

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH DAKOTA,	)	51C84-000048A0
Plaintiff,	)	
	)	
v.	)	AMENDED DECISION GRANTING NEW
	)	TRIAL
GEORGE G. LUNA,	)	
	)	
Defendant.	)	
	)	
	)	

Before the Court is Petitioners Motion for a New Trial. A hearing was held on the matter on October 27, 2022. Petitioner appeared with his counsel, John Murphy. Respondent appeared by and through counsel, Tracey Decker. The Court heard testimony from Adrienne Barranco, Jessika Kirkpatrick, and Investigator Steve Neavill. Four exhibits were received. On December 6, 2023, Petitioner filed a Brief in Support of Motion for New Trial. On December 20, 2022, Respondent filed Respondent's Brief. On January 4, 2022, Petitioner filed Reply Brief in Support of Motion for New Trial. The Court had issued a Memorandum Decision on February 28, 2023. A hearing was held after additional information, specifically about the discovery that in fact the hair samples believed to be missing after the testing done in 2016 were *not missing*. This discovery led to additional testing and a subsequent hearing was held on April 29, 2025. Additional information which is reflected in both the [State's] Motion to Vacate and Reconsider Court's Memorandum Decision Dated February 28, 2023 which has been grated in a separate Order filed contemporaneously with this decision, and further information included in this Amended Decision and Order Granting New Trial leads the Court to the same conclusion it had previously come to, however, under slightly different, and stronger support. The analysis and ultimate decision of the Court is found herein.

DISCUSSION

Motion for New Trial

Under SDCL 23-5B-16, a new trial must be granted if certain conditions are met:

The court shall grant the motion of the petitioner for a new trial if the DNA test results, when considered with all other evidence in the case, establish by compelling evidence that a new trial would result in the acquittal of the felony offense, as referenced in § 23-5B-1, for which the petitioner is under a sentence of imprisonment.

Accordingly, the Court must examine the DNA test results together with all other evidence in the case to determine whether compelling evidence exists that a new trial would result in an acquittal.

1. DNA testing results

a. DNA testing of hair from the hand of Lynn Luna

During the 1984 trial, testimony was presented by the State's hair analyst regarding hairs submitted to him that were found in the hand of Lynn Luna including "light brown head hairs exhibiting Caucasian characteristics, which matched in every observable microscopic characteristic the known head hairs of Lynn Luna" as well as "a reddish brown head hair, exhibiting Caucasian characteristics, which matched none of the known hair samples which were submitted to [the hair analyst]."¹ The known hair samples that were submitted to the hair analyst included those of Lynn, Helen, Grandma Jessie, an infant child whose parentage was the Defendant and the victim Lynn Luna, George, Doug, and Joseph Leonard.² The hair analyst went on to explain the parameters of hair analysis:

Q When you say a head hair sample matches, what do you mean by that?

A In order for a head hair—for me to say that a question hair answers a known hair, it has to match in every observable microscopic characteristic, the characteristic that I talked about previously or just a small list of those characteristics I look at and also the arrangement of those characteristics, then it could not have originated from the source of the known hairs. I would then say that hair could not have come from the source of the known hairs I'm comparing it to.

Q Is it ever possible to examine hair samples and know exactly who they come from?

A No. Hair examinations are not like fingerprints. It's not a positive means of identification. We can say that a hair could have come from an individual by comparing it to another hair. . . . So right now [in 1984] the state of the art is all

¹ Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), p. 1568.

² Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1561-63, 1565, 1567.

we can say [is that] it could have [come from a particular individual], it's not a positive means of identification.

....

Q Now, let me ask you a little more. Now, you said that usually your determinations when you make a match are that they could have come from the sample.

A That's Correct.

Q Now, by the same token, does it go the other way, that they could not have come from there?

A No, that's something that's very easily presumed when you say they could have, then they also could not have. Well, that's not true. If the hairs could not have come from that individual, they would have differed in at least one microscopic characteristic. In this case, I said they could have originated from Lynn Luna, that meant they matched in every observable microscopic characteristic.

Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1568-69; 1578-79.

In 2016 (more than 30 years later), one of the hairs from the hand of Lynn Luna measuring approximately 3.5cm (Bode Cellmark Sample Name CCB1590-0368-E01b; Agency Sample ID 14-209730-Q5) was tested for mitochondrial DNA (mtDNA).³ Mitochondrial DNA testing, which is used to identify a maternal line, was selected rather than nuclear DNA testing, which can identify an individual, since the hair sample provided to the lab was not suitable for nuclear DNA testing.⁴ During the testing process, the hair was destroyed.⁵ The result of the mtDNA test was that "Doug Thomas . . . could not be excluded as a contributor of the [hair] sample CCB1590-0368-E01b"⁶—but neither could anyone in his maternal line which would include, among others, Lynn, Helen, Grandma, and Baby Luna.⁷

The parties to this case did not specify, and it appears to be unknown, which hair from the hand of Lynn Luna was tested in 2016 for mtDNA. Was it one of the hairs that were identified by the "original analyst" (who testified in the 1984 jury trial) as hairs matching the characteristics of Lynn Luna's hair (which would explain the 2016 mtDNA maternal line testing result) or was it the hair that remained unidentified by the original analyst ("unidentified hair")—i.e. the unidentified hair that did not match any of the known hair samples presented to the original analyst? If the hair that was tested in 2016 for mtDNA was the unidentified hair, that means there may have been a relative from the maternal line at issue who was present at the crime scene, but who did not receive a request from law enforcement to provide a hair sample for

³ Transcript of Motion Hearing held 10/27/22 (filed 11-15-22), p.15 (3.5cm hair tested); Bode Cellmark Forensics lab report dated September 19, 2016) (filed 10-31-22). It should be noted that Bode Technology merged with/into Bode Cellmark Forensics during the time of testing and re-testing of materials sent to their lab(s) – they are essentially the same agency under a different name

⁴ Transcript of Motion Hearing held 10/27/22 (filed 11-15-22), pp. 15-17.

⁵ Transcript of Motion Hearing held 10/27/22 (filed 11-15-22), p. 15.

⁶ Exhibit 4, p. 2 (Bode Cellmark Forensics lab report dated September 19, 2016) (filed 10-31-22); Transcript of Motion Hearing held 10/27/22 (filed 11-15-22), pp. 24-25.

⁷ Transcript of Motion Hearing held 10/27/22 (filed 11-15-22), pp. 30-32.

comparison purposes.⁸ That person would exclude Doug since a sample of his hair was taken. There is a third scenario which must also be considered—that nothing more is known about the origin of the 3.5 cm hair than what the Bode testing revealed. The Defense described the amount of hair in Lynn Luna’s hand as “not just a little bitty eyelash type of piece of hair. . . . This was a gob of hair in Lynn Luna’s hand. The hairs in the hand of Lynn Luna that were submitted to the original analyst were identified as “Q4” (also known as State’s Exhibit 23).⁹ According to the original analyst, he mounted the Q4 hairs (State’s Exhibit 23) on “glass, microscop[e] slides” (plural) which left State’s Exhibit 23 an empty container.¹⁰ But the analyst also said that he took the Q4 hairs “and placed them on a glass slide” (singular).¹¹ The slide (or perhaps slides) then became known as State’s Exhibit 23A.¹² At one point the parties referred to State’s Exhibit 23A as “the slide” (singular)¹³ and the List of Exhibits to the Jury Trial Transcript also describes State’s Exhibit 23A with a singular slide reference: “Slide of hair in Exhibit 23”¹⁴ When compared to the 2016 Bode report, this singular vs. plural inconsistency becomes even more enigmatic.

The 2016 Bode Cellmark Forensics lab report refers to the items it received and tested as follows:

<u>Bode Cellmark Sample Name</u>	<u>Agency Sample ID</u>	<u>Agency Description</u>
CCB1590-0368-E01	14-209730-Q5	Slide: Hairs from hand of Lynn Luna
CCB1590-0368-E01b		Apparent hair, ~3.5cm
CCB1590-0368-R02	14-209730	Buccal Swabs – George Luna
CCB1590-0368-R03	14-209730-K34,K35,K36	Slide: Hairs - Joseph Leonard
CCB1590-0368-R04	14-209730-K37	Slide: Hairs - Doug Thomas

The Court notes that the Agency Sample ID for the slide of hairs from the hand of Lynn Luna ends in Q5 and the Agency Description refers to a singular slide with “Hairs” (plural) that are further described as “Apparent hair ~ 3.5cm.” Despite the incongruent descriptions, the slide submitted to Bode Cellmark Forensics apparently had only one hair as implied by the Bode

⁸ For a discussion of how unknown hairs could be found at crime scenes due to innocuous reasons, see Transcript of Jury Trial, Volume VIII, Day 8 (filed 10-1-84), pp. 1569-70 (hairs are easily spread in conjunction with human contact); *Id.* at p. 1562 (a hair sample from a combing as opposed to pulling out or cutting a hair is not considered a known sample since it could be the hair of another person).

⁹ Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), p. 1561 (hair analyst reference to Q4); Transcript of Jury Trial Volume I, Day 1 (filed 10-1-84), List of Exhibits, p. ii (Q4 is a reference to State’s Exhibit 23—i.e. hair found in the hand of Lynn Luna).

¹⁰ Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), p. 1571-72.

¹¹ Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), p. 1573.

¹² Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), p. 1573. At one point, the analyst referred to State’s Exhibit 23 as his Q1 item. *Id.* at 1573-74. That appears to be a misstatement since Q1 (also known as State’s Exhibit 21) is a reference to a hair found on the index finger of the victim (Helen) which was unsuitable for comparison. *Id.* at 1559-60.

¹³ Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), p. 1575 (“MR. ROUBIDEAUX: Now which exhibit are you talking about? MR LEFHOLZ: That would be the slide, Ramon. THE COURT: 23A. MR. ROUBIDEAUX: I thought it was already in evidence. THE CCOURT: Has it been—it is in evidence.”)

¹⁴ Transcript of Jury Trial Volume I, Day 1 (filed 10-1-84), List of Exhibits, p. ii.

[Technology]. DNA analyst who explained “[w]e were asked to test the hairs from the hands [sic] of Lynn Luna, and that included a hair that was about three and a half centimeters long. We did consume that hair during our testing.”¹⁵ Furthermore, neither the testimony of the Bode analyst nor the Bode Cellmark Forensics report refer to any other hair or hairs that Bode tested. Accordingly, it is not clear if the 3.5cm hair from the hand of Lynn Luna that Bode tested was a hair that the original analyst also analyzed since the Q5 designation does not match the original Q4 designation—and also because if the original analyst indeed prepared only one slide—i.e. the slide that was presented to Bode—then there should have been multiple hairs on it, not just one. In the words of the Defense, there should have been “a gob” of hairs on that exhibit. Ultimately, the mystery of whether the 3.5cm hair belonged to Lynn Luna; a maternal relative of Lynn Luna, excluding Doug; or a maternal relative of Lynn Luna, inclusive of Doug, seems unresolvable since the 3.5 cm hair consumed during Bode’s testing process.¹⁶ The trial court had concluded, discussed *infra*, that Doug Thomas was not a possible match for the hair samples found on the victims—given the DNA evidence from the 2016 analysis together with the ambiguity in the court record,¹⁷ there was not evidence which fully supported this conclusion.

However, this changed after the remaining hairs, thought to be missing, were re-tested by Bode and testified to at the hearing of April 29, 2025. At that hearing, testimony was presented that the additional testing of Q1/Q4 showed that the hairs could only have come from a female contributor. *Hearing of 4/29/2025; States Exhibit 1*. The State correctly points out in their Motion to Vacate and Reconsider Court’s Memorandum Decision Dated February 28, 2023, the new (latest) testing excludes Doug Thomas, who was still a possible source of the hairs in Lynn Luna’s hand as he was the brother of Lynn and the son of Helen as Doug Thomas is a male. Although this appears to finish the conclusive evidence sought by George Luna which would have bolstered his argument that the perpetrator’s hair was in the hands of the dead victim, it also excludes George Luna as the source. This is the first of *many pieces of DNA evidence that exclude George Luna as a contributor* to evidence found at and beyond the scene. And after a careful review of all the gathered DNA evidence, the Court finds that none of the DNA evidence connects George Luna to the murders.

b. Testing of other items for presence of blood and DNA

¹⁵ Transcript of Motion Hearing held 10-27-22 (filed 11-15-22), p. 15

¹⁶ Transcript of Motion Hearing held 10-27-22 (filed 11-15-22), pp. 36-38. The remaining hairs were thought to have been lost while in the custody of the State. This was a strong basis for the original decision of this Court to grant a new trial. In fact, *the hairs were not lost*. They were later discovered upon further review of the evidence held by the Pennington County Evidence section when (then) Staff Attorney Laura Hilt requested to review the returned evidence from Bode and realized the remaining hairs had in fact not been lost, but returned, and that there had been an error in cataloging the evidence once returned to the evidence building after the 2016 testing. This led to additional testing of the remaining (found) hairs.

¹⁷ The Defense originally offered a blanket objection to a string of exhibits (State’s Exhibits 21-57) when State’s Exhibit 23 was presented as hairs in the hand of Lynn Luna, yet it was only an empty container. As the objection was overruled, clarity surrounding the exact composition of State’s Exhibit 23A was never addressed. Transcript of Jury Trial Day Volume VIII, Day 8 (filed 10-1-84), pp. 1571-73 (objection to exhibits on grounds of improper foundation). *See also Id.* at 1574-75 (depicting confusion surrounding exhibit 23A).

Prior to the 1984 trial, various items were tested for the presence of blood including items of clothing taken from George's person on the day the bodies were discovered (shirt, T-shirt, jeans, belt, brown jacket, gloves from the brown jacket pocket, and boots).¹⁸ The results of the testing are summarized as follows:

Item number	Item description	Presece of blood?	type of blood (human or animal blood)	Serologist's comments
Q22	white shirt	no		
Q23	t-shirt	no		
Q24	blue jeans	no		
Q24 [sic]	brown belt	no		
Q27	brown jacket	no		
Q28	rope	yes	No human blood detected (negative reaction for human blood)	Testing indicates bovine blood, but it may be deer blood
Q29 & Q30	pair of brown gloves from brown jacket	no		
Q33 & Q34	pair of black boots	yes	Blood could not be confirmed as being of human origin	First test resulted in no human blood; second more concentrated test resulted in a nonspecific reaction all across the board from human to bovine and deer. The general reaction probably means there is nothing there, but bovine reaction was the strongest. Leather material may also be a factor.
Q93 & Q94	pair of brown gloves (van gloves)	positive presumptive test for blood	Species origin cannot be confirmed	Very weak presumptive test suggests blood may be present, but nothing obvious at all; it cannot be called human blood without a good positive presumptive; it may be human sweat and bovine blood
Q160	shoe cleaning box	no		

Defendant's Exhibit A, Serological Research Institute report and phone interview of Serologist Brian Wraxall by Deputy Bill Olsen (filed 9-13-23, nunc pro tunc 5-29-84).¹⁹ As discussed further below, the prosecution believed George wore the white shirt (shirt), T-shirt, blue jeans

¹⁸ Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84) pp. 778-82 (Officer Ken Gardner collects George's boots on May 1, 1983); Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84), pp. 783-87 (Evidence Technician Harold Plooster collects items of George's clothing on May 1, 1983 including his shirt, T-shirt, jeans, belt, brown jacket, and gloves that were in the brown jacket); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1810-11 (George's clothes collected by law enforcement).

¹⁹ The brown jacket (no blood found) and the rope (no human blood found) were also tested for blood by the FBI; however, the FBI serologist did not differentiate between human and animal blood in the testing process. Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), p. 1274 (brown jacket); pp. 1274-76 (rope); pp. 1286-89 (failure to differentiate between human and animal blood).

(jeans), and boots during the commission of the murders (and used the gloves found in his van (van gloves) while breaking a window at the crime scene²⁰).

In 2020, additional testing was conducted on various items of evidence to test for blood and conduct DNA analysis (including testing for touch DNA),²¹ the results of which are summarized as follows:

Item number	Item description	Presece of blood?	DNA extraction attempted?	George Luna excluded as contributor to DNA profile?
7	towel stains A & B (bedroom towel)	yes	yes: female origin	Luna excluded
11	towel stain (kitchen towel)	yes	yes: female origin	Luna excluded
12	right hand bag-Helen Thomas	yes	yes, partial DNA profile obtained: female origin	Luna excluded
13	rope collected from George Luna	yes	yes, but amount was insufficient and/or degraded to produce profiling results	Luna excluded as major contributor to DNA profile; minor component of DNA profile was not suitable for comparisons
15	sample-kitchen sink	yes	yes: major contributor female origin	
16	sample-above stairs	yes		
16.01	swabs of sample		yes, but insufficient DNA prevented profiling	
21	sample-kitchen wall	yes	yes, partial DNA profile obtained: female origin	Luna excluded as source of partial DNA profile obtained
22	Right hand bag-Lynn Luna	yes		
	Inside of right hand bag-Lynn Luna		yes, but insufficient genetic information so no statement could be made about the source of the weak DNA types	
	Outside of right hand bag-Lynn Luna		yes, partial DNA profile obtained: female origin	Luna excluded
8	rug-rear door	no	no	
9	black boots-George Luna	no	no	
10	steering wheel cover	no	no	
14	swab from sink	no	no	
17	sample-kitchen sink	no	no	
18	sample-kitchen ceiling	no	no	

Exhibit 2, DCI Forensic Laboratory report dated January 22, 2020 (filed 10-31-22); Transcript of Motion Hearing held October 27, 2022 (filed 11-15-22), pp. 33-47. None of the serology or DNA testing placed George at the crime scene. Of particular interest to an investigator with the [Pennington County] State's Attorney's Office, who assisted in identifying items for further

²⁰ Transcript of Jury Trial Volume XIII, Day 13 (filed 10-1-84), p. 2361 (prosecution proposing theory that "after breaking the glass [at crime scene] with these (van) gloves to protect his hands, he [George] took them off, probably put them in his pocket."

