls from her daughter Leah Day imply that Betsy Faria was deceased by 7:21 p.m.,
  - f. Pamela Marie Hupp interfered with the interview of her Husband by answering detectives' questions for him.
449. The failure to consider the evidence exonerating Mr. Faria and the evidence implicating Pamela Marie Hupp further rendered the Probable Cause Statement false.
450. The lack of luminescence, the evidence exonerating Mr. Faria and the evidence implicating Pamela Marie Hupp was all material in that it would have had a reasonable likelihood of affecting the incarceration of Mr. Faria and/or the outcome of the case.
451. In the alternative at such time as the blood analysis of the tiles and cabinets was returned negative all facts in Para. G of the Probable Cause Statement which might have created probable cause to arrest Mr. Faria for the murder of Betsy Faria had been established as absolutely false.<sup>18 19</sup>
452. The conduct of Defendant Sergeant McCarrick as described in this Count:
- a. Was truly egregious and extraordinary,

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<sup>18</sup> *Carson v. Lewis*, 35 F. Supp. 2d 250, 263 (E.D.N.Y. 1999)

<sup>19</sup> *Livers v. Schenck*, 700 F.3d 340, 357 (8th Cir. 2012), indicating this right clearly established before 2006.

- b. Shocks the contemporary conscience,
- c. Was reckless, and
- d. Amounts to brutal and inhumane abuse of official power,
- e. Showed evidence of systematic pressure to implicate the defendant in the face of contrary evidence.<sup>20</sup>

453. From January 4, 2012 until June 16, 2015 Mr. Faria was thereby damaged by suffering (“the losses as a result of the second incarceration”):

- a. Garden variety emotional distress including terror, stress, fear, anxiety, humiliation, embarrassment, and disgrace,
- b. Loss of personal reputation in the community,
- c. Loss of trust in law enforcement generally and the law enforcement community of Lincoln County particularly
- d. Loss of physical liberty for 41 months and 12 days.

454. Those damages were the natural consequence of Defendant Sergeant McCarrick signing a false probable cause statement.

455. The actions of Defendant Sergeant McCarrick as described in this Count were objectively unreasonable under the Fourth Amendment.

#### **Recklessly**

456. In taking the actions described in this Count Defendant Sergeant McCarrick acted recklessly.

#### **Punitive Damages**

457. The actions of Defendant Sergeant McCarrick as described in this Count were:

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<sup>20</sup> *Winslow v. Smith*, 696 F.3d 716, 732 (8th Cir. 2012).

- a. Malicious or recklessly indifferent to the Plaintiff's constitutional rights, and
- b. Taken in the face of a perceived risk that they would violate federal law.

**PRAYER**

WHEREFORE, Plaintiff prays for judgment under 42 U.S.C. 1983 and 1988 against Defendant Sergeant Ryan J. McCarrick in his individual capacity, for second seizure of Plaintiff Russell Faria without probable cause, for compensatory damages in excess of \$25,000.00 and for punitive damages, for reasonable attorney's fees and non-taxable expenses, for costs, and for such other relief as the court finds to be just, meet and reasonable.

**COUNT III  
FOURTH AMENDMENT  
SECOND SEIZURE AND INCARCERATION OF MR. FARIA  
WITHOUT PROBABLE CAUSE,  
AGAINST DEFENDANT PROSECUTING ATTORNEY ASKEY**

458. Plaintiff incorporates by reference all prior paragraphs.
459. At the time of Mr. Faria's initial release two days after the murder of Betsy Faria Prosecuting Attorney Askey directed Defendant Detective Merkel and Detective Harney to obtain more evidence against Mr. Faria so she could charge him.
460. On information and belief from the time when Mr. Faria was released on December 29, 2011 until she filed the murder charge against him on January 4, 2012 Prosecuting Attorney Askey participated in and influenced the investigation of the murder of Betsy Faria.
461. In participating in and influencing the investigation Defendant Prosecuting Attorney Askey:
- a. Acted in a non-prosecutorial manner, and

- b. Was working with other law enforcement to develop probable cause against Mr. Faria.
462. On information and belief Defendant Prosecuting Attorney Askey knew:
- a. The statements in Para. G regarding luminescence were false, and
  - b. Without the statements regarding luminescence in Para. G there was insufficient evidence against Mr. Faria to create probable cause for his arrest for the murder of Betsy Faria.
463. On inference Prosecuting Attorney Askey contributed to the fabrication of the luminescence evidence.
464. During the time period after Mr. Faria's initial release until January 4, 2012 Defendant Prosecuting Attorney Askey failed to consider the evidence:
- a. Exonerating Mr. Faria, or
  - b. Implicating Pamela Marie Hupp.
465. Each of the evidence of the lack of luminescence (and therefore the lack of evidence of clean up), the evidence exonerating Mr. Faria, and the evidence implicating Pamela Marie Hupp was material in that each of the items would have had a reasonable likelihood of affecting the incarceration of Mr. Faria and/or the outcome of the case.
466. A day or two after the murder Defendant Prosecuting Attorney Askey advised family members of Betsy Faria to tell Pamela Marie Hupp that she needed to tell investigators that Betsy Faria had told Pamela Marie Hupp that Mr. Faria had abused his family members.
467. Defendant Prosecuting Attorney Askey refused to have the dog's paws tested for blood, when evidence of no blood could have only supported Mr. Faria and not the prosecution.

468. The conduct of Prosecuting Attorney Askey before the filing of the probable cause statement as described in this Count:
- a. Was truly egregious and extraordinary,
  - b. Shocks the conscience,
  - c. Was reckless,
  - d. Amounts to brutal and inhumane abuse of official power, and
  - e. Showed evidence of systematic pressure to implicate the defendant in the face of contrary evidence.<sup>21</sup>
469. During the entire time that Prosecuting Attorney Askey participated in and influenced the development of an alleged factual basis to support a finding of Probable Cause Prosecuting Attorney Askey never had a truthful factual basis sufficient to constitute probable cause for Mr. Faria's arrest.<sup>22</sup>
470. During the entire time that Prosecuting Attorney Askey participated in and influenced the development of an alleged factual basis to support a finding of Probable Cause Prosecuting Attorney Askey did not have even arguable probable cause Mr. Faria had murdered Betsy Faria, that is, any belief which Prosecuting Attorney Askey had that Mr. Faria had murdered Betsy Faria was not objectively reasonable.<sup>23</sup>

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<sup>21</sup> *Winslow v. Smith*, 696 F.3d 716, 732 (8th Cir. 2012).

<sup>22</sup> *Livers v. Schenck*, 700 F.3d 340, 357 (8th Cir. 2012), indicating this right clearly established before 2006.

<sup>23</sup> *Greenman v. Jessen*, 787 F.3d 882, 888 (8th Cir. 2015), *Copeland v. Wicks*, 468 S.W.3d 886, 891 (Mo. 2015)

471. Prosecuting Attorney Askey has no absolute prosecutorial immunity for her conduct engaging in participating in and influencing the investigation of the murder of Betsy Faria before there was probable cause sufficient to warrant an arrest.<sup>24</sup>
472. Prosecuting Attorney Askey is liable for Mr. Faria's subsequent arrest and 41 months and 12 days in jail.<sup>25</sup>
473. The fact that Defendant Prosecuting Attorney Askey called a grand jury and obtained an indictment does not retroactively transform her misconduct from the administrative or investigative to the prosecutorial.<sup>26</sup>
474. Mr. Faria's service of 41 months and 12 days incarceration and facing a false prosecution was the natural consequence of Prosecuting Attorney Askey's conduct in connection with that investigation and before the development of probable cause and the filing of the charges.
475. Those damages were the natural consequence of Defendant Prosecuting Attorney Askey participating in, directing, leading and controlling the investigation.
476. The actions of Defendant Prosecuting Attorney Askey as described in this Count were objectively unreasonable under the Fourth Amendment.