²¹ Transcript of Motion Hearing held 10-27-22 (filed 11-15-22), p. 36 (blood and touch DNA testing conducted).

analysis, was the testing of George's boots—which tested negative for the presence of blood.²² *Ultimately, the complete absence of human blood on all of George's clothing, including his boots, is noteworthy considering there was a significant amount of blood at the crime scene.*²³ Even the prosecution thought blood had to have splattered on the perpetrator—which led the State to assert that George must have worn a different coat during the commission of the crime than the one seized by law enforcement:

After the killings the Defendant--the evidence is going to show that the Defendant had ample opportunity to dispose of the tire iron and any other garments that he might have had on that might have got bloodstains on them from this tremendous beating he's just administered; and because of this blood on the tire iron and because of this blood on the outer garments, the Defendant--the evidence is going to show--disposes of these garments;^[24] but because there was no blood on some of the other garments [worn at the crime scene], the Defendant didn't dispose of those and, in fact, had those garments on a matter of six or eight hours later when he was confronted by law enforcement. So, law enforcement removed those various pieces of clothing from him [that he was wearing], his shoes--or boots, rather, his socks, his jeans, his underpants, his shirt, his T-shirt; [additionally,] from within the van that the Defendant was driving, they find a small pair of gloves.

These various items then are analyzed, the evidence is going to show you, by an F.B.I. glass fragments expert; he will testify that it's his opinion that the glass found on the jeans, the shirt, and the T-shirt came from the back door of that [crime scene] residence. He'll also testify that he didn't find any glass on the jacket or outer garment [i.e. brown jacket] that the Defendant was wearing when he was arrested that morning; and a blood specialist will testify also that there was no blood found on that jacket. The evidence, I think, is going to be very clear to you that there had to have been blood on the jacket of the person that administered that beating, so the evidence is going to show that that garment [the jacket that was worn at the crime scene]--we don't have--we don't have a [jacket] garment with blood on it. We don't have a [jacket] garment with glass fragments on it.

Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84), pp. 22-23. The prosecution further noted that

[we] brought you a serologist, a blood expert, from Washington D.C.; and I think [Defense Attorney] Mr. Roubideaux will comment on another serologist that we

²² Transcript of Motion Hearing held October 27, 2022 (filed 11-15-22), pp. 48-51, 55-57 (Investigator Steve Neavill discusses his review of the case and recommendation to test the boots).

²³ Transcript of Jury Trial Volume VI, Day 6 (filed 10-1-84) p. 1118 (Evidence Technician Plooster noting "[t]here was blood splatters all over"); Transcript of Jury Trial, Volume VII, Day 7 (filed 10-1-84), p. 1339 (pathologist noting there was "a considerable amount of blood" at the crime scene); See also State's Exhibits 120, 133, 137, 138, 140 (filed 8-17-23, nunc pro tunc 5-21-84) (photos of blood at crime scene) and Defendant's Exhibits UU, VV, WW, XX, YY, ZZ, AAA, BBB, CCC, DDD, EEE (photos of blood at crime scene) (filed 9-20-23, nunc pro tunc 5-29-84).

²⁴ While the prosecutor uses the plural form of the word garment, his use of the plural may have been inadvertent as the State's theory was that George disposed of a jacket—no other argument or theory was presented in regard to another item of clothing thought to be missing from the investigation.

had examine those items [who is] from San Francisco; and those serologists both tell us the same story: there is no blood on this coat. You look at these various scenes and you see a lot of blood. Do you think the person that's wielding this pipe or tire iron or whatever splatters that blood all over and not on himself? Well, that person did get some blood on himself, probably the arm that was closest to the point of impact when this steel bar, whatever it was, was wielded. Where is that coat? We don't know. Where is the tire iron? We don't know that either, but we do know the Defendant is not telling us the truth when he tells us he wore this coat all that night. If he had worn that coat all this night, two things would have happened: glass fragments [from the crime scene] would have got on that coat and blood would have got on that coat.

Transcript of Jury Trial Volume XIII, Day 13, (filed 10-1-84), pp. 2360-61. If the State is correct that blood would have gotten on the perpetrator's coat on account of the amount of blood and splatter involved, a corollary question arises as to how could all of George's clothing—including his outer garments—been devoid of human blood if he was at the crime scene. Even if he had worn a different coat to cover his upper body, his jeans and boots also tested negative for human blood. And if any part of his shirt, such as the collar or cuffs were exposed while wearing some other coat, those parts of the shirt would have been at risk for blood splatter as well; but there was no blood on the shirt. The Defense pointed to the same enigma in its closing argument:

Now, the prosecutor here says that [the perpetrator's] jacket had to have blood on it. We agree. It had to have blood on it; but what he neglected to say is that the jeans, the shirt, the gloves, everything else had to have blood on it

. . . .

[A]nd [Dr.] Fernando Marques comes in and shows you folks just exactly what those glass fragments [on the clothing] are made of and whether or not they actually do match that door, and they don't; but even if they did match, where is the blood? There is no blood on any of those [clothing] items.

Transcript of Jury Trial, Volume XIII, Day 13 (filed 10-1-84), pp. 2427-28, 2430. Finally, in regard to any blood associated with the rope collected from George, he testified at trial that the rope had been used in association with butchering a deer after hunting with his friend²⁵ which is consistent with the results of the serology testing showing bovine or deer blood on the rope—nor is there any indication in the record that law enforcement thought a rope was used in the commission of the crimes.

2. Consideration of all other evidence in the case

²⁵ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1775-78 (rope used in process of butchering deer); Transcript of Jury Trial Volume XI, Day 11 (filed 10-1-84), p. 1990 (used rope for deer hunting).

As noted above, the Court must examine the DNA test results together with *all other evidence in the case* to determine whether compelling evidence exists that a new trial would result in an acquittal. SDCL 23-5B-16. Accordingly, an examination of the *entire case record* is necessary to comply with the dictates of the statute.

a. Discovery of the bodies

On Sunday, May 1, 1983, at approximately 9:30 a.m.²⁶ Jessie Nicksic (Grandma Jessie), who struggled with cognitive impairment,²⁷ appeared at her neighbor's house in a distraught state, with blood on her hands, talking about broken glass and blood and requesting assistance because she could not wake her daughter, Helen Thomas, even after shaking her by the shoulders.²⁸ Law enforcement was notified²⁹ and arrived sometime prior to 10:00 a.m.³⁰ to find the bodies of Helen Thomas and Lynn Luna (Helen's daughter) in the residence they shared on Fairview Street with Grandma Jessie and Lynn's infant child (Baby Luna). The cause of death for both women was determined to be blunt force trauma to the head³¹ and the time of death was sometime between 12:30 a.m. and 6:30 a.m. (approximately) on May 1, 1983.³² At some point after the bodies were discovered, Doug Thomas, Helen's estranged son, arrived at the crime scene and spoke with law enforcement.³³ Doug had not seen his mother or sister for more than a year prior

²⁶ Transcript of Jury Trial, Volume IX, Day 9 (filed 10-1-84), pp. 1663, 1665 (Neighbor Mary Wanek notes approximate time Grandma Jessie came to her door).

²⁷ Transcript of Jury Trial, Volume IX, Day 9 (filed 10-1-84), p. 1661-62, 1668 (Helen told neighbor Grandma Jessie was senile and could not be left alone); Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1756 (George noting Grandma Jessie's senility caused problems for other women in household who could not locate pans and dishes that she misplaced).

²⁸ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1646-47, 1649-61, 1665, 1671-72 (the transcript appears to be misnumbered in that pages 1650-1659 are missing, yet there does not appear to be any gap in testimony between pages 1649 and 1660) (Grandma Jessie requests help from neighbor).

²⁹ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1649 (Neighbor Mary Wanek called for emergency help when Grandma Jesse came to her for help).

³⁰ Officer Dwayne Plucker testified that he arrived at the crime scene at approximately 10:00 a.m. and that there were some officers from the Rapid City Police Department and ambulance workers that were already there. Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), pp. 1241-42, 1253.

³¹ Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), pp. 1314-15 (cause of death).

³² The record shows that the time of death was, approximately, sometime between 12:30 a.m. and 6:30 a.m. on May 1, 1983. Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), pp. 1253, 1257 (Pathologist Robert Bloemendaal arrived at the crime scene at approximately 10:30 a.m.); Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), p. 1343 (Pathologist Bloemendaal estimates the time of death to be between 4 and 10 hours prior to his arrival at the crime scene).

³³ Additional Evidence Third Party Perpetrator (filed 8-16-23, nunc pro tunc 5-17-84), Exhibit 5 (Addendum report by Officer F. Eisenbraun describing conversation with Doug); Statement from Douglas Olin Thomas on 5-1-83 (filed 8-12-91, nunc pro tunc 5-8-84), pp. 1-2, 9 (Doug stops at crime scene); Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 6-10 (Doug's estrangement from his family); Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 27-32 (Doug and Rhonda Lawrence went to crime scene); Additional Evidence Third Party Perpetrator (filed 8-

to their deaths.³⁴ Sometime between approximately 11:00 and 11:45 a.m., law enforcement officers went to the apartment where George Luna (Lynn's husband) resided.³⁵ After being handcuffed and told his wife and mother-in-law were found beaten to death,³⁶ George was taken to the Sheriff's Department at the Public Safety Building where his clothing was collected as part of the investigation.³⁷ George's van was also taken by law enforcement.³⁸

b. George's Behavior

The record shows that Lynn felt threatened and reported instances of physical abuse by George.³⁹ While there exists disagreement in the record between George, Lynn, and Helen as to

16-23, nunc pro tunc 5-17-84), Exhibit 3 (Conversation between Joe Valandra and Rhonda Lawrence on 1-26-84), p. 14 (Rhonda Lawrence and Doug went to Helen's place). Defense Attorney Ramon Roubideaux states that, according to Officer Fred Eisenbraun, Doug arrived at the crime scene at 10:47 a.m. and refers to Officer Eisenbraun's report. It is not clear how Defense Attorney Roubideaux identified Doug's arrival time as 10:47 a.m., however, since Officer Eisenbraun's report does not specify the time Doug arrived at the crime scene. Additional Evidence Third Party Perpetrator (filed 8-16-23, nunc pro tunc 5-17-84), p. 4 (defense attorney notes arrival time) and Exhibit 5 (Addendum report by Officer F. Eisenbraun describing conversation with Doug).

³⁴ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 6-7 (Doug notes he had not seen mother or sister for a year); *Id.* at pp. 7-8, 36-37 (Doug had not seen his mother and sister while they were in New Mexico and he thought they left for New Mexico in the fall of 1981; nor did Doug see them after they returned to South Dakota in the summer of 1982).

³⁵ Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84), pp. 664-66 (Sheriff Don Holloway estimates time law enforcement went to George's residence); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1802 (George estimates time law enforcement arrived at his apartment).

³⁶ Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1804-05, 1807 (George recounts being handcuffed and informed of the murders).

³⁷ Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1809-10 (George taken to Sheriff's Department at Public Safety Building); Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84), pp. 666 (same); Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84) pp. 778-82 (Officer Ken Gardner collects George's boots); Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84), pp. 784-87 (Evidence Technician Harold Plooster collects items of George's clothing including his shirt, T-shirt, and jeans); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1810-11 (George's clothes collected by law enforcement).

³⁸ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1609-12 (Patrol Sergeant Charles Chandler discussing seizure of George's van).

³⁹ State's Exhibit 9, ¶ 4 (filed 8-22-23, nunc pro tunc 5-21-84) (Affidavit by Lynn Luna stating George threatened to kill her while hitting her vehicle window and attempting to pry open the door (March 30th incident) and also implied threats to her via a tape recording); State's Exhibit 142 (filed 8-28-23, nunc pro tunc 5-22-84), p. 9 (Lynn noting on Child Custody/Visitation Questionnaire the same incident wherein George attacked Lynn's vehicle (March 30th incident)); State's Exhibit 10, ¶ 7 (filed 8-22-23, nunc pro tunc 5-21-84) (Affidavit by Lynn Luna noting gestures of throat cutting and stabbing by George); State's Exhibit 11, ¶ 4 (filed 8-22-23, nunc pro tunc 5-21-84) (Affidavit by Helen Thomas stating George had hit Lynn and left a bruise on her jaw and he had also dragged Lynn across the yard); State's Exhibit 12, ¶ 3 (filed 8-22-23, nunc pro tunc 5-21-84) (Affidavit by Lynn Luna stating that George choked, struck, and pushed her); Transcript of Jury Trial Volume V, Day 5 (filed 10-1-84), pp. 991-93 (Attorney Portia Brown recounting statements by Lynn detailing why she felt threatened by George); pp. 1024-29, 1031 (Attorney Lous Freiberg recounting discussion with Lynn wherein she disclosed feeling threatened by George and noted acts of physical aggression); Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-

what exactly transpired at different times,⁴⁰ George admitted to physical aggression toward Lynn⁴¹ and testimony was presented that he had admitted to threatening Lynn's life⁴² and made threatening remarks regarding the women to friends.⁴³ The record also shows that Helen alleged an instance wherein George had stated that he hated her entire family and had made "threats to the effect that he would 'get them.'" ⁴⁴

84), pp. 1403-05 (Clinical Social Worker Laurie Stenseth recounting discussions with Lynn about why Lynn felt threatened by George including Lynn's statement that George had held a knife to Lynn's throat while threatening her); Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1451-53, 1458-59 (Psychologist Frederick Magnavito recounting discussion with Lynn about why Lynn felt threatened by George and physical aggression exhibited by George); Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1470-75 (Friend Mary McClaren recounting discussions with Lynn about why Lynn felt threatened by George); Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1523-25 (Friend Valerie Bowman noting how Lynn felt in regard to George); Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1544-46 (Aunt Joyce Thomas recounting discussion with Lynn of instance of physical aggression by George (apparently referring to March 30th incident)); Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1531-39 (Patrolman Tom DeCoteau discussing Lynn's reporting of encounters with George to law enforcement); Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1581-1585 (Patrolman Kevin Miller discussing Lynn's reporting of encounters with George to law enforcement); Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1586-87 (Patrolman Rich Fox discussing Lynn's report to law enforcement that she felt threatened by George); Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1634-1639 (Neighbor Mary Wanek recounting discussions with Lynn wherein Lynn disclosed threats and acts of physical aggression by George).

⁴⁰ For example, compare State's Exhibit 11, ¶ 4 (filed 8-22-23, nunc pro tunc 5-21-84) (Affidavit by Helen Thomas recounting an incident of George dragging Lynn across the yard) with State's Exhibit 6 (filed 8-21-23, nunc pro tunc 5-21-84) (Lynn recounting incident where she "hysterically pulled" George in an effort to compel him to let go of their pet cat); compare State's Exhibit 9, ¶ 4 (filed 8-22-23, nunc pro tunc 5-21-84) (Affidavit by Lynn Luna stating George threatened to kill her while hitting her vehicle window and attempting to pry open the door (March 30th incident)) with Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1767 (George states the incident wherein he was accused of attacking the vehicle (presumably the March 30th incident) was a complete fabrication).

⁴¹ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1757 (George testifies to slapping Lynn on left side of face).

⁴² Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), p. 1365 (Neighbor Suzanne O'Donnell testifies that George admitted to her that he had threatened Lynn in a moment of anger); George testified that he was joking with Neighbor Suzanne O'Donnell when discussing what he had said to Lynn. Transcript of Jury Trial Volume IV, Day 9 (filed 10-1-84), pp. 1765-66.

⁴³ Transcript of Jury Trial Volume VI, Day 6 (filed 10-1-84), pp. 1215-16 (George's friend Dennis Radlinger testifies that George said "they'd be sorry they ever fucked with him."); *Id.* at 1194, 1197 (George's friend Keith Knutson testifies George said two or three times "they'd be sorry they fucked with him and he'd get his revenge."); *Id.* at 1235-38 (George's friend Debbie Radlinger testifies George said "he was going to get even with them.").

⁴⁴ State's Exhibit 8 ¶ 3 (filed 8-22-23, nunc pro tunc 5-21-84) (Affidavit by Helen Thomas stating George made threats to her family to the effect that he would "get them."); Transcript of Jury Trial Volume V, Day 5 (filed 10-1-84), p. 995 (Attorney Portia Brown recounting statement by Helen alleging George wanted to "get" her family); Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), p. 1542 (Helen's Brother-in-law Paul Thomas recounting statement by Helen that George had threatened to "wipe the family out."); Transcript of Jury Trial Volume V, Day 5 (filed 10-1-84) pp. 1026-28, 1032 (Attorney Lous Freiberg recounting discussions with Helen about her feeling threatened by George).

In the months prior to the murders Lynn and George were going through a divorce and addressing child custody matters. Even prior to the institution of divorce proceedings, however, the record indicates that George wanted to leave with their child (Baby Luna).⁴⁵ According to George, he believed that Lynn did not properly care for the child⁴⁶ and did not possess certain moral values.⁴⁷ George also suspected Lynn had been unfaithful to him during the marriage.⁴⁸ On February 16, 1983, Lynn initiated divorce proceedings and requested a temporary restraining order so as to remove George from the Fairview Street home and secure custody of their child

⁴⁵ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1773 (George stating that Lynn offered to let him take the baby after child was born if he would buy her trailer back for her or one like it); Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1761, 1772 (George explains that he talked about taking child to New Mexico to visit relatives and that a note demonstrating his plan to take the child secretly was intended to be utilized only if Lynn's attitude toward and yelling at the child did not cease); State's Exhibit 168 (filed 9-11-23, nunc pro tunc 5-28-84) (Note to Lynn from George regarding leaving with the child); State's Exhibit 169 (filed 9-11-23, nunc pro tunc 5-28-84) (Note to Helen from George regarding leaving with the child); Transcript of Jury Trial, Volume V, Day 5 (filed 10-1-84), p. 989 (Attorney Portia Brown discussing note written by George regarding taking the child and how Lynn thwarted George's attempt to leave with child prior to commencement of divorce proceedings); State's Exhibit 8 ¶ 3 (Affidavit of Helen Thomas indicating that George made statements about taking the child away to New Mexico); State's Exhibit 12, ¶ 6 (filed 8-22-23, nunc pro tunc 5-21-84) (Affidavit by Lynn Luna noting that George had made threats to take the child and return to New Mexico and she had thwarted an attempt by him to do so). State's Exhibit 11, ¶¶ 6-7 (filed 8-22-23, nunc pro tunc 5-21-84) (Affidavit by Helen Thomas indicating George wanted to leave with the child both before and after the birth and stating her fear that he would leave the jurisdiction of the Court with the child if given an opportunity to do so); State's Exhibit 142 (filed 8-28-23, nunc pro tunc 5-22-84), p. 9 (Lynn notes on Child Custody/Visitation Questionnaire that George had threatened on many occasions to take the child to New Mexico); Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), p. 1404 (Clinical Social Worker Laurie Stenseth noting that Lynn thought George wanted to take away the baby); Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1640-41, 1668-69 (Neighbor Mary Wanek noting that Lynn and Helen were concerned that George would take the child to New Mexico).

⁴⁶ Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84) p. 1358 (Friend Bill Kotilla notes that George did not think Lynn had been a willing mother when their child was premature and she had to make many trips to the hospital); Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1772 (George explains that a note demonstrating his plan to take the child secretly was intended to be utilized only if Lynn's attitude toward and yelling at child did not cease); Transcript of Jury Trial Volume 10, Day 10 (filed 10-1-84), pp. 1888-89 (George states Lynn had been yelling at the baby to shut up and been doing so for several days); Transcript of Jury Trial Volume 10, Day 10 (filed 10-1-84), pp. 1839-40 (George states he took pictures of Lynn in connection with the divorce and custody action to show that she was not at home caring for the baby, but rather always out somewhere).

⁴⁷ Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1881-83 (George acknowledges he wanted to get his daughter away from her mother's family because he thought they were "money diggers and thieves and liars." He also did not want Lynn to "teach [their child] her corrupt ways.").

⁴⁸ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1758 (George suspected an affair); Transcript of Jury Trial Volume V, Day 5 (filed 10-1-84), pp. 1008-10 (Defense attorney asserting Lynn had been having an affair that started prior to her institution of divorce proceedings). However, there is disagreement in the record as to whether an affair was taking place as Lynn denied the allegation. Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), p. 1405 (Clinical Social Worker Laurie Stenseth noting Lynn had claimed she was faithful to George).

(Baby Luna).⁴⁹ Thereafter, George was allowed visitation with Baby Luna for one hour on Wednesdays and Saturdays.⁵⁰ After the murders there were two people left alive at the residence—Grandma Jessie and Baby Luna.⁵¹ Grandma Jessie suffered from cognitive decline and was known by George to be senile,⁵² which means Baby Luna was left without an able caregiver in the house after Lynn and Helen were murdered. While the prosecution argued that George wanted Baby Luna to be with him at any cost and had intentions to kidnap her,⁵³ nothing was presented to explain why George left the infant behind (and essentially unattended) after the murders.

c. Evening of April 30-May 1, 1983 and trip to Sturgis

On Saturday, April 30, 1983, George and his friend Dennis Radlinger went to Helen's house for George's hour of visitation with Baby Luna at 5:30 p.m. and then to Dennis's house to watch television. After leaving Dennis' house, George said he went to his apartment, took a bath, got dressed, and fixed something to eat.⁵⁴ George testified that he put on a new white speckled shirt⁵⁵ and new blue jeans⁵⁶ he had bought earlier that day. George also testified that he wore his brown

⁴⁹State's Exhibit 12 (filed 8-22-23, nunc pro tunc 5-21-84); Transcript of Jury Trial, Volume V, Day 5 (filed 10-1-84), p. 973-74 (Attorney Portia Brown discussing initiation of divorce proceedings).

⁵⁰ Transcript of Jury Trial Volume V, Day 5 (filed 10-1-84), pp. 997-98.

⁵¹ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1663 (prosecutor noting that two people were left alive at the scene of the crime).

⁵² Transcript of Jury Trial, Volume IX, Day 9 (filed 10-1-84), p. 1661-62, 1668 (Helen told neighbor Grandma Jessie was senile and could not be left alone); Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1756 (George noting Grandma Jessie's senility caused problems for other women in household who could not locate pans and dishes that she misplaced).

⁵³ Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1887-91 (prosecution pointing to diary entries indicating George was willing to kidnap the baby even though he knew there would be consequences and two "kidnap notes" (State's Exhibits 168 & 169) which had been written to Lynn and Helen from George); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1881 (prosecution points out that George's diary entry indicating his desire to take his daughter away from her mother's family was written the day before the murders); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1884-91 (prosecution making case that George intended to kidnap the child); Transcript of Jury Trial Volume XIII, Day 13 (filed 10-1-84), pp. 2333, 2341 (same). According to the testimony of witnesses at the trial, Helen and Lynn, even prior to the institution of divorce proceedings, believed that George wanted to leave with the child.

⁵⁴ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1779-81 (George goes to apartment after leaving Dennis' house and gets ready to go out for the evening).

⁵⁵ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1779-80 (new white speckled shirt); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1860 (George testifies he wore shirt marked Exhibit 59A on night of April 30th and May 1st, 1983).

⁵⁶ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1779-80 (new blue jeans); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1862 (George testifies he wore jeans marked Exhibit 61A on night of April 30th and May 1st, 1983).

coat with a fluffy collar⁵⁷ as well as boots⁵⁸ and a T-shirt.⁵⁹ At 10:30 p.m. George left his apartment and spent the first part of the evening going to bars.⁶⁰ While in the Oasis bar George encountered an acquaintance, Holly Weeks, who testified George “had on a black leather jacket, it was open on the top, and blue jeans, and black boots.”⁶¹ George testified that he did not own a black leather jacket.⁶² George said he left the last bar he visited when it closed at 2 a.m.,⁶³ went home, and decided he wanted to go to Sturgis.⁶⁴ After arriving in Sturgis, George checked into a motel and spent the night.⁶⁵ George explained he decided to go to Sturgis because he hadn’t gone anywhere since moving into his stuffy apartment,⁶⁶ he felt cooped up, he wanted to get out and drive in the rain and get away from the place even if for a few hours, and he wanted to go someplace other than Rapid City.⁶⁷ And while neither party directly addressed the issue, the record suggests George, who had gone to the bars alone, may have felt dejected after his encounter with Holly who testified she “walked off” after George approached her and asked if she was related to Dennis.⁶⁸ The prosecutor pointed out that George had never made a decision

⁵⁷ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1780 (brown coat with fluffy collar); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1859-60 (George testifies he wore brown jacket marked Exhibit 64A on night of April 30th and May 1st, 1983).

⁵⁸ Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1858 (George testifies he wore boots marked Exhibits 68[A] and 69A on night of April 30th and May 1st, 1983).

⁵⁹ Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1859 (George testifies he wore T-shirt marked Exhibit 60A on night of April 30th and May 1st, 1983).

⁶⁰ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1781-87 (George recounts part of the evening spent at bars).

⁶¹ Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1387-88 (Holly Weeks describes George’s clothing).

⁶² Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1851-52 (George denies owning a black leather jacket).

⁶³ The State accepted George’s testimony that he left the bar at 2 a.m. Transcript of Jury Trial, Volume X, Day 10 (filed 10-1-84), p. 1865 (George agrees with Prosecutor Rodney Lefholz that State’s Exhibit 13 (a time chart) is accurate; the chart shows George out at various bars from 11:00 p.m. on Saturday night until 2:00 a.m. on Sunday morning); Transcript of Jury Trial Day 9 (filed 10-1-84), pp. 1787 (George testifies that he was at the Crystal bar when last call was announced, he ordered a drink, and when he was through with it the time was pretty close to 2:00 a.m.).

⁶⁴ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1787-88 (George testifies he went to his apartment after leaving the bars and decided to go to Sturgis); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1928 (same); The prosecution noted, however, that George’s diary entry suggested he had decided to drive to Sturgis before he got home. Transcript of Jury Trial Volume XI, Day XI (filed 10-1-84), pp. 1991-92 (prosecution quoting diary entry that indicates George decided to go to Sturgis and get away from Rapid City for a day after leaving bar and prior to stopping at home to get cigarettes and leave a note as to his whereabouts).

⁶⁵ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1789, 1793-96 (George checks into Sturgis motel and spent the night); *See also* Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1938-39.

⁶⁶ The apartment was located in a basement. Transcript of Jury Trial, Volume X, Day 10 (filed 10-1-84), p. 1802.

⁶⁷ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1788, 1795 (George describes why he wanted to drive to Sturgis); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1930 (same).

⁶⁸ Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1387 (Holly Weeks describes encounter with George). *See also Id.* at 1389, 1395-98 (Holly noting George staring at booth she occupied with friends).

to go to a motel to spend the night at any other time while living in South Dakota,⁶⁹ that George had noted a shortage of money in his diary yet chose to spend money on a hotel,⁷⁰ and that George told his neighbor he had driven to Sturgis to visit friends.⁷¹ George did not dispute the prosecution's observation that he did not have much money to spend on motels, but figured he had had enough money for that occasion and noted he had gotten his paycheck the day before.⁷² George also testified that he had taken drives in the past to relax including a drive he had taken at 1:00 or 2:00 a.m. after an evening of drinking to get out of the city limits while living in New Mexico—a drive that resulted in an arrest for driving under the influence of alcohol.⁷³ George agreed with the prosecution that he was the only one who knew of his whereabouts from 2:00 a.m., when he left the Rapid City bars, until 3:30 a.m. when he was seen at the Sturgis motel.⁷⁴ George indicated he was wearing the same clothes he had put on earlier when he arrived at the hotel⁷⁵ and did not have any toiletries as it was a spur of the moment decision to stay there.⁷⁶ He spent the night at the motel, woke up around 9:00 a.m., and drove back to Rapid City.⁷⁷ According to the motel owner, when George walked out of the motel in the morning he turned in his key, went out, then came back in at some point and asked if the motel had a public phone; since there was not a public phone the owner handed George the key to his room so he could use the phone.⁷⁸ When asked by the prosecution who he called, George testified that he did not make

⁶⁹ Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1932 (first trip to a motel to spend the night while in South Dakota). George had been living in South Dakota for approximately 9 ½ since his arrival on July 19, 1982. Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1753.

⁷⁰ Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1941-42 (spending choices).

⁷¹ Transcript of Jury Trial Volume XI, Day 11 (filed 10-1-84), p. 2063 (Neighbor Richard Sowers testifies that George said he went to Sturgis to see friends).

⁷² Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1931-33, 1941-42 (motel stay and payday).

⁷³ Transcript of Jury Trial Volume XI, Day 9 (filed 10-1-84) pp. 1730-31 (history of taking drives and DWI arrest); *See also* Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84) pp. 1912-14 (DWI convictions).

⁷⁴ Transcript of Jury Trial, Volume X, Day 10 (filed 10-1-84), p. 1865 (George agrees with Prosecutor Lefholz that State's Exhibit 13 (a time chart) is accurate; the chart indicates George was at various bars until 2:00 a.m. and was later seen at a motel at 3:30 a.m.).

⁷⁵ The motel night attendant, John Klingman, gave varying descriptions at different times of what George was wearing when he arrived at the hotel including a tan jacket, a shirt with yellow spots or flowers or markings (which he thought was possibly the shirt marked State's Exhibit 59A), a work uniform, grey trousers, a shirt that was not a solid color, a yellow shirt, a shirt that was a solid rather than a print, a grey jacket, grey pants, tan trousers, oxford shoes, light brown oxford lace shoes, and he also said he did not notice George's footwear (Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1424-25, 1433-36, 1438-39).

⁷⁶ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1794-95 (same clothes and no toiletries). The prosecution notes that George's diary entry instead indicates that before going home that evening to get cigarettes and leave a note on his door as to his whereabouts, he had decided to go to Sturgis and get away from Rapid City for at least a day. Transcript of Jury Trial Volume XI, Day 11 (pp. 1991-92).

⁷⁷ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1796 (slept at motel and left in the morning); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1799-1800 (drove to Rapid City).

⁷⁸ Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1444-45 (motel owner gave room key back to George to use the phone).

any telephone call and the motel owner was mistaken that he had returned to inquire about a phone.⁷⁹

d. Microscopic glass particles

(I)

When law enforcement arrived at the crime scene, a broken window was discovered; the window was part of a door to the residence that opened into the kitchen (kitchen door) and glass pieces were on the ground on both sides of the door.⁸⁰ The prosecution's glass examiner (also referred to as the "glass expert"), FBI Special Agent Ron Rawalt (Agent Rawalt), explained that when glass is broken, microscopic particles of glass will be propelled through the air and land on surfaces such as clothing:

A glass examination is actually a comparison. The comparison deals with the source of glass that's broken; in this specific case, a window. Particles of glass at the time the window was broken will be propelled on an average of ten to twelve feet in all directions because of the elastic property of the glass. Anybody standing within approximately ten to twelve feet . . . will be covered with microscopic particles of glass. These particles of glass will stay around for an average of approximately forty-eight hours, two days . . . [if the] clothing [is] worn for both days.

Transcript of Jury Trial Volume V, Day 5 (filed 10-1-84) p. 867.⁸¹ Additionally, "if the item of clothing is not utilized again for approximately forty-five hours of continual usage during the daytime hours [glass particles] certainly would stay there a longer period of time."⁸²

While no report of his testing or findings was offered into the record, Agent Rawalt testified that he found glass particles on George's shirt (Q22),⁸³ T-shirt (Q23),⁸⁴ jeans

⁷⁹ Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1940-41 (George disputes motel owner's recollection of George returning to use the phone).

⁸⁰ State's Exhibits 79-82 (filed 8-16-23, nunc pro tunc 5-17-84) (photos of kitchen door and broken glass); State's Exhibits 134 (filed 8-17-23, nunc pro tunc 5-21-84) (photo of kitchen); Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84), pp. 773, 806, 808 (glass found on both sides of the door).

⁸¹ Agent Rawalt also explained that broken glass can fly less than or further than the average depending on how much force is used to break the glass and the size of the object impacting the glass. Transcript of Jury Trial, Volume V, Day 5 (filed 10-1-84), pp. 891-92.

⁸² Transcript of Jury Trial, Volume XII, Day 12 (filed 10-1-84), p. 2296 (length of time glass stays on clothing).

⁸³ Agent Rawalt testified that he tested seven particles of glass associated with Q22 (shirt). Transcript of Jury Trial, Volume 5, Day 5 (filed 10-1-84), pp. 892, 929-30; Transcript of Jury Trial, Volume XII, Day 12 (filed 10-1-84), p. 2284.

⁸⁴ Agent Rawalt testified that he tested two particles of glass associated with Q23 (T-shirt). Transcript of Jury Trial, Volume 5, Day 5 (filed 10-1-84), pp. 892, 930-31; Transcript of Jury Trial, Volume XII, Day 12 (filed 10-1-84), p. 2284.