### **Recklessly**

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<sup>24</sup> See *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993), squarely on point denying absolute immunity to a prosecutor before he has "probable cause to have anyone arrested," and see *Saterdalen v. Spencer*, 725 F.3d 838, 841-842 (8th Cir. 2013), and see *McGhee v. Pottawattamie Cty., Iowa*, 547 F.3d 922, 933 (8th Cir. 2008) "We find immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not "a distinctly prosecutorial function."

<sup>25</sup> *Fields v. Wharrie*, 740 F.3d 1107, 1113 (7th Cir. 2014) confirming liability for all the damages.

<sup>26</sup> *Fields v. Wharrie*, 740 F.3d 1107, 1113 (7th Cir. 2014).

477. In taking the actions described in this Count Defendant Prosecuting Attorney Askey acted recklessly.

**Punitive Damages**

478. The actions of Defendant Prosecuting Attorney Askey as described in this count were:

- a. Malicious or recklessly indifferent to the Plaintiff's constitutional rights, and
- b. Taken in the face of a perceived risk that they would violate federal law.

**PRAYER**

WHEREFORE, Plaintiff prays for judgment under 42 U.S.C. 1983 and 1988 against Defendant Prosecuting Attorney Leah Askey in her individual capacity, for second seizure of Plaintiff Russell Faria without probable cause, for compensatory damages in excess of \$25,000.00 and for punitive damages, for reasonable attorney's fees and non-taxable expenses, for costs, and for such other relief as the court finds to be just, meet and reasonable.

**COUNT IV  
FOURTH AND FOURTEENTH AMENDMENT  
CONSPIRACY TO SEIZE THE PERSON AND DENY SUBSTANTIVE DUE PROCESS  
AGAINST ALL DEFENDANTS**

479. Plaintiff incorporates by reference all prior paragraphs.

480. All Defendants acted together to obtain the search warrant to look for blood clean up.

481. The execution of the warrant produced no evidence of blood clean up.

482. On January 3, 2012 Defendant Sergeant McCarrick and Defendant Detective Merkel fabricated the luminescence evidence, that is, they fabricated evidence that there was blood clean up.

483. On inference Defendant Prosecuting Attorney Askey participated in this fabrication.

484. In order to conceal the fabrication Defendants:

- a. Stated that pictures failed to develop, and

- b. Before the first trial failed to produce to criminal defense counsel the late drafted report, and
  - c. Failed to produce the developed pictures until immediately before the second trial.
485. Until the second trial all Defendants refused to test for blood on the gloves when, if it turned out a third party's blood were on the gloves, it would have assisted Mr. Faria and not the prosecution.
486. During the investigation Defendant Sergeant McCarrick covered up an improper and unconstitutional interrogation technique in which, on information and belief, officers set up a faux polygraph and claimed that Mr. Faria had flunked it, thereby threatening Plaintiff.<sup>27</sup>
487. When the letter from State Farm came to Mr. Faria stating that State Farm would pay Pamela Marie Hupp, not Mr. Faria, the insurance proceeds Defendant Detective McCarrick spoke to Mr. Faria about it without Mr. Faria's counsel present in an attempt to elicit a confession, all in violation of Mr. Faria's right to counsel.
488. Throughout the prosecution all Defendants failed to consider the evidence exonerating Mr. Faria or the evidence implicating Pamela Marie Hupp.
489. As the prosecution proceeded Defendant Sergeant McCarrick and Defendant Detective Merkel ignored the following additional evidence implicating Pamela Marie Hupp:
- a. Pamela Marie Hupp many times changed her story about, first, her own whereabouts the night of the murder and, second, what she saw the night of the murder,

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<sup>27</sup> *Winslow v. Smith*, 696 F.3d 716, 732 (8th Cir. 2012).