(Q24),⁸⁵ and the small gloves (van gloves) (Q93 and Q94)⁸⁶ that could have originated from glass at the crime scene (K9 and K10).⁸⁷ While Agent Rawalt stated at times that the glass particles on the clothing “matched” the glass from the crime scene, his testimony as a whole indicates his conclusion was that the glass particles on the clothing shared certain characteristics in common (the same optical properties) as the glass from the crime scene; he did not take the position that his testing methods could prove that the glass particles on the clothing came from the crime scene.⁸⁸ In regard to glass imbedded in one of George’s boots (Q33), Agent Rawalt determined the glass did not come from the crime scene.⁸⁹

The glass examiner for the defense, Professor Fernando Marques, Phd. (Dr. Marques), explained that when he was provided with the containers of glass particles tested by Agent Rawalt, there were no glass particles inside the containers associated with the T-shirt (Q23)⁹⁰ or the small (van) gloves (Q93&Q94),⁹¹ but there were glass particles in the containers associated

⁸⁵ Agent Rawalt testified that he tested six particles of glass associated with Q24 (jeans). Transcript of Jury Trial, Volume 5, Day 5 (filed 10-1-84), pp. 892, 931; Transcript of Jury Trial, Volume XII, Day 12 (filed 10-1-84), p. 2284; Transcript of Jury Trial, Volume V, Day 5, p. 880.

⁸⁶ Agent Rawalt testified that he tested five particles of glass associated with Q93 (left glove) and four particles of glass associated with Q94 (right glove) which was about half of the particles he found on the gloves. Transcript of Jury Trial, Volume V, Day 5 (filed 10-1-84), p. 882; Transcript of Jury Trial, Volume XII, Day 12 (filed 10-1-84), p. 2284. See also Transcript of Jury Trial, Volume 5, Day 5 (filed 10-1-84), pp. 892, 934, 959-60.

⁸⁷ Transcript of Jury Trial, Volume V, Day 5 (filed 10-1-84), pp. 877-78, 879, 881-82 (Agent Rawalt’s examination of shirt, T-shirt, jeans, and small gloves).

⁸⁸ Transcript of Jury Trial Volume V, Day 5 (filed 10-1-84), p. 878, (Agent Rawalt refers to a match of “optical properties”); *Id.* at pp. 899-901 (Agent Rawalt discusses different tests that can be conducted to compare glass); *Id.* at p. 935 (Agent Rawalt affirms that the glass under scrutiny that matched the crime scene window could have instead come from some other window); *Id.* at 966 (Agent Rawalt agrees that glass from another window in town could have the same refractive index as the window glass at the crime scene); Transcript of Jury Trial Volume XII, Day 12, (filed 10-1-84), pp. 2266 (Agent Rawalt disclaims any finding of a “positive opinion of identity”); Transcript of Jury Trial Volume XII, Day 12, (filed 10-1-84), pp. 2293 (Agent Rawalt notes that he has no doubt that there is other glass in Rapid City that he would not be able to distinguish from the glass under scrutiny based on the optical properties).

⁸⁹ Transcript of Jury Trial, Volume XII, Day 12 (filed 10-1-84), p. 2284 (Agent Rawalt tested five glass fragments associated with Q33); Transcript of Jury Trial, Volume V, Day 5 (filed 10-1-84), pp. 881, 922 (Agent Rawalt notes that glass probed from the sole of the boot (Q33) could not be associated with the (broken) window (K9&K10). See also *Id.* at pp. 928-29, 932-33.

⁹⁰ Transcript of Jury Trial, Volume XI, Day 11 (filed 10-1-84), pp. 2127-28 (Dr. Marques unable to locate any glass particles inside containers or on a slide represented to him as being associated with the T-shirt (Q23)).

⁹¹ Transcript of Jury Trial, Volume XI, Day 11 (filed 10-1-84), pp. 2131-32, 2136 (Dr. Marques unable to locate any glass particles inside containers or on a slide represented to him as being associated with the smaller gloves (van gloves) (Q93&94)).

with George's shirt (Q22)⁹² and jeans (Q24).⁹³ While the State and the defense never reached a consensus on what happened to the missing particles associated with the T-shirt (Q23) and van gloves (Q93&Q94), or if they even existed, if they did exist as Agent Rawalt testified, no explanation was offered for why his procedure after examining the slides he prepared was to disassemble and scrape microscopic glass particles—which cannot be seen with the naked eye—from the slides into a pill box as opposed to maintaining the slides intact as was done with other evidence that had been examined by the FBI in the same case.⁹⁴ In regard to the glass particles collected from the shirt (Q22) and the jeans (Q24), Dr. Marques concluded that none of the particles matched the glass from the broken door window at the crime scene (K9 & K10) (“door glass”) on account of inconsistencies between the chemical composition of the particles under scrutiny versus the door glass as well as the amount of erosion on the edges of some of the particles under scrutiny which also demonstrated those particular particles had not come from a recent breakage of glass such as the breakage of the door glass.⁹⁵ When Agent Rawalt was questioned about the findings of Dr. Marques regarding the particles associated with the shirt (Q22) and jeans (Q24), Agent Rawalt did not dispute that the results of Dr. Marques’ testing—if the testing was reliable—would demonstrate that the particles under scrutiny did not come from the crime scene. Specifically, in regard to the particles of glass associated with the jeans (Q24), Agent Rawalt testified that between the photographs of the particles and the chemical composition reporting presented by Dr. Marques, he did not think the particles were even glass—or if one of the particles was glass, it was broken glass from a time that was remote from the time period under examination.⁹⁶ Similarly, when questioned about the findings of Dr. Marques regarding the glass particles associated with the shirt (Q22), Agent Rawalt testified that between the photographs of the particles and their chemical composition, either the particles were not glass or they were a completely different type of glass than the glass at issue in the criminal case (i.e. window pane glass).⁹⁷ In regard to the chemical composition of the particles, Agent Rawalt

⁹² Dr. Marques found 7 glass particles in the containers associated with the shirt (Q22). Transcript of Jury Trial, Volume XI, Day 11 (filed 10-1-84), pp. 2124-27; Defendant's Exhibits AA through GG (filed 9-14-23, nunc pro tunc 5-29-84); Transcript of Jury Trial, Volume XII, Day 12 (filed 10-1-84), p. 2304.

⁹³ Dr. Marques found 5 glass particles in the containers associated with the jeans (Q24). Transcript of Jury Trial, Volume XI, Day 11 (filed 10-1-84) pp. 2126-30; Defendant's Exhibits HH through LL (filed 9-14-23, nunc pro tunc 5-29-84); Transcript of Jury Trial, Volume XII, Day 12 (filed 10-1-84), pp. 2304-05.

⁹⁴ Transcript of Jury Trial Volume XII, Day 12 (filed 10-1-84), pp. 2269-70, 2282-83 (Agent Rawalt explaining that he took the cover slips off the slides and scraped the particles off the slides once he finished examining them); Transcript of Jury Trial Volume VI, Day 6 (filed 10-1-84), p. 1187 (Technician Bauer discussing an exhibit of hair and explaining that the FBI's practice was to insert two slides into a special packet for mailing and return the evidence in that manner).

⁹⁵ Transcript of Jury Trial Volume XI, Day 11 (filed 10-1-84), pp. 2139-2150 (Dr. Marques discusses analysis of edges of glass particles on shirt (Q22) and jeans (Q24) and comparison of chemical composition of glass particles on shirt (Q22) and jeans (Q24) versus glass from the door at the crime scene (K9 & K10)); Transcript of Jury Trial Volume XII, Day 12 (filed 10-1-84), pp. 2173-75 (Dr. Marques concluding glass particles from George's jeans (Q24) and shirt (Q22) could not have come from the glass associated with the door at the crime scene (K9 & K10)).

⁹⁶ Transcript of Jury Trial, Volume XII, Day 12 (filed 10-1-84), pp. 2257-59 (Agent Rawalt commenting on Dr. Marques' findings related to particles associated with jeans (Q24)). See also Transcript of Jury Trial Day XII, Day 12 (filed 10-1-84), p. 2301.

⁹⁷ Transcript of Jury Trial, Volume XII, Day 12 (filed 10-1-84), pp. 2259-61 (Agent Rawalt commenting on Dr. Marques' findings related to particles associated with the shirt (Q22)). See also Transcript of Jury Trial Day XII, Day 12 (filed 10-1-84), pp. 2301-02.

and Dr. Marques ultimately differed on whether Dr. Marques' testing method (EDAX testing)⁹⁸ could conclusively prove that the particles on the clothing did not come from the crime scene as they disagreed about the reliability of the testing method.⁹⁹

(II)

George's boots

Agent Rawalt did not find any glass from the crime scene on or imbedded in George's boots. Recounting his procedure, he explained

[t]his pair of boots was again processed like the other items. It was scraped. Additionally, because of the nature of shoes and the possibility of walking on glass and actually imbedding glass, I turned my attention to the soles of these boots. This specific boot, which is the left boot, had glass imbedded in the underside where I've marked it on the bottom of the sole. I removed that glass by probing it with a stainless steel dental probe. I then examined the small pieces of glass that were imbedded for the optical properties. I found imbedded in one area were two specific particular sources of glass. These sources of glass did not match the window in this case.

Transcript of Jury Trial Volume V, Day 5 (filed 10-1-84), p. 881. See also *Id.* at 922 (Agent Rawalt notes that glass probed from the sole of the boot (Q33) could not be associated with the (broken) window (K9&K10)). Agent Rawalt further explained that most people at any given time have glass on their shoes:

I would certainly expect if I took everybody's clothing and processed it individually that the majority of you would have glass on your shoes. This is a common occurrence from walking around in parking lots, on streets where there have been automobile accidents, where bottles have been thrown out and broken, and the glass remains, it's not cleaned up. So, with respect to shoes, I would expect there to be glass.

Transcript of Jury Trial, Volume V, Day 5 (filed 10-1-84), p. 916. Despite previously referring to "the nature of shoes and the possibility of walking on glass and actually

⁹⁸ Transcript of Jury Trial, Volume XI, Day 11 (filed 10-1-84), (Dr. Marques explaining that EDAX, which stands for energy dispersive analysis by x-rays, is analogous to fingerprinting particles); *Id.* at p. 2133 (Dr. Marques describing a scanning microscope with an electron microprobe with an EDAX detector which detects x-rays); Transcript of Jury Trial Volume XII, Day 12 (filed 10-1-84), p. 2225 (Dr. Marques notes that his testing recorded the energy dispersive analysis spectrum of the particles).

⁹⁹ Transcript of Jury Trial, Volume V, Day 5 (filed 10-1-84), p. 956-58, 960-61, 968, 971-72 (Agent Rawalt discussing spectrographic techniques); Transcript of Jury Trial, Volume XII, Day 12 (filed 10-1-84), pp. 2262-64 (Agent Rawalt discussing x-ray beam testing); Transcript of Jury Trial, Volume XII, Day 12 (filed 10-1-84), pp. 2305-06 (Dr. Marques discussing electron beam testing).

imbedding glass,”¹⁰⁰ Agent Rawalt thought it was unlikely that glass would have imbedded in George’s boots at the crime scene:

Q [Defense Atty. Roubideaux]: Now, you’ve already touched on this, but I find it hard to understand that if George was there [at the crime scene], as you’ve claimed, there was glass and glass particles all over the floor by the door, weren’t they [the particles] possibly even ten to twelve feet away [from the door]?

A [Agent Rawalt]: Well, first, I haven’t claimed that anybody was at the scene. I have no personal knowledge who was wearing any type of clothing; but certainly I would expect glass to be within ten to twelve feet of that door.

Q [Defense Atty. Roubideaux]: But these boots that are an exhibit here were worn by George Luna; and if he were there, you would expect to find consistent glass particles in those—on the soles of those boots, wouldn’t you?

A [Agent Rawalt]: If the boots were worn at that time.

Q [Defense Atty. Roubideaux]: Okay.

A [Agent Rawalt]: And if they came into contact in such a way that the glass would have imbedded in that, which is not very common, then I would not find it unusual to find glass associated with it; however, my experience in the laboratory tells me that shoes are a very poor object for evidence in retaining glass because you’re usually stepping on a flat piece of glass after it’s broken, not on a sharp edge; and it’s very uncommon for the glass to actually imbed in the shoe.

Transcript of Jury Trial Volume V, Day 5 (filed 10-1-84), p. 952. Dr. Marques also commented on footwear analysis when he noted that shoes are an important consideration in an investigation since shoes can collect glass particles and glass particles also leave imprints in soles.¹⁰¹ Taking into consideration Agent Rawalt’s remarks on the nature of shoes and the possibility that glass will imbed in shoes (a point bolstered by the fact Agent Rawalt found (non-crime scene) glass in the sole of George’s boot); Agent Rawalt’s testimony that it is common for glass to be on shoes; Agent Rawalt’s testimony that anyone near breaking glass will be covered with microscopic glass particles; Dr. Marques’ remark that shoes can collect glass particles; and the presence of broken glass on both sides of the door used to gain access to the crime scene,¹⁰² it is noteworthy that no glass from the crime scene—whether on a surface or imbedded in the soles—was found on George’s boots.

(III)

Small gloves found in George’s van

¹⁰⁰ Transcript of Jury Trial Volume V, Day 5 (filed 10-1-84), p. 881 (Agent Rawalt commenting on the nature of shoes).

¹⁰¹ Transcript of Jury Trial Volume XII, Day 12 (filed 10-1-84), pp. 2165-66 (Dr. Marques noting importance of shoes).

¹⁰² Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84), pp. 773, 806, 808 (glass on both sides of the door); *Id.* at 773 (law enforcement believed intruder used door with broken window to gain access to house).

The small gloves (van gloves) were taken by law enforcement from George's van.¹⁰³ The gloves belonged to Helen, but George used to wear the gloves for work and home projects prior to receiving a larger pair of gloves for Christmas in 1982.¹⁰⁴ Prior to the commencement of the divorce proceedings, George lived with Lynn, Baby Luna, Helen, and Grandma Jessie in the Fairview Street home (Helen's House).¹⁰⁵ On February 16, 1983, Lynn's attorney initiated divorce proceedings, obtained a temporary restraining order, and had George served at his workplace so he would be aware, before leaving work, he would need to leave the home.¹⁰⁶ Law enforcement was present in the home on February 16, 1983 when George collected his belongings—some of which had been packed by Lynn and some of which George himself gathered:

Q [Prosecutor Lefholz]: Recalling your attention to February 16, 1983, did there come a time on that day that you were called to a possible disturbance at 713 Fairview Street here in Rapid City?

A [Patrol Sergeant Chandler]: Yes, sir.

Q [Prosecutor Lefholz]: What information did you have at your disposal as you were being called to that scene?

A [Patrol Sergeant Chandler]: The information that I had, I knew that we had been to that particular residence on disturbances before; and that it was some type of an unknown type of disturbance between--and possibly had something to do with the divorce case or something like that.

Q [Prosecutor Lefholz]: Did you go with any other officers?

A [Patrol Sergeant Chandler]: I initially arrived there by myself. The other officer dispatched was Officer Samuel Roach.

Q [Prosecutor Lefholz]: What did you even consider there once you arrived on that scene?

A [Patrol Sergeant Chandler]: When I arrived there, I observed the Defendant who was standing in front of the residence and in the area of the sidewalk; and I got out of my patrol car.

....

Q [Prosecutor Lefholz]: What did you do next?

¹⁰³ Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84), p. 787 (Evidence Technician Harold Plooster took gloves 71[A] and 72[A] from the VW van); State's Exhibits 19, 127, 131 (filed 5-17-84) (photos of gloves, State's Exhibits 71A and 72A, and where gloves were found inside van).

¹⁰⁴ Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1852-54 (George discusses the smaller and larger pair of gloves). See also Transcript of Jury Trial Volume XI, Day 11 (filed 10-1-84), pp. 1970-71, 1984-85 (same).

¹⁰⁵ Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1753-55 (George discussing living arrangement); Doug indicated that the home was owned by Helen. Statement from Douglas Olin Thomas on 5-1-83 (filed 8-12-91, nunc pro tunc 5-8-84), p. 2 (Doug indicates that the crime scene house was owned by his mother).

¹⁰⁶ State's Exhibit 12 (filed 8-22-83, nunc pro tunc 5-21-84); Transcript of Jury Trial, Volume V, Day 5 (filed 10-1-84), pp. 973-74 (Attorney Portia Brown discussing initiation of divorce proceedings, temporary restraining order, and serving George at work); Transcript of Jury Trial, Volume IX, Day 9 (filed 10-1-84), pp. 1755-56 (George notes moving out on February 16, 1983, a temporary stay with friends, and searching for a new place to live).

A [Patrol Sergeant Chandler]: I approached him, asked him who he was. He told me that--he gave me his name and I asked him what the problem was.

Q [Prosecutor Lefholz]: What did he respond?

A [Patrol Sergeant Chandler]: He said that he wanted to get some of his personal effects out of the residence and that he didn't feel that he was getting the cooperation that he should; and he didn't want any further problems so he decided to wait outside until the police arrived.

Q [Prosecutor Lefholz]: Then what happened?

A [Patrol Sergeant Chandler]: We went up to the door, met Lynn Luna, and asked her if we could come in and discuss this with her; and she let us in the residence.

Q [Prosecutor Lefholz]: Then what happened?

A [Patrol Sergeant Chandler]: Lynn told me that she had all of George's stuff packed and she did have some boxes with clothing and various other effects in it in the living room area; and George said that he had some other stuff down in the basement that he needed to get; and I asked Lynn, I said, "If I go ahead and go with him and you check everything that we bring up, if we get his personal effects in that manner, is that okay with you?" And she said, "Yes."

Q [Prosecutor Lefholz]: What happened next?

A [Patrol Sergeant Chandler]: Mr. Luna and I went to the basement bedroom area and he went through a chest of drawers and kind of looked around. Some items he picked up, some items he left, but he did pick up some more personal effects.

Transcript of Jury Trial Volume IX, Day 9, pp. 1599-1600, 1603-04. George thought he had left the small gloves behind when he moved out of Helen's house when the divorce matter was initiated.¹⁰⁷ But they were found in George's van and the prosecution argued that George used them at the crime scene to break the window.¹⁰⁸ As discussed above, the State's glass analyst found microscopic glass particles on the small gloves that could have (but did not necessarily) come from the crime scene while the glass examiner for the defense not only found no such glass particles associated with the van gloves—he found no glass particles *whatsoever* in the evidence containers associated with the small gloves.

e. Third-party perpetrator evidence

(I)

¹⁰⁷ Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), pp. 1852-53, 1856-57 (George remembers placing Helen's gloves on shelf above stairway leading to basement near kitchen door (Exhibit 75) at Fairview house; George testifies he did not put Helen's gloves in his van); Transcript of Jury Trial Volume XI, Day 11 (filed 10-1-84), pp. 1970-89 (George testifies Helen's gloves had been stored in Helen's residence on shelf above where steps go down to basement near kitchen door and in Helen's pickup on the dashboard (where they had faded); Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84), pp. 710-12 (Sheriff Holloway testifies about his questioning of George in regard to Helen's gloves).

¹⁰⁸ Transcript of Jury Trial Volume XIII, Day 13 (filed 10-1-84), p. 2361 (Prosecution argues George used the (van) gloves to protect his hands when breaking window at crime scene).

Luna sought to introduce third-party perpetrator evidence into trial as summarized by the South Dakota Supreme Court:

The evidence that Luna sought to introduce, as outlined in his brief, is: (1) Joe Leonard (Leonard) entered a convenience store, the Common Cents Store, situated on Rushmore Road, about one-half block from the scene of the crime, about 2:30 a.m. on the morning of May 1. Leonard had blood on his hands and his shirt cuff. On June 18, 1983, approximately seven weeks later, Leonard also confessed to a drinking companion [Mark Valdez] that he had committed the murder and that he was a killer for hire. The drinking companion also made some allegations about Leonard leaving a steel pipe under his [Mark Valdez's] davenport and that another steel pipe had been moved from where he [Mark Valdez] usually stored it. (2) Doug Thomas (Thomas), son of Helen and brother of Lynn, had threatened Helen in the fall of 1981 (a year and a half before the crime) and had fired a gun into the ceiling. Although Thomas had not seen the victims for a year prior to the crime, he arrived at the scene shortly after the bodies were found. Thomas was also the beneficiary of a life insurance policy on Helen's life and a trust account, as well as the devisee/legatee under Helen's will. (3) There is also some allegation that one of two boxes containing four or five thousand dollars was missing from Helen's apartment, although the authorities had reported nothing missing. The existence of such boxes was related in an unsworn statement by a friend of Helen's [Rex Ball] who was, at that time, apparently on the West Coast eluding investigation on charges regarding illegal taking or possession of eagle feathers.

Luna's theory of a third-party perpetrator is apparently in the alternative, to-wit: The crime was committed by either Leonard or Thomas individually or by Leonard and Thomas in conspiracy.

State v. Luna, 378 N.W.2d 229, 231–32 (S.D. 1985). A review of the case file provides additional details for consideration. An affidavit filed by defense counsel further explains why the defense believed that information concerning Joseph (Joe) Leonard and Doug Thomas was relevant to the case:

Your affiant [Defense Attorney Ramon Roubideaux], Associate Counsel, Roscoe Dean, and investigator, Joe Valandra have worked continuously on this case . . . interviewing witnesses and engaging in pre-trial discovery.

Our investigation revealed that the son of the deceased[] Helen Thomas, Douglas Thomas[,] has made several threats to kill both of them in the past. Several years ago [Doug] was committed to the State Mental Hospital in Yankton, South Dakota, and diagnosed as a paranoid schizophrenic. Since that time he has blamed his parents for his incarceration with the resulting threats. He has spent time in the Penitentiary and has a felony record as an adult. Witnesses reveal that they were afraid of him even to the point of moving to New Mexico.

Our investigation further reveals that on the morning after the murders were committed[,] at about 8:30 a.m., before the bodies were discovered around 10:00 a.m., [Doug] picked up his girl friend Rhonda Lawrence at her apartment and told

her that something terrible had happened to Helen and Lynn. After the police had arrived [at the crime scene], he [Doug] showed up at the crime scene and asked a police officer if his mother and sister were dead. He made no mention of Grandma [Jessie] Nicksic and the baby [who also lived there] and did not even inquire of their health. Douglas Thomas lives between five and ten miles away from the Helen Thomas home [the crime scene] and his explanation to the police as to how he got there that morning is not only unbelievable it is false. He had no way of knowing they were dead at the time he asked the question unless he was involved. Our investigator talked to the girl friend, Rhonda Lawrence, who has been in Arizona since, and her story does not support the alibi of Douglas Thomas. Another witness [Tamela Lee Lester] also denies he spent the night at his girl friends [Rhonda's] apartment.

Further investigation reveals that Douglas Thomas stands to inherit both estates valued around \$160,000.00. Late on the very day of the murders, he called Charles Michel, attorney, about the probates of these two estates.^[109] In the petition for probate, he alleges that Lynn Luna died first, which would effectively disinherit George Luna from the mother's estate. Only the murderer would know who died first.

Further investigation reveals that there was an insurance policy on Helen Thomas' life and a trust account at First Federal Savings and Loan here in Rapid City. It is believed that Douglas Thomas is the beneficiary of these instruments.

....

We have also uncovered further evidence that a man named Joe Leonard, who showed up at a convenience store a half block away from the murders with blood on his hands and shirt at about the time of the murders, has some connection with the family and Douglas Thomas and may have been contracted to do the killings. We also believe we may have located the murder weapon which can be traced to Joe Leonard who admitted to another witness [Mark Valdez] that he killed them.

Affidavit in Support and Motion for Order to Take Deposition of Douglas Thomas (filed 8-12-91, nunc pro tunc 5-3-84). *See also* Affidavit (by Ramon A. Roubideaux, dated 3-28-84) (filed 8-12-91, nunc pro tunc 3-29-84).

(II)

Doug Thomas

On May 2, 1983 Helen's former employer, Carlyle Beebe, gave a statement to law enforcement regarding threats made by Doug Thomas toward Helen and Lynn:

¹⁰⁹ Defense counsel found it "very strange that [Doug Thomas] would call [the attorney] on the very day of the murders, which was a Sunday, and where [Doug] would have to actually call the attorney's home in order to get a hold of him." Transcript of Hearing on Motion for Appointment of Costs for an Expert, Renewed Motion for Change of Venue, and Motion Regarding the Taking of the Deposition of Doug Thomas held on May 1, 1984 (filed 6-14-84), p. 12.

Mr. Beebe stated that victim #1 [Helen] was his secretary at one time. The last time he saw the victim was in church last Sunday. He stated that occasionally, the victim would tell him about violent incidents involving her son Doug. He reported that Doug would get violent and do extensive damage to apartment walls, make threats to kill his mother and sister, and one time, pulled a Knife on [Helen's friend] Rex Ball. . . . Mr. Beebe was told that Doug has spent some time in a state mental hospital, and that Rex has advised victim #1 [Helen] that he should be sent back because of his violent behavior.

Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 5 (Addendum report of Officer F. Eisenbraun dated 8-2-83). While the statement of Carlyle Beebe did not specify the dates of the threats, a report by Officer Hammond noted that Rex Ball¹¹⁰ had disclosed threats made by Doug toward Helen and Lynn in the fall of 1981:¹¹¹

5/6/83, 1504 hours, this detective had another conversation with [Agent] John Salquist. As a result of a conversation that Agent Salquist had with Rex Ball, he states that there may possibly be a quantity of money, \$4,000 to \$5,000 kept in two steel boxes stored in a trunk in the [Helen] Thomas house. He stated that Rex had agreed to take a polygraph and that he was anxious to clear himself. Salquist stated that Rex had told him that Doug Thomas had called during the fall of 81' and threatened to kill Lynn and Helen Thomas. He also related an incident in their Clark Street apartment where Doug shot a gun through the ceiling and reportedly tore up the place twice. . . . Rex still believes that George is more of a suspect th[a]n Doug.¹¹²

Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 2 (Addendum report of Officer Hammond). During a hearing, Laurie Stenseth, a clinical social worker at West River Mental Health, explained that Lynn sought help

¹¹⁰ Rex Ball was a friend or boyfriend of Helen who lived with Helen after her husband died. Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), p. 8 (Doug identifies Rex Ball as Helen's friend); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1832 (George identifies Rex Ball as Helen's boyfriend).

¹¹¹ The record indicates that the fall of 1981 is also when Helen and Lynn moved to New Mexico. Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), p. 36 (Doug estimating time period his family members moved to New Mexico). Helen and Lynn moved back to Rapid City on July 19, 1982. Transcript of Jury Trial, Volume IX, Day 9, pp. 1752-53; *see also* Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1842.

¹¹² The record suggests there may have been tension between Rex Ball and George since George testified that shortly after being served with divorce papers he reported his mother-in-law's boyfriend (a reference to Rex Ball) to the U.S. Marshall's Service. Transcript of Jury Trial Volume XI, Day 11 (filed 10-1-84), pp. 2001-02 (call to U.S. Marshall's Service); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1832 (George identifies Rex Ball as Helen's boyfriend); Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), pp. 1599, 1605, 1613-15 (Patrol Sergeant Charles Chandler noting arrival of US Marshalls at Fairview Street residence in connection with inquiry into parts of an eagle or eagle feathers); Transcript of Jury Trial Volume X, Day 10 (filed 10-1-84), p. 1832 (George notes he had called the US Marshalls and they wanted to know the whereabouts of Rexall Ball in connection with killing eagles).

because she felt frightened and threatened by George,¹¹³ but Social Worker Stenseth also acknowledged there had been a prior history of Doug's behavior that affected the family as recorded on Lynn's intake statement:

[i]n regards to their household, the grandmother and mother have been very fearful of their son, who is twenty-nine years old. According to Lynn, he is very unpredictable and has threatened their lives on numerous occasions. The family felt as though they were threatened at that time so left for New Mexico to escape from their son.

Transcript of Suppression Hearing and Motion in Limine on Hearsay held on 4/2/84 and 4/3/84 (filed 6-14-84), p. 100. In a statement to law enforcement, Social Worker Stenseth also recounted further details of her conversations with Lynn, including Lynn's concerns in regard to Doug:

KG [Officer Ken Gardner]: Ok is there anything else in your notes there, that might be pertinent to what we're dealing with here[?]

. . . .

A [Social Worker Stenseth]: The only other thing that I could think of that would um before they moved to [New] Mexico, when she and her mother were afraid of their you know, her mother's son her brother ah ah that's why they moved to [New] Mexico, because they were scared for their lives, he'd been threatening, I guess he was involved in a lot of drugs, and drinking if I recall her saying that related that and ah I don't recall her saying anything if he'd tried anything in the past, but it was to the point where they were afraid, and mother went down, to see grandmother, I think that's how it went well, somebody in [New] Mexico and Lynn was staying up here but she was living in a place where there wasn't water and they had to carry her own --

. . . .

wood, and ah, she needed some help with that and the people that usually helped her had gone to [New] Mexico so she felt obligated to be with her mother then and help her she couldn't swing it any longer up here, so that's when she went down there and that's where she met George, but that would we, you know, another person that they were afraid of the son her mother's son and I

KG [Officer Ken Gardner]: Her brother[.]

A [Social Worker Stenseth]: Ya, her brother, and I don't have much more details on it [other] than that that he'd, ah, threatened them a lot and that he was really into the drugs and alcohol and they couldn't predict him either supposedly[.]

¹¹³ Transcript of Suppression Hearing and Motion in Limine on Hearsay held on 4/2/84 and 4/3/84 (filed 6-14-84), pp. 93-97 (Lynn felt frightened and threatened by George).

Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1414-16 (ellipses indicating pauses between words omitted); *See also* Transcript of Suppression Hearing and Motion in Limine on Hearsay held on 4/2/84 and 4/3/84 (filed 6-14-84), p. 109. Social Worker Stenseth also explained that she thought the threats from Doug were primarily directed toward Helen and the grandmother (Jessie):

The impression I received is she moved to New Mexico because it was hard living by herself if the mother and grandmother were leaving. It was my impression that she was more afraid for them than herself. That was the impression I received.

....

What I recall was mainly that Lynn went down there [to New Mexico] because she couldn't make it in her new life—in the life she was living. She was afraid for her mother and her grandmother and she went down for that reason because they were being threatened.

Transcript of Suppression Hearing and Motion in Limine on Hearsay held on 4/2/84 and 4/3/84 (filed 6-14-84), pp. 106, 110.

On May 1, 1983 (Sunday), after the bodies were discovered, Doug gave a statement to law enforcement (1983 Statement).¹¹⁴ When asked what he did the previous evening Doug said he was with Rhonda Lawrence at her apartment at Knollwood near the mall and then he went home “about 11:30, to twelve,” turned on the TV for a few minutes, but couldn't remember what was on since he went to the other room and washed up; he then turned the TV off and went to bed.¹¹⁵ A year later, in a deposition taken on May 4, 1984 (1984 Deposition), Doug instead indicated that he had left Rhonda's place between 1:30 and 2:00 in the morning.¹¹⁶

On January 26, 1984, Rhonda gave a statement to an investigator for the defense, Joe Valandra, in which she said that Doug had spent the night of the murders with her:

J. [Defense Investigator Joe Valandra]: Ok, huh, do you recall what you guy[']s were doing the night before the murders?

R. [Rhonda]: Yes, I do.

J. [Defense Investigator Joe Valandra]: Could you tell me?

R. [Rhonda]: Ok we were together, and we were watching TV.

J. [Defense investigator Joe Valandra]: Did Doug stay with [you] that night?

R. [Rhonda]: Yes, he did.

J. [Defense Investigator Joe Valandra]: He stayed all

¹¹⁴ Statement from Douglas Olin Thomas on 5-1-83 (filed 8-12-91, nunc pro tunc 5-8-84).

¹¹⁵ Statement from Douglas Olin Thomas on 5-1-83 (filed 8-12-91, nunc pro tunc 5-8-84), pp. 8-9 (left Rhonda's around 11:30-12:00 and went home).

¹¹⁶ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), p. 25 (Doug woke Rhonda up between 1:30 and 2:00 to say he was going to leave).

R. [Rhonda]: Till he left oh geez, he had to go out to the shop so he left early morning hours, and he went out to the shop to get some (unclear) he had to bring them into the store?

J. [Defense Investigator Joe Valandra]: Um huh

....

J. [Defense Investigator Joe Valandra]: Ok but was he with you all night?

R. [Rhonda]: Most of it.

J. [Defense Investigator Joe Valandra]: What do you mean, most of it?

R. [Rhonda]: Well, I mean, the first part of the evening we wer[e]n't together, and then he came over and we were together and we watched Saturday [N]ight [L]ive and you know, went to bed and then he had to get up early the next morning to ge[t] the (unclear) you know.

Additional Evidence Third Party Perpetrator (filed 8-16-23, nunc pro tunc 5-17-84), Exhibit 3 (Conversation between Joe Valandra and Rhonda Lawrence on 1-26-84), pp. 7-8 (ellipses indicating pauses between words omitted).

While Doug and Rhonda's accounts of Doug's evening at Rhonda's apartment were inconsistent in regard to the time Doug left, neither description reconciled with the account given by Rhonda's friend and houseguest, Tamela Lee Lester,¹¹⁷ who testified in her deposition (taken on April 11, 1984) that on the night of the murders Doug did not stay at Rhonda's apartment; rather, Rhonda and her daughter, Tamela and her daughter, Bernie Gulkey (another boyfriend of Rhonda¹¹⁸), and Dennis Murphy stayed the night at Rhonda's apartment (although Tamela could not remember exactly when Dennis left¹¹⁹).¹²⁰ Tamela's deposition also reveals that the presence of Bernie (and Dennis) at Rhonda's apartment on the evening of the murders had likewise been disclosed to the prosecution at some point by Rhonda as well:

Q [Prosecutor Lefholz]: Now, Tammy, I am not trying to get into something that may be tough to talk about here, but Rhonda tells us there was a Bernie Gulkey and a Dennis, and you tell us his last name was Murphy—those are the two fellows that was there that night, aren't they?

A [Tamela]: Yes, now that you have told me their last names. I wasn't sure about that before.

Q [Prosecutor Lefholz]: When did those fellows leave the apartment?

A [Tamela]: I thought they—I thought Bernie, Rhonda's boyfriend, had been gone—left in the morning.

Q [Prosecutor Lefholz]: You mean before you woke up?

¹¹⁷ Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), pp. 4-5, 10 (Tamela noting close friendship with Rhonda and occasions as houseguest).

¹¹⁸ Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), p. 23 (Tamela refers to Bernie as Rhonda's boyfriend). Tamela also referred to Doug as Rhonda's boyfriend. *Id.* at 5.