- b. Betsy Faria's family members' stories and records about their phone calls, including the timing and the missing of calls the night of the murder were consistent with Pamela Marie Hupps' guilt,
- c. Pamela Marie Hupp's story about seeing various cars the night of the murder was inconsistent with the actual location of those cars as law enforcement saw those cars when law enforcement arrived at the scene,
- d. Pamela Marie Hupp many times changed her story about her relationship with Betsy Faria,
- e. Pamela Marie Hupp many times changed her story about the character of Mr. Faria and how well she knew Mr. Faria,
- f. Pamela Marie Hupp many times changed her story about her own finances.
- g. Pamela Marie Hupp many times changed her story about the strength of her memory,
- h. Pamela Marie Hupp changed her story about what car Mr. Faria was driving the night of the murder,
- i. The cell phone records of Pamela Marie Hupp's from the night of the murder, when law enforcement finally did obtain those phone records, were inconsistent with Pamela Marie Hupp's various stories about her whereabouts that night.
- j. p.doc was the only document on Betsy Faria's computer for which the creator was stated in the metadata as "unknown," which implies that Pamela Marie Hupp had created the document and put it on Betsy Faria's computer, for otherwise the metadata of the computer would have shown Betsy Faria as the document's creator, and Pamela Marie Hupp over and over told investigators to find that

letter, with the implication that she knew the contents, because she had created it, and the contents would implicate Mr. Faria.

490. The lack of luminescence, the evidence exonerating Mr. Faria and the evidence implicating Pamela Marie Hupp was all material in that it would have had a reasonable likelihood of affecting the incarceration of Mr. Faria and/or the outcome of the case.
491. Before the first trial Defendant Sergeant McCarrick encouraged Pamela Marie Hupp to put the insurance proceeds into a trust for Betsy Faria's children in order to make Pamela Marie Hupp look better before the jury.
492. Pamela Marie Hupp did so, which was a fabrication of evidence.
493. In the months before the second trial Defendant Detective Merkel and Defendant Detective Harney coerced or coached Ms. Hupp's testimony by suggesting to her that she saw Mr. Faria near the house when she dropped off Betsy Faria.
494. Defendant Detective Merkel and Defendant Detective Harney thereby manufactured false evidence to fill the deficiencies in the case, to wit, that there was no evidence Mr. Faria was at the scene at the time of the murder.
495. During the time Defendants were still developing alleged probable cause they all ignored clearly verifiable facts of the murder in Mr. Faria's favor.<sup>28</sup>
496. After Defendant Sergeant McCarrick signed the probable cause statement Defendant Sergeant McCarrick and Defendant Detective Merkel ignored clearly verifiable facts of the murder in Mr. Faria's favor.<sup>29</sup>

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<sup>28</sup> *Dean v. Cty. of Gage, Neb.*, 807 F.3d 931, 940 (8th Cir. 2015)

<sup>29</sup> *Dean v. Cty. of Gage, Neb.*, 807 F.3d 931, 940 (8th Cir. 2015)

497. During the time all Defendants were still developing alleged probable cause and up until Defendant Sergeant McCarrick signed the probable cause statement Defendant Prosecuting Attorney Askey acted as an investigator.

498. Defendant Prosecuting Attorney Askey publicly stated to the press that she hoped she would be able to charge Mr. Faria with the murder, thereby concluding who the murderer was before the evidence justified such a conclusion.<sup>30</sup>

499. The conduct of all Defendants as described in this Count:

- a. Was truly egregious and extraordinary,
- b. Shocks the conscience,
- c. Amounts to brutal and inhumane abuse of official power, and
- d. Showed evidence of systematic pressure to implicate the defendant in the face of contrary evidence.<sup>31</sup>

500. The conduct of all Defendants as described in this Count went far beyond mere negligence.<sup>32</sup>

501. The conduct of all Defendants as described in this Count violated Plaintiff's

- a. Fourth Amendment right to be free of seizure of his person without probable cause, and
- b. Fourteenth Amendment liberty interest protected by the due process clause of the Fourteenth Amendment in being free of arbitrary government action such as being

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<sup>30</sup> *Livers v. Schenck*, 700 F.3d 340, \_\_\_\_\_ (8th Cir. 2012) GET PAGE NUMBER FOR PUBLIC COMMITMENT

<sup>31</sup> *Winslow v. Smith*, 696 F.3d 716, 732 (8th Cir. 2012).