¹¹⁹ Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), pp. 23, 25-26 (when Dennis left Rhonda's apartment).

¹²⁰ Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), pp. 10-11, 16-17, 22-26 (people who spent night at Rhonda's apartment).

A [Tamela]: No. I think he—I don't remember if it was before or after she had left, but he was sleeping when the phone rang.

Q [Prosecutor Lefholz]: That is Bernie that was sleeping?

A [Tamela]: Yes.

Q [Prosecutor Lefholz]: How about Dennis?

A [Tamela]: I don't remember if he left in the night or—I can't say for sure when he left.

Q [Prosecutor Lefholz]: It is pretty hard, then, to think back almost a year ago and remember when either Bernie left or Dennis left; is that right?

A [Tamela]: I think I had gone to sleep, and I don't know if these guys—I know there had been one there in the morning that left that morning. I don't know about the other guy.

Q [Prosecutor Lefholz]: He might have left in the afternoon?

A [Tamela]: No, he was gone, but I don't know if it was later in the night or—I can't say for sure when the other guy left.

Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), pp. 22-23.

In his 1984 Deposition, Doug mentioned a previous period spent at Yankton State Hospital,¹²¹ acknowledged money owed to his mother (and other debts),¹²² his status as a financial beneficiary to his mother's estate,¹²³ his threatening behavior towards his mother,¹²⁴ and his estrangement from both the victims.¹²⁵ While drugs were not discussed in Doug's deposition, the record includes a statement by Rhonda that Doug had previously been incarcerated for drug dealing.¹²⁶ Doug denied knowing anything about metal boxes that were supposed to contain a great deal of money at his mother's house and stated that to his knowledge she did not keep anything more than one hundred dollars on hand for emergencies, but he did acknowledge she had a metal box in which she kept coins that was either in the custody of police or his attorney.¹²⁷

¹²¹ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 4-6 (observation period at Yankton State Hospital).

¹²² Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 11, 17, 32-33 (debts).

¹²³ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 11-12 (beneficiary of Helen's estate).

¹²⁴ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 8-9; 18-22; 33; 36-37 (threats).

¹²⁵ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 6-8, 32, 35 (lack of contact with mother and sister).

¹²⁶ Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 3 (Transcript of Conversation between Joe Valandra and Rhonda Lawrence), p. 7 (drug dealing).

¹²⁷ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 14, 33. When questioned about the discovery of any steel or metal boxes containing money at the crime scene, Officer Plooster testified that other than a small tea can with \$10.65, no such metal boxes containing money were found. Transcript of Jury Trial Volume VI, Day 6 (filed 10-1-84), pp. 1111-13; In regard to money in the house, Officer Plooster estimated that there was approximately \$3,000.00 hidden around the house which included both coins and bills. *Id.* at 1101-02.

He also provided information about the evening of and morning after the murders and how he first learned about the murders in the morning “after 9:00 and before 10:00.”¹²⁸ Doug stated that he ate dinner and spent the evening of the murders at Rhonda’s.¹²⁹ They fell asleep watching a movie and when the test pattern woke them up Doug left to go home because he had an order to do the next morning.¹³⁰ Elaborating further, Doug explained that they watched Saturday Night Live, fell asleep on the couch watching “some kind of corny movie” he could not remember, and then he left between 1:30 and 2:00 in the morning.¹³¹ He lived about five miles away.¹³² The next morning, a Sunday morning, he arrived at Rushmore Mall around 9 a.m. to deliver an order to Black Hills Waterbeds that was destined for Prairie View Waterbeds in Pierre—an order which would be picked up later in the week; however, he could not complete the delivery as the mall was closed on a Sunday morning and the loading door was locked.¹³³

Doug’s explanation of his business activity on the morning of May 1, 1983 (Sunday) did not reconcile with the testimony of Lynn Delameter, who worked at Black Hills Waterbeds. Lynn explained that Black Hills Waterbeds does not open until 12:00 (noon) on Sundays and to his knowledge he did not have any business or previous appointment set up with Doug that morning.¹³⁴ When pressed as to whether Doug came in at all that day, Lynn explained that he had not come in contact with Doug or could not remember if Doug came in that day or not, but that Doug did not usually make deliveries since Doug’s hired help usually brought in deliveries.¹³⁵ Lynn did remember speaking to Doug, however, when Doug made a delivery to the store with his girlfriend and he was upset about the murders, but Lynn was not sure about the date of the delivery and thought it might have been the day of the murders, or the day after, or another day.¹³⁶ Lynn also explained that the only time his store channeled merchandise to a store in Pierre (Doug’s claimed destination for his drop-off items) was when the two stores would buy a truckload of freight together and then the owner of the Pierre store would pick up the merchandise in Rapid City; the purpose of buying freight together was to save freight costs, but this was an infrequent thing that they did together.¹³⁷

¹²⁸ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), p. 23 (time of learning about murders).

¹²⁹ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 22-23 (spent evening at Rhonda’s).

¹³⁰ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), p. 23 (woke up to test pattern and went home).

¹³¹ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), p. 25 (watched TV, fell asleep, then left between 1:30 and 2 a.m.).

¹³² Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), p. 25 (lived about five miles away from Rhonda).

¹³³ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 23-26 (attempted delivery of work order).

¹³⁴ Transcript of Hearing on Defense Motions Re: Hearsay and Third-Party Perpetrator held 5-4-84 (filed 6-14-84) pp. 27-28 (Sunday opening time and no appointment with Doug on Sunday, May 1, 1983).

¹³⁵ Transcript of Hearing on Defense Motions Re: Hearsay and Third-Party Perpetrator held 5-4-84 (filed 6-14-84) pp. 29-30 (no contact with Doug and Doug’s hired help usually makes deliveries).

¹³⁶ Transcript of Hearing on Defense Motions Re: Hearsay and Third-Party Perpetrator held 5-4-84 (filed 6-14-84) pp. 32-34 (Doug made delivery to store with girlfriend and was upset on account of murders).

¹³⁷ Transcript of Hearing on Defense Motions Re: Hearsay and Third-Party Perpetrator held 5-4-84 (filed 6-14-84) pp. 30-31 (sharing of freight costs between Rapid City and Pierre stores).

Returning to Doug's 1984 Deposition, Doug explained that after arriving at Rushmore Mall around 9 a.m. and finding that the loading door was locked, he decided to get something to eat at McDonalds.¹³⁸ Rather than stopping at the McDonald's closest to him, he decided to go to the McDonalds on the other side of town since he had friends that lived on that side of town.¹³⁹ After stopping at the other-side-of-town McDonalds, his route took him by Fairview Street.¹⁴⁰ As he passed Fairview Street he looked up the street and noticed police cars and emergency vehicles and then circled around to get a better view.¹⁴¹ He then went to Rhonda's place to pick her up and returned to Fairview Street."¹⁴² Doug stated that he "knew when they [law enforcement] had roped off the yard and things that it wasn't no burglary or a robbery that had occurred there. I knew it was something pretty drastic. There was all those officers."¹⁴³ Doug also noted that he was driving "kind of a charcoal black, charcoal brown" hatchback Mazda.¹⁴⁴

In his report dated May 2, 1983, Officer F. Eisenbraun summarized his encounter with Doug on May 1, 1983 (Sunday) at the crime scene:

Following is a brief summation of my conversation with Doug yesterday. Doug approached me, and asked me what the problem was here (at the Scene)[.] He then identified himself as Doug Thomas. I obtained ID and asked him how he was related. He stated that his mother lives there and he'd like to know what is going on. The subject [Doug] asked, "Does it involve my mother?" I said yes. Then he asked, "Does it involved my sister?" Again I said yes. Subject, "were they murdered?" Again, Yes. The subject turned around, hugged his wife, and started to cry.

Additional Evidence Third Party Perpetrator (filed 8-16-23, nunc pro tunc 5-17-84), Exhibit 5 (Addendum report by Officer F. Eisenbraun).

Doug's 1984 Deposition description of the sequence of his driving activity on the morning of May 1, 1983 differed from the 1983 Statement he gave to law enforcement on the same day as his driving activity (May, 1, 1983). In his 1984 Deposition, Doug explained that he went to pick

¹³⁸ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 26-27 (McDonalds).

¹³⁹ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 26-27 (choice of McDonalds).

¹⁴⁰ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 27 (drove past Fairview Street).

¹⁴¹ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 27-28 (observed activity on Fairview Street).

¹⁴² Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 28-29 (picked up Rhonda and went to Helen's house). While the record does not clarify where Rhonda lived, it appeared she may have lived somewhere in the vicinity of N. Maple Street and Knollwood Dr. or E. Knollwood Dr. Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), pp. 9-10 (description of Rhonda's apartment as number 34 on the third floor in an apartment complex with 34 units in each building on Maple Avenue); Additional Evidence Third Party Perpetrator (filed 8-16-23, nunc pro tunc 5-17-84), Exhibit 3 (Conversation between Joe Valandra and Rhonda Lawrence on 1-26-84), p. 6 (indicating Rhonda lived across from townhouses in the Knollwood area).

¹⁴³ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 28-29 (nature of crime).

¹⁴⁴ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 23-24 (description of Doug's vehicle).

up Rhonda after noticing the presence of law enforcement on Fairview Street and then returned to Fairview Street. But in Doug's 1983 Statement, he indicated that he stopped by the crime scene after driving down the block and looping around when he first noticed the presence of law enforcement after getting his Egg McMuffin (and if Doug stopped at the crime scene after looping around as indicated in the 1983 Statement, Rhonda would have already been with Doug at that time since, as noted above, Officer Eisenbraun had observed that Doug was with his "wife" at the crime scene and Doug had named Rhonda as the person he took to the crime scene):

A [Doug]: This morning [May 1, 1983] ah well, like I said, I'm self-employed I made some pattern rails to drop off at the Mall and the Mall wasn't open at the time I drove by, so I picked up an egg mcmuffin and as I was driving down 8th street I noticed a patty wagon up the street in front of a house that my mom had owned, and I know they'd lived there quite a bit over the years and (inaudible) so I (inaudible) around this block and that's the time when I talked to I think it was an officer Eisenbraun

JM [Deputy Jerry Moore]: Ok, ya, he was there

A [Doug]: And ah

JM [Deputy Jerry Moore]: That's when you discovered something had happened

A [Doug]: Ya

JM [Deputy Jerry Moore]: Ok

A [Doug]: Ya, that was the first first I knew, and he was the first (sounds like—guy to make) you know and asked me for identification and things, and then I finally said did they have, you know is it my family then or you know he said ya (inaudible) were they killed and that was the first time I really knew

JM [Deputy Jerry Moore]: Ok, that's when you found out what happened

A [Doug]: Ya, I didn't think anything was good and then I saw (sounds like—seventeen) police cars in the yard

. . . .

A [Doug]: [I] got up at eight did my work put the rails in the car and when I went by the Mall, they hadn't opened yet so I drove up 8th Street and a I got an egg mcmuffin and was driving by, eating it when I saw you know the wagons there ah or first all I saw was a paddy-wagon as I drive by, so I went the block down and looped around and when I came down, I seen several sheriff's cars, and a bunch of volvo's and it was then that I in the yard, you know, then I was trying to figure where I seen the yard roped and then I just, you know I ah just I knew when the yard was roped off, I didn't you know

JM [Deputy Jerry Moore]: Ok

A [Doug]: And then I talked to that [Officer] Eisenbraun and like I say he was probably justifiably a little vague you know when I

JM [Deputy Jerry Moore]: Right

Statement from Douglas Olin Thomas on 5-1-83 (filed 8-12-91, nunc pro tunc 5-8-84), pp. 1-2, 9 (ellipses indicating pauses between words omitted).

As noted above, Tamela (Rhonda's friend and houseguest) testified that Doug did not spend the evening of the murders at Rhonda's apartment. Tamela also recounted that on the morning of the murders (May 1, 1983), Rhonda received a phone call from Doug who informed Rhonda that there were problems with his family and something bad had happened and he was coming to pick her up and Rhonda was "going to go with him to see."¹⁴⁵ Tamela recalled that the phone call took place at 8:30 in the morning, but when pressed by the attorneys asking questions, she conceded it could have been before or after that time.¹⁴⁶ The specific time of Doug's phone call to Rhonda recounting something bad had happened is relevant since law enforcement arrived at the crime scene sometime after 9:30 a.m. and prior to 10:00 am.¹⁴⁷ Hence, if Doug informed Rhonda, prior to the arrival of law enforcement at the crime scene, that there were problems with his family and something bad had happened, he would have had knowledge of such information even before he could have seen law enforcement at the scene. Tamela remembered that she, her daughter, Rhonda's daughter, and Bernie were sleeping when the phone rang.¹⁴⁸ Tamela also explained that approximately within a week of the murders Rhonda told her that she (Rhonda) was going with Doug to help clean Helen's house.¹⁴⁹ When asked whether he had visited his mother's house within a week or two after the murders for cleaning or taking care of property, Doug denied having done so.¹⁵⁰ Also of note in Tamela's deposition is that Doug and Rhonda's long-term relationship had been physically abusive and included an occasion when Rhonda's nose was broken and a time when Tamela observed holes that Doug had caused to walls.¹⁵¹

¹⁴⁵ Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), pp. 11-12 (Doug's phone call to Rhonda).

¹⁴⁶ Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), pp. 11, 14-15, 19-20 (time of Doug's phone call).

¹⁴⁷ Transcript of Jury Trial, Volume IX, Day 9 (filed 10-1-84), p. 1663 (Neighbor Mary Wanek notes the approximate time Grandma Jesse came to her door was about 9:30 a.m. but before 10:00 a.m.); Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), pp. 1241-42, 1253 (Officer Dwayne Plucker testified that he arrived at the crime scene at approximately 10:00 a.m. and there were some officers from the Rapid City Police Department and ambulance workers already there).

¹⁴⁸ Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), pp. 23-24 (houseguests sleeping when phone rang).

¹⁴⁹ Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), p. 15-16 (cleaning Helen's house). While it is unknown whether the alleged visit to the crime scene was with or without permission of law enforcement, the record shows that the rear (kitchen) door to the house was removed as part of the investigation and there is no indication of whether or how the crime scene was secured after removal of the door. Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84), p. 790 (Evidence Technician Plooster noting rear door to house was removed); Transcript of Jury Trial Volume VI, Day 6 (filed 10-1-84), p. 1115 (same).

¹⁵⁰ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), p.15 (Doug denies visiting mother's house within a week or two after murders).

¹⁵¹ Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), pp. 5-9 (Doug's physical abuse toward Rhonda and property damage); See also Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 3 (Transcript of Conversation between Joe Valandra and Rhonda Lawrence), pp. 14-15 (Rhonda's nose broken during fight with Doug).

At 9:13 a.m. on May 1, 1983 (Sunday)—prior to the time law enforcement was contacted when Grandma Jessie sought help from her neighbor at approximately 9:30 a.m.—Ruth Beardsley noticed a man and woman sitting in a vehicle on Fairview Street near the crime scene:

KG [Deputy Ken Gardner]: Ruth, why don't you tell me a little bit you know what, what you told me on the telephone.

A [Ruth]: O.K.

KG [Deputy Ken Gardner]: A[h] where you went and what happened and and all that (inaudible)

A [Ruth]: Now.

KG [Deputy Ken Gardner]: Yeh.

A [Ruth]: A[h] I had received mail . . . for 711 Fairview ¹⁵² and so I took the mail over to [that house] and um it was a letter and the guy evidentially hadn't been home cause his mailbox was stuffed full and . . . as I was driving on Fairview . . . there was a car in front of me that pulled over to the side and stopped on the north side of the street and so did I and they were stopped and . . . nobody got out then I a[h] as I parked over there and . . . I got out and started over there and I kind of looked at the couple wonder[ing] you know, if they were gonna get out [of the car] cause most people do get out and he turn[ed] around and he looked at me so od[d] kind of started to nod and then as I went to [house] 711 why he turned around and it was all right then but I thought it was odd that a couple would drive up there and they were a little you know few seconds while I was parking there all the time I walked up and . . . put the letter in the mailbox and came back there a[h] he still didn't get out and then the lady and neither one of them got out and then I went down almost to eighth street and turned around in the that little, I guess a filling station whatever it is.

KG [Deputy Ken Gardner]: That Common Sense store?

A [Ruth]: Yeh and turned around and came back and as I went on Fairview and turned . . . south on seve[n]th street, they were still there and still nobody had gott[e]n out of the car and a[h] then I came around on Saint James and picked up the lady I was suppose[d] to and it was nine thirteen when I seen them over there and I picked up the lady nine fifteen.

KG [Deputy Ken Gardner]: How did you know it was nine thirteen?

A [Ruth]: I have a clock in my car and I was looking to see what time it was so I could pick up the other lady.

. . . .

KG [Deputy Ken Gardner]: O.K. what morning was this?

A [Ruth]: Sunday morning.

KG [Deputy Ken Gardner]: Sunday morning O.K. a[h] you got a good look at this man?

¹⁵² The crime scene was located at 713 Fairview Street. Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), p. 1241.

A [Ruth]: Yes, I did.

KG [Deputy Ken Gardner]: And you think you can identify him if you see him again?

A [Ruth]: I'm pretty sure I can unless there's somebody that looks an awful lot like hi[m].

KG [Deputy Ken Gardner]: O.K. do you remember what kind of car he was in?

A [Ruth]: No I know nothing about the car.

KG [Deputy Ken Gardner]: Was it a

A [Ruth]: Dark colored.

KG [Deputy Ken Gardner]: It was dark colored but it was a regular type car was it American made or a smaller, like a Japanese vehicle[?]

A [Ruth]: No no and it wasn't a van, a pickup or a small car and . . . I don't think it was four[-]door, but I couldn't say cause I really didn't pay attention to it.

KG [Deputy Ken Gardner]: O.K. here's a picture I want you to look at, could you identify either one of those people? ^[153]

A [Ruth]: No.

KG [Deputy Ken Gardner]: That's not him?

A [Ruth]: No . . . I think this guy was a bigger man I mean heavier.

KG [Deputy Ken Gardner]: Well, it's kind of hard to tell

A [Ruth]: Yeh.

KG [Deputy Ken Gardner]: You mean wider?

A [Ruth]: [T]he um I'm sure it isn't no a[h] some of the same features, but still this man was a more robust person he wasn't a thin person and no, huha, it's not.

. . . .

A [Ruth]: I thought it was very odd, because he gave me such a funny startled look[] when I got out and went over [to the mailbox].

KG [Deputy Ken Gardner]: Yeh he might have thought you were following him or something a[h] he never left while you were in the area at all.

A [Ruth]: No . . . and as I came around . . . I kind of stopped to see thought it was kind of odd and I just stopped and looked back and there ain't nobody still got out of the car.

KG [Deputy Ken Gardner]: Were either of them of them wearing glasses?

A [Ruth]: No he wasn't I don't think she was but she was a smaller person and she had kind of black lady hair it wasn't straight and it wasn't kinky.

¹⁵³ Deputy Gardner does not state who the people were in the picture that he showed Ruth, nor is the information otherwise contained in the in the law enforcement report/transcript styled Statement from Ruth Beardsley. Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 1 (Statement from Ruth Beardsley).

KG [Deputy Ken Gardner]: Could you take a guess at how long it was[,] was it below the shoulders or above the shoulders[?]

A [Ruth]: Well see she was s[i]tting in the car so it was down so I

KG [Deputy Ken Gardner]: O.K. . . . you couldn't see how long it was?

A [Ruth]: No um this man I know I have seen him . . . the guy I seen. [C]ould [it] have been possible that somebody from the Police or the a[h] Sheriff's Department would have went up there just as ahead of the people, I mean, just went up there [to Fairview Street] to watch?

KG [Deputy Ken Gardner]: No . . . we didn't even get the call till after that time.

A [Ruth]: Oh now this guy[']s for[e]head kind of looked something like that but [t]his guy has got his hair parted on the side which looks like is fine hair this other guy had a nice full head of hair.

KG [Deputy Ken Gardner]: He was from the front to the back.

A [Ruth]: Yeh mhm (affirmative) but he di[d][,] he had a for[e]head like this.

KG [Deputy Ken Gardner]: O.K.

A [Ruth]: But he didn't have a nose like that.

. . . .

A [Ruth]: Both of them had black hair¹⁵⁴ and he looks like he could either be . . . maybe mixed with a[h] either Mexican or French dark I mean they weren't you know, their complexion was not real light (inaudible, believe she is saying olive)[.]

KG [Deputy Ken Gardner]: Could it have been Indian?

A [Ruth]: It could be because some Indians, they really don't, you know it depends on what their ancest[o]rs were beside[s] Indian this is why I say sometimes Indians, you know have a lot of [F]rench background.

KG [Deputy Ken Gardner]: Mhmm.

GH [Officer Gene Hammond]: And on this car a[h] I don't remember if we established anything about how old it was does it appear fairly new or older or what?

A [Ruth]: It wasn't a real old one and I don't pay too much attention to cars . . . but it come out, you know, sloped down to the back rather than, where my car stops at the back and goes down (inaudible) slopey.

Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 1 (Statement from Ruth Beardsley), pp. 1-4 (ellipses indicating pauses between words omitted). Attorney Roubideaux summarized why the defense believed Ruth's statement was relevant:

¹⁵⁴ When asked by an investigator for the defense if Doug's hair was "[r]eal dark brown," Rhonda Lawrence responded, "[y]eah, I'd say it was dark." Additional Evidence Third Party Perpetrator (filed 8-16-23, nunc pro tunc 5-17-84), Exhibit 3 (Conversation between Joe Valandra and Rhonda Lawrence on 1-26-84), p. 12.

[Ruth Beardsley] was on Fairview Street the morning of the offense [after the offense occurred]; and there was a car, a strange car, that was parked right by the [Lynn] Luna residence or nearby and these two people [in the car] acted very suspiciously. When she approached, the driver of the car, who was described as a French or Indian person with a gal that had long hair, she didn't . . . get a good enough look to make a positive identification; however, our position is that the jury might very well . . . connect up the activities of Doug Thomas that day [with this incident] as our other third party evidence reveals that he did pick up Rhonda at about 8:30 or 9:00 that [Sunday] morning and at that time he seemed to have knowledge that something had occurred at the—had knowledge of the murders prior to the time the bodies were discovered; and they [the jury] could very well assume that that [man in the vehicle] was Doug Thomas; our position would be . . . that he was waiting to see when the bodies [would be] discovered; that he had some connection with it so that he was interested to know whether or not they were actually dead.

.....

[A]n Indian woman is close to the description of Rhonda Lawrence, Doug's girlfriend. Now, he admitted that he was driving around with her and had picked her up at 8:30 to 9:00. Our evidence—this is connected with the whole train of evidence; in other words, he was clearly over in the far side of town when no satisfactory explanation was given as to why he was over there. He was a good five to ten miles away [from where he resided¹⁵⁵]. He—and also in connection with his inquiry of the officer at the scene when he only inquired about Lynn Luna and the mother [who were not the only family members living in the house]; and seemed to know that they were the ones that were dead; and that they had been killed when no one had told him anything, [he] only [saw] that the police cars were there.

.....

[Ruth Beardsley] identified . . . a car similar to one of the cars that Doug Thomas has and similar to the one he was driving that day.

Transcript of Jury Trial Volume V, Day 5 pp. 823-25 (proceedings had outside presence of jury. *Id.* at 819). While the prosecution did not challenge the defense's allegation that Ruth's descriptions of what she saw could have matched with Doug's vehicle and Rhonda Lawrence as the woman in the vehicle, the prosecutor asserted that Ruth's testimony shows she did not think the man near the scene of the crime was Doug Thomas.¹⁵⁶ While the prosecution did not clarify what it meant by Ruth's "testimony," the prosecutor may have been referring to Ruth's statement to law enforcement, *supra*, in which Ruth was shown a picture (which the record does not describe) and asked if she could "identify either one of those people."¹⁵⁷ Hence it appears Ruth was shown a picture of Doug (and, presumably, Rhonda). As detailed above, Ruth noted some similarity between the man she saw and the photograph, but she also thought some of the

¹⁵⁵ Doug resided five miles northeast of Rapid City. Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), p. 3.

¹⁵⁶ Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), p. 1500 (Prosecutor Lefholz argues Ruth's testimony is that she did not see Doug Thomas near scene of the crime).

¹⁵⁷ Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 1 (Statement from Ruth Beardsley), p. 2.

features looked different so she did not think the man she saw matched with the photograph. Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 1 (Statement from Ruth Beardsley), pp. 2-4.

On January 26, 1984, Defense Investigator Joe Valandra questioned Rhonda as to her and Doug's activities on the evening of and morning after the murders:

J. [Defense Investigator Joe Valandra]: Ok, huh, do you recall what you guy[]s were doing the night before the murders?

R. [Rhonda]: Yes, I do.

J. [Defense Investigator Joe Valandra]: Could you tell me?

R. [Rhonda]: Ok we were together, and we were watching TV.

J. [Defense Investigator Joe Valandra]: Did Doug stay with [you] that night?

R. [Rhonda]: Yes, he did.

J. [Defense Investigator Joe Valandra]: He stayed all

R. [Rhonda]: Till he left oh geez, he had to go out to the shop so he left early morning hours, and he went out to the shop to get some (unclear) he had to bring them into the store?

J. [Defense Investigator Joe Valandra]: Um huh

R. [Rhonda]: And then when he came in, he went by his mother[']s house cause he went to Mc[D]onalds on Eighth St.? And that's when he seen the police and so then he turned around and called me and he came and got me immediately and we went over there, we thought maybe his mom had rented the house out, we were thinking different things, I was, you know we were trying not to really think of what really happened.

J. [Defense Investigator Joe Valandra]: Well, let me just try to get a clarification here, he went out early in the morning, picked up his bed rails, and then huh, went up to McDonalds and then was coming back and saw the police and then he came up and got you or called you?

R. [Rhonda]: He called me first, and he was all upset he says, the police are at my mom's and (unclear) well maybe, they rented the apartment out, maybe the people in it, you know, we were just jumping to conclusions so he said, will you come with me over there? [A]nd I said yes, so he came and got me.

Additional Evidence Third Party Perpetrator (filed 8-16-23, nunc pro tunc 5-17-84), Exhibit 3 (Conversation between Joe Valandra and Rhonda Lawrence on 1-26-84), pp. 7-8. Later during their conversation, Defense Investigator Valandra and Rhonda had the following exchange:

J. [Defense Investigator Joe Valandra]: Ok, after Doug called you that morning, do you remember what time you and him got down to Helen's place?

R. [Rhonda]: Oh God, I think it was around nineish.

Additional Evidence Third Party Perpetrator (filed 8-16-23, nunc pro tunc 5-17-84), Exhibit 3 (Conversation between Joe Valandra and Rhonda Lawrence on 1-26-84), p. 14. As it appears that the morning Defense Investigator Valandra and Rhonda were discussing was the morning the

bodies were discovered (Sunday, May 1, 1983),¹⁵⁸ it is noteworthy that Rhonda and Doug's arrival at Helen's place around "nineish" coincides with both the time that Ruth saw the couple in the car on Fairview Street and Tamela's (Rhonda's houseguest) recollection that Doug called Rhonda at 8:30 a.m. and then picked her up "to go with him to see."¹⁵⁹ And if Doug and Rhonda were already together around 9:00 a.m., then Doug's call to Rhonda with news that there were problems with his family and something bad had happened¹⁶⁰ took place prior to the time law enforcement was notified and arrived at the scene (between 9:30 and 10:00 a.m.)—which, if accurate, would mean Doug had been in possession of information that something bad had happened even before he saw law enforcement at the scene.

(III)

Joseph Leonard

During an interview with law enforcement, Joseph Leonard (Joe) recounted two different versions of his whereabouts during the evening of the murders. In his first version, he explained that on the evening of the murders, after having been at the T-Lounge bar (beside the Pheasant Court Motel) drinking, he was walking after midnight with a friend nicknamed "Farmer" on Dinosaur Hill past a parked car when a man pulled out a gun, fired it, and scared them.¹⁶¹ The man then gave them a ride down to Robin Martin's house where they got out, went up on her porch, knocked on the door, received no response, and made a mess eating potato chips on the porch—a mess that Joe recalls had made Robin angry.¹⁶² The visit to Robin's porch and her subsequent anger, however, did not align with the testimony of Robin Martin who explained that while Joe had been to her home two or three times, she had him arrested for breaking and entering into her apartment on a date she believed took place prior to the murders, and Joe had not returned to her home since that date.¹⁶³ After leaving Robin's porch Joe said he went to

¹⁵⁸ The exchange between Defense Investigator Valandra and Rhonda is transcribed on 15 pages. Rhonda's description of the time of arriving at Helen's place as "nineish" is located on the top of page 14 while the discussion immediately preceding said statement cannot be examined since page 13 is missing from the record. Consequently, it is not possible to ascertain whether page 13 would confirm the date of the morning being discussed, but the morning appears to be the morning the bodies were discovered (Sunday May 1, 1983) since the reference to a telephone call followed by going to Helen's place matches Rhonda's prior description of the time period surrounding the murders on pages 7-8. Additional Evidence Third Party Perpetrator (filed 8-16-23, nunc pro tunc 5-17-84), Exhibit 3 (Conversation between Joe Valandra and Rhonda Lawrence on 1-26-84).

¹⁵⁹ Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), p. 11 (Tamela's recollection of why Doug picked up Rhonda).

¹⁶⁰ Deposition of Tamela Lee Lester dated 4-11-84 (filed 4-18-84), pp. 11-12 (Doug's phone call to Rhonda).

¹⁶¹ Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) pp. 4-6 (encountered man with a gun while walking on Dinosaur Hill after drinking at T-Lounge).

¹⁶² Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) pp. 5, 17 (went to Robin's porch, ate potato chips, and the mess made Robin angry).

¹⁶³ Transcript of Hearing on Defense Motions Re: Hearsay and Third-Party Perpetrator held 5-4-84 (filed 6-14-84) p. 37 (after Robin had Joe arrested he did not return to her house again).

Baken Park and then to a park.¹⁶⁴ When the interviewing officer pointed out to Joe that his description of events on the night in question did not account for his being seen at the Common Cents store with blood on him¹⁶⁵ and asking the security guard when was the last time he had ever been punched out or had his face punched in,¹⁶⁶ Joe offered another version of events.¹⁶⁷ In the second version Joe said he might have been at the Oasis (or the Crystal¹⁶⁸) bar for five or six hours, they asked him to leave, and he walked into the parking lot and might have punched the walls (accounting for the blood on him).¹⁶⁹ When asked which wall he punched and whether it was wood, brick, or block, Joe said it was a block wall; however, when asked to identify the location of the wall, Joe remarked that he might have tried to hit a wall and slipped and fell down instead.¹⁷⁰ While Joe did not then state where he went next or how he arrived there, one of his interviewers interjected that Joe then walked from the Oasis up 8th Street.¹⁷¹ After stopping at the Common Cents store, eating a sandwich, and threatening the security guard, Joe said he then returned to the mountain.¹⁷² Joe also mentioned that he paid for the sandwich with change and

¹⁶⁴ Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) pp. 6-7 (went to Baken Park and then a park); later in his testimony Joe revised his account of what happened after going to Robin's house saying that the sun was coming up and he went to the Pheasant Court motel (p. 17) where he was registered (p. 15) and then went to work peddling fruit (p. 17).

¹⁶⁵ The interviewing officer pointed out to Joe that "the night that you went into the Common Cents [store] . . . you had blood on your hands and a big cut on your arm." Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) p. 19.

¹⁶⁶ At another point the interviewing officer stated to Joe "you told the security guard that he looked like he hadn't had the shit kicked out of him in a long time[,] remember that" Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) p. 10.

¹⁶⁷ Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) p. 7 (interviewing officer points out issues with Joe's description of events).

¹⁶⁸ Joe also said he might have been at the Crystal bar rather than the Oasis bar (p. 9) or maybe both (p. 22) and that he arrived there at 5:30 or sixish (p. 10) or 6:30 or 7:00 (p. 20). Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) pp. 9-10, 20, 22.

¹⁶⁹ Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) pp. 8-9, 20, 22 (kicked out of bar(s), went out to parking lot and punched walls). Page 21 of the transcript may also have included details about the Oasis version of events, but it is missing from the record.

¹⁷⁰ Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) pp. 9-10 (block wall and slip and fall).

¹⁷¹ Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc, 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) pp. 8-9 (interviewer tells Joe that Joe walked from the Oasis up 8th street); *See also* p. 10 ("but you left the Oasis, and you apparently went to the Common Cents store on 8th Street you didn't have a vehicle, so you must have walked, right.").

¹⁷² Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) pp. 10-11 (went to mountain (Skyline Drive) after leaving Common Cents store).

that he had a lot of change.¹⁷³ When asked if there was anybody who saw Joe punch a wall, Joe thought that Mike Mandrin [Micheal Matren] might have seen it happen; the record, however, indicates that Mike [Micheal Matren] denied he was with Joe Leonard when Joe claims to have beat a wall.¹⁷⁴ After recounting the two versions of his whereabouts on the evening in question, Joe acknowledged previously talking to law enforcement on May 4th when his memory was “fresh” about two women that got killed the morning of May 1st, suggesting that the man who had fired a gun on Skyline Drive “was the man,” and then failing to keep his appointment for an interview with law enforcement thereafter.¹⁷⁵

(IV)

Another affidavit submitted by the defense assists in summarizing their third-party perpetrator evidence:

Ruth Beardsley came over . . . next door to the [Helen] Thomas house on May 1, 1983 at around 9:00 a.m. She reported seeing a car parked on the north side of the street which would be across from the Thomas house. She described the couple as Spanish, French or Indian, with black hair and the man and woman could fit the general appearance of Doug Thomas and Rhonda Lawrence. She described the car as a dark colored car which wasn't a van, pickup or small car. That morning [Doug] Thomas was driving a charcoal black, charcoal brown Mazda. He said he found out about the murders after 9:00 a.m. and before 10:00 a.m. on May 1, 1983. (See his deposition taken on May 4, 1983, on file herein). He also denies threatening to kill his sister and mother and denies that they went to New Mexico because they were afraid of him and his violence. Also, he had not seen either of them for a year or so. However, he admits owing and borrowing money from his deceased mother. Between five and six thousand dollars which is still owing.