<sup>32</sup> *Winslow v. Smith*, 696 F.3d 716, 732 (8th Cir. 2012).

subject to the start of and continuation of a criminal charge with no basis in fact.<sup>33</sup>

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502. Defendant has a liberty interest in fair criminal proceedings.<sup>35</sup>
503. All Defendants conspired together to deprive Plaintiff of his constitutional right to be free of unreasonable seizure of his person and the constitutional right to substantive due process, by incarcerating him and prosecuting him for a crime which he did not commit.<sup>36</sup>
504. There was more than one person involved in the conspiracy.
505. The purpose of the conspiracy was to convict Mr. Faria of a murder he did not commit.

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<sup>33</sup> Most cases suggest the rights herein fall under substantive due process but others assert procedural due process, and by reference Plaintiff hereby asserts both, See Avery, Police Misconduct Law and Litigation, § 2:30, footnote 19.

<sup>34</sup> *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). See also *Livers v. Schenck*, 700 F.3d 340, 351-52 (8th Cir. 2012):

Intentionally or recklessly failing to investigate other leads or manufacturing false evidence may shock the conscience and can violate the Fourteenth Amendment's due process clause. See *Winslow v. Smith*, 696 F.3d 716, 731-732 (8th Cir. 2012); *Wilson v. Lawrence Cnty., Mo.*, 260 F.3d 946, 955-57 (8th Cir.2001). We have referenced areas of "reckless investigation," which include: (1) coercing a suspect's confession; (2) "purposely ignor[ing] evidence suggesting ... innocen[ce]"; and (3) "systemic pressure to implicate [a suspect] in the face of evidence to the contrary." *Amrine v. Brooks*, 522 F.3d 823, 833-35 (8th Cir.2008) (citing *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir.2002) (en banc) (*Moran I*), and *Wilson*, 260 F.3d at 955-56). Negligence and even gross negligence is not enough because the state action must be "truly egregious and extraordinary" to shock the conscience, *Winslow*, 696 F.3d at 735-36 (quoting *Strutton v. Meade*, 668 F.3d 549, 557 (8th Cir.2012)) (internal quotation marks omitted), and so severe as to amount to "brutal and inhumane abuse of official power," *id.* (quoting *Golden ex rel. Balch v. Anders*, 324 F.3d 650, 653 (8th Cir.2003)) (internal quotation marks omitted). The "reckless[ness] standard normally contains a subjective component." *Wilson*, 260 F.3d at 956 n. 9. Law enforcement "must be faithful to the overriding interest that 'justice shall be done.'" *Id.* at 957 (quoting *United States v. Agurs*, 427 U.S. 97, 110-11 (1976)).

<sup>35</sup> *Winslow v. Smith*, 696 F.3d 716, 731 (8th Cir. 2012)

<sup>36</sup> *Dean v. Cty. of Gage, Neb.*, 807 F.3d 931, 939 (8th Cir. 2015) (Same case as Winslow, third trip to Eighth Circuit)

506. Defendants or any two of them had a meeting of the minds on the object of the conspiracy or the course of action to be taken, including the acts of constitutional misconduct outlined herein,
507. Defendants or any two of them engaged in one or more acts in furtherance of the conspiracy, including the acts of constitutional misconduct outlined herein.
508. Plaintiff was damaged by being subject to criminal charges for almost four years and enduring a first criminal trial ending in a finding of guilty, a successful appeal, and a second trial ending in a finding of not guilty.
509. Evidence of a conspiracy may be circumstantial.
510. Each of the Defendants is jointly liable for his or her co-conspirators' acts in furtherance of the conspiracy.
511. Defendants were seeking evidence that Mr. Faria could have possibly committed the murder, not seeking to determine who did commit the murder.