We are submitting herewith statements (Exhibit 2) by Rex Ball, the mother's friend, concerning two (2) steel boxes holding money in the [Helen] Thomas

¹⁷³ Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) p. 11 (paid for sandwich with change and had a lot of change).

¹⁷⁴ Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) pp. 11-12, 18 (Joe notes Mike might have seen Joe punch the wall). The record shows that “Mike Mandrin” is instead known as “Michael Matren” and, as noted by the defense, “Michael Matren . . . denies he was with Joe Leonard when he says he got angry and beat the wall at one of the local bars, to account for the blood on his hands.” Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), p. 6. While Michael's statement cannot be located in the court file, “a statement taken from Michael Matren, which is impeachment of statements made by Joe Leonard” was offered and received as Exhibit G during a hearing on May 4, 1984. Transcript of Hearing on Defense Motions Re: Hearsay and Third-Party Perpetrator held 5-4-84 (filed 6-14-84), pp. 2, 11-12.

¹⁷⁵ Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 8 (Transcript of Statement from Joseph Charles Leonard given on 7-6-83) pp. 13-14 (discussion of Joe's statements to law enforcement on May 4th (1983) and failure to keep interview appointment).

residence, only one of which was there when the bodies were discovered. Ball also recalls threats by the son to kill his sister and mother. The Court has denied our request to subpoena Lynn Delameter of Black Hills Waterbeds who can find no record of any business proposed or undertaken with Doug Thomas on Sunday morning May 1, 1983. In fact, they do not open until 12:00 noon. Reference is made to his deposition on file herein.

Rhonda Lawrence, his [Doug's] girl friend, (statement Exhibit 3), advises us that Doug called her at 9:00 a.m. May 1, 1983, wanting her to go with him "over there", [to] the [Helen] Thomas house. She told our investigator on January 26, 1984 that Doug Thomas blamed his father and mother for putting him in Yankton where he was diagnosed as a paranoid schizophrenic. (See attached papers, Exhibit 3A). He appeared to hate them for it by yelling at his mother over the phone. . . . She supports Doug Thomas' statement that he stayed at her place all night ^[176] and left in the early morning hours to deliver the bed rails. She also admits to being parked on the street[,] where Mrs. Beardsley recalls [seeing a couple in a car,] at about 9:00 a.m. which our investigator will testify to.^[177]

The Court has refused our subpoena for Rex Ball who has refused to talk to us. The attached statement (Exhibit 2) by [Officer] Gene Hamm[o]nd reveals that Rex Ball said Doug Thomas threatened to kill Lynn and Helen, and "tore up" the place twice. He also said there were two steel boxes stored in a trunk in the [Helen] Thomas house, containing \$4,000.00 to \$5,000.00. Only one was found by the police and this money is missing even though the police say nothing was taken. ^[178]

Also Doug Thomas has no reason whatsoever to be on the south side of town that Sunday morning. His place is 5 miles northeast of Rapid City and the Helen Thomas house is another 5 miles or so south across town. His excuse is that he was to deliver water bed rails to Black Hills Waterbeds which is at the Rushmore Mall which is on the north side of Rapid City at 8:00 a.m. ^[179] when it does not

¹⁷⁶ The record does not contain a statement by Doug wherein he claimed to stay with Rhonda all night. Rather, in his conversation with law enforcement on May 1, 1983 he claimed to have left Rhonda's apartment "about 11:30, to twelve" (Statement from Douglas Olin Thomas on 5-1-83 (filed 8-12-91, nunc pro tunc 5-8-84), p. 8) and in his deposition on May 4, 1984 he claimed to have left Rhonda's place between 1:30 and 2 in the morning. Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), p. 25.

¹⁷⁷ On page 14 of her statement to the defense investigator, Rhonda also said that she and Doug got down to Helen's place "around nineish." It is unknown what she said just prior to that, however, as page 13 of her statement is missing from the record. Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 3 (Transcript of Conversation between Joe Valandra and Rhonda Lawrence on 1-26-84) p. 14.

¹⁷⁸ Helen's method of safekeeping money was noted at trial when Helen's attorney, Louis Freiberg, testified that in February 1983 Helen brought large amounts of cash to his office for the purchase of a house; when Attorney Freiberg inquired where she had been keeping the cash, she replied that she had it at home. Transcript of Jury Trial Volume V, Day 5 (filed 10-1-84), p. 1030. Evidence Technician Plooster also testified that money in the form of coins and bills, approximating \$3,000.00, was found in various locations in Helen's home. Transcript of Jury Trial, Volume VI, Day 6 (filed 10-1-84), pp. 1101-02.

¹⁷⁹ It appears that 8:00 may be a typo since Doug claimed he attempted his delivery around 9:00. Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 24-26

open until after 12:00 noon. We also question this as rails cannot fit in a Mazda for transportation.^[180] No one else saw them. If he didn't deliver them, where did he leave them? Also, there are several places on the north and central areas of the city where he could have gotten an "egg McMuffin". He is no stranger in town and has not visited his mother for a year. At the deposition he said he wanted to visit certain friends, and this is the first time he has fabricated this story. He never mentioned it before.

Tammy [Tamela] Lester in her statement on file herein reveals that both Rhonda Lawrence and Doug Thomas lied about his alibi. Even Doug contradicts Rhonda when he says he left for home at 11:30 p.m. She [Rhonda] says he left in the early morning hours. Tammy says that about 8:30 a.m. on May 1, 1983, Rhonda received a phone call from Doug Thomas and she left with him after that stating that something terrible had happened to Lynn and Helen. She also says both Rhonda and Doug visited the [Helen] Thomas house a few days later to "clean up." The house was closed by police at this time.^[181]

Mary Peterson called the police on May 5, 1983 and asked about the case at the insistence of Doug Thomas. The officer could hear someone in the background coaching her as to what to say. The report of officer Doug Noyes who took the call is attached. (Exhibit 4).^[182]

Officer Fred Eisenbraun, the first officer there, says that at 10:47 a.m. on May 1, 1983, Doug Thomas arrived^[183] and informed him that something had happened, [Doug] asked if it was his mother and sister, and Doug asked if they were dead. He said nothing about the grandmother and baby. This officer thought

¹⁸⁰ While photographs of cap rails in a Mazda have not been located in the record, the trial court acknowledged receiving a "file folder containing [an] affidavit" to which was paperclipped "a folder containing photographs" which, according to the State, included photographs of cap rails inside Doug's car. Transcript of Jury Trial Volume VIII, Day 8 (filed 10-1-84), pp. 1498-1499. Doug explained he could fit padded cap rails inside his Mazda by "slid[ing] them in where the passenger's seat is in the window. It's a hatchback and there's quite a bit of room in there." Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), p. 24.

¹⁸¹ The record shows that the rear (kitchen) door to the house was removed as part of the investigation and there is no indication of whether or how the crime scene was secured after removal of the door. Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84), p. 790 (Evidence Technician Plooster noting rear door to house was removed); Transcript of Jury Trial Volume VI, Day 6 (filed 10-1-84), p. 1115 (same).

¹⁸² The record suggests that Mary Peterson and Rhonda Lawrence may be the same person. Mary Peterson stated to Officer Noyes that she was a friend of Doug Thomas and he had been staying with her since the homicide occurred; Officer Noyes observed that Mary Peterson sometimes sounded close to tears and was being coached on what to say by a male in the background. Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 4 (Addendum report by Officer F. Eisenbraun describing conversation with Mary Peterson). Similarly, Rhonda Lawrence told Defense Investigator Joe Valandra that Doug Thomas stayed with her for a little over a month after the murders. Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 3 (Conversation between Joe Valandra and Rhonda Lawrence on 1-26-84), p. 8.

¹⁸³ It is not clear how Defense Attorney Roubideaux ascertained Doug's 10:47 a.m. arrival time since Officer Eisenbraun's report does not specify the time Doug arrived at the crime scene. Additional Evidence Third Party Perpetrator (filed 8-16-23, nunc pro tunc 5-17-84), Exhibit 5 (Addendum report by Officer F. Eisenbraun describing conversation with Doug).

this was strange, as the inquirer [Doug] seemed to know it [the murders] already happened and was merely confirming the deaths of both Lynn and Helen. (See Exhibit 5).

The estates of the deceased total approximately \$160,000.00 ^[184] and if Luna is convicted Doug Thomas will be the sole heir with the baby coming in for part of Lynn Luna's estate. Doug Thomas is also the beneficiary of a life insurance policy and trust account with 1st Federal Savings and Loan (copies attached Exhibit 6). On the evening of May 1, 1983 Doug Thomas called Charles Mickel, his attorney, about the probates. In his later petitions [Doug] Thomas alleges that Lynn died first, even though only the murderer could know this. But this would disinherit George Luna from the larger estate of the mother. (Copies of these probate papers are attached, Exhibit 7). Both Doug Thomas and his attorney have been uncooperative and refused to give us the aforesaid documentation without a court order which we secured.

The statement of Rodney Kiefer has been filed with the Court wherein he relates that about 2:30 a.m. on May 1, 1983 at the Common Cents Store on Eighth Street a half block away from the murdered women, a man, identified as Joe Leonard, appeared at the store in an intoxicated condition with blood on his hands. He came from the North. The [Helen] Thomas house is North and East of there. He attempted to argue with and threaten the security guard. The blood was described as "spotted up to the cuff." The pathologist estimates the time of death between 12 and 4 a.m. ^[185]

The affidavit of Mark Valdez, on file herein, reveals that on the weekend of July 18, 1983, he and Joe Leonard were drinking together at his residence and Leonard admitted to killing both women. Valdez then remembered that at about the time of the murders Joe Leonard on one of many visits through the murder time, had left a steel pipe, with an appendage on the end, (bar #1) under his [Mark Valdez's] davenport. He [Mark Valdez] searched around and found another steel pipe (bar #2) which had been missing but was found in a place where he had not stored it. It was not that way before. He had been using both for door latches on his garage. They are included herewith as Exhibits and marked Bar #1 and Bar #2. Investigator Joe Valendra with our office says both these bars or pipes are consistent with the injuries. He has read the autopsy report, viewed all pictures

¹⁸⁴ The prosecution asserted that the value of Helen's estate was around \$60,000.00 and Lynn's estate was insolvent. Transcript of Jury Trial Volume III, Day 8 (filed 10-1-84), pp. 1499-1500. However, in documents submitted to the probate court, Doug Thomas estimated the value of Lynn's estate to be over \$60,000.00 and the value of Helen's estate to be over \$100,000.00. Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 7 (Petition for Letters of Administration (section IV); Petition to Admit Will to Probate (section III)).

¹⁸⁵ The record shows that the time of death was, approximately, sometime between 12:30 a.m. and 6:30 a.m. on May 1, 1983. Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), pp. 1253, 1257 (Pathologist Robert Bloemendaal arrived at the crime scene at approximately 10:30 a.m.); Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), p. 1343 (Pathologist Bloemendaal estimates the time of death to be between 4 and 10 hours prior to his arrival at the crime scene).

and consulted with others. The state has refused to test these bars or pipes.^[186] They are included herewith.

Earlier, Joe Leonard on May 4, 1983 talked with officers Jerry Moore and John Barley and asked about the dead women. When asked how he knew they were dead he said he heard it on the TV news with Robin Martin and Michael Matren. Robin Martin denies this. Michael Matren also denies he was with Joe Leonard when he [Joe] says he got angry and beat the wall at one of the local bars, to account for the blood on his hands. (See Joe Leonard's statement attached hereto, Exhibit 8).

The foregoing is submitted, as well as previous submissions as evidence which the Court has denied, as an offer of proof in support of our claim of a third party perpetrator. Joe Leonard has a long record of burglaries and violence. (A copy of his rap sheet is attached, Exhibit 9).^[187] Although we have not secured a direct evidentiary link between Joe Leonard and Doug Thomas, we submit that a jury could do this on a circumstantial basis. We have Doug Thomas who benefits the most from these murders, an admitted killer for hire in Joe Leonard, and unexplained knowledge of the murders[,] before the bodies were discovered by the police after 10:00 a.m.^[188] on May 1, 1983[,] by Doug Thomas.

Additional Evidence Third Party Perpetrator pp. 1-6 (filed 6-12-23, nunc pro tunc 5-23-84). On the seventh day of trial, in proceedings outside the presence of the jury, the parties questioned Forensic Pathologist Dr. Thomas Henry¹⁸⁹ on whether two "pipelike instruments" presented by the defense as third-party perpetrator exhibits could have caused the injuries to the women as well as damage to parts of a door frame:

¹⁸⁶ On the fourth day of trial, Sheriff Holloway referenced "a couple of bars" and "some bars" that Defense Attorney Roubideaux had given to Investigator Olsen. No other identifying information was provided, however. Transcript of Jury Trial Volume IV, Day 4 (filed 10-1-84), pp. 720, 767-69.

¹⁸⁷ Joe Leonard's criminal history included charges of sex perversion, kidnapping, resisting arrest, glue sniffing, possession of marijuana, violation of probation, sodomy, inhalation of fumes, burglary, possession of marijuana, carrying a firearm without a license, possession of prohibited weapon, defrauding an innkeeper, wandering upon the streets, inhalation of poison fumes, drunk driving, entry without consent, possession of dangerous drugs, attempted burglary, resisting arrest, fleeing from an officer, disorderly conduct, loitering, battery, and possession of narcotic controlled substance. Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 9 (FBI record).

¹⁸⁸ Police arrived at the crime scene sometime between 9:30 a.m. and 10:00 a.m. on Sunday, May 1, 1983. Transcript of Jury Trial, Volume IX, Day 9 (filed 10-1-84), pp. 1663, 1665 (Neighbor Mary Wanek notes the time was about 9:30 a.m. when Grandma Jessie came to her door); Transcript of Jury Trial Volume IX, Day 9 (filed 10-1-84), p. 1649 (Neighbor Mary Wanek called for emergency help when Grandma Jesse came to her for help); Officer Dwayne Plucker testified that he arrived at the crime scene at approximately 10:00 a.m. and that there were some officers from the Rapid City Police Department and ambulance workers that were already there. Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), pp. 1241-42, 1253.

¹⁸⁹ Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), pp. 1289-90 (Forensic Pathologist Thomas Henry identifies his occupation).

THE COURT: At this point there is separate issue before the Court which the Court would ask, I guess, Mr. Roubideaux, do you want to make a brief questioning of this witness relating to the issue concerning some other evidence?

MR. ROUBIDEAUX: Yes, Your Honor.

THE COURT: You may proceed.

(Whereupon, at this time Defendant's Third Party Perpetrator Exhibits and 2 were marked for identification by the Court Reporter.)

MR. ROUBIDEAUX: May it please, Your Honor, in the absence of the jury and in connection with the third party perpetrator issue, may I inquire of this witness?

THE COURT: You may.

MR. ROUBIDEAUX: Doctor, I want to hand you what has been marked as Defendant's Third Party Exhibit 1 and Defendant's Third Party Exhibit No. 2 and ask you to please examine those objects.

THE WITNESS [Pathologist Henry]: Do you have a ruler?

(Whereupon, at this time a discussion was had off the record.)

MR. ROUBIDEAUX: Have you examined those?

THE WITNESS [Pathologist Henry]: Yes, I have.

MR. ROUBIDEAUX: Doctor, referring by them by 102 would you please state whether or not these two pipe-like instruments could have been the murder weapons in this case and are they consistent with the injuries that you observed on the bodies?

THE WITNESS [Pathologist Henry]: Okay. Both of the instruments could be consistent with the injuries to the heads specifically. Specifically, about the lacerations and skull fractures and the bruise on Lynn Luna's back. The round doughnut-shaped area on Helen Thomas' head could conceivably have come from being struck with either round end of either one of these pipes. So that part of that everything is consistent. This is not consistent with the round doughnut-shaped object on her head, but the end of it could be consistent with it.

MR. ROUBIDEAUX: Referring to that as--

WITNESS [Pathologist Henry]: Exhibit 1.

MR. ROUBIDEAUX: On Exhibit 1?

THE WITNESS [Pathologist Henry]: That's correct.

MR. ROUBIDEAUX: However, the ends of that is consistent with the wound of Helen Thomas' forehead?

THE WITNESS [Pathologist Henry]: It could be, yeah.

MR. ROUBIDEAUX: All right. I want to show you also State's Exhibit 105 and 58, which are pieces of the threshold above the head of Helen Thomas where it was discovered over here. See, here is the one on the right-hand side there and that is about the position she was lying when she was found in the doorway leading down to the--help me.

MR. DEAN: Down to the basement.

MR. ROUBIDEAUX: Yeah, down to the basement, okay.

THE WITNESS [Pathologist Henry]: I'm not sure of where you mean. Now, where is this from?

MR. ROUBIDEAUX: Okay. Both of these were secured from the overhead part of the doorway leading down.

THE WITNESS [Pathologist Henry]: Okay.

MR. ROUBIDEAUX: I want you to examine these, directing your attention specifically to Exhibit 105 and this mark here, marked 1B, and ask you whether or not that mark could have been made by either one of these weapons