**Recklessly**

512. In taking the actions described in this Count all the Defendants acted recklessly.

**Punitive Damages**

513. The actions of all Defendants as described in this Count were:
- a. Malicious or recklessly indifferent to Plaintiff's constitutional rights, and
  - b. Taken in the face of a perceived risk that they would violate federal law.

**Prayer**

WHEREFORE, Plaintiff prays for judgment under 42 U.S.C. 1983 and 1988 against Defendant Sergeant Ryan McCarrick, Defendant Detective Michael Merkel, Defendant Detective Harney and Defendant Prosecuting Attorney Leah Askey, and each of them for

conspiracy to deny due process, for compensatory damages in excess of \$25,000.00 against each of them, for punitive damages against each of them, for reasonable attorney's fees and non-taxable expenses, for costs, and for such other relief as the court finds to be just, meet and reasonable.

**COUNT V**  
**FOURTH OR FOURTEENTH AMENDMENT**  
**FEDERAL CLAIM FOR MALICIOUS PROSECUTION**  
**AGAINST DEFENDANT SERGEANT MCCARRICK AND**  
**DEFENDANT DETECTIVE MERKEL**

514. Plaintiff incorporates by reference all prior paragraphs.<sup>37</sup>
515. The statute of limitations began to run when Mr. Faria was acquitted.
516. Prior to that time Mr. Faria was seized by being subject to prosecution.
517. Defendant Sergeant McCarrick, Defendant Detective Merkel and Defendant Detective Harney instituted a criminal proceeding against Mr. Faria.
518. The criminal proceeding ended in Mr. Faria's favor.
519. There was no probable cause to initiate the proceeding.
520. Defendant Sergeant McCarrick, Defendant Detective Merkel and Defendant Detective Harney acted maliciously, in that they wished to be seen as correct that they were prosecuting the correct person as Defendant Prosecuting Attorney Askey had stated to the press, and they wished to be seen as correct for telling State Farm that Pamela Marie Hupp was not a suspect, so that the life insurance proceeds would be paid to her.

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<sup>37</sup> Whether this claim is viable is currently at the briefing stage in the Supreme Court of the United States in *Manuel v. Joliet*, 14-9496, and the rest of this Count presumes that the Supreme Court will rule favorably to Plaintiff's position. See prior somewhat confusing decision in *Albright v. Oliver*, 510 U.S. 266 (1994). In the meantime Plaintiff acknowledges that there is no federal claim for malicious prosecution in the Eighth Circuit, *Bates v. Hadden*, 576 F. App'x 636, 639 (8th Cir. 2014). Plaintiff notes that Plaintiff may need to amend depending on how the Supreme Court rules.

521. Mr. Faria suffered a deprivation of liberty consistent with the concept of a seizure as a consequence of the criminal proceeding.
522. Any intervening actions such as the filing of charges, the indictment, or the first acquittal at best create a rebuttable presumption that an independent judgment as to probable cause was made.

### **Punitive Damages**

523. The actions of Defendant Sergeant McCarrick and Defendant Detective Merkel as described in this Count were:

- a. Malicious or recklessly indifferent to Plaintiff's constitutional rights, and
- b. Taken in the face of a perceived risk that they would violate federal law.

WHEREFORE, Plaintiff prays for judgment under 42 U.S.C. 1983 and 1988 against Defendant Sergeant Ryan McCarrick, Defendant Detective Michael Merkel and Defendant Detective Harney, and each of them for malicious prosecution, for compensatory damages in excess of \$25,000.00 against each of them, for punitive damages against each of them, for reasonable attorney's fees and non-taxable expenses, for costs, and for such other relief as the court finds to be just, meet and reasonable.

Respectfully submitted,

Co-Counsel for Plaintiff

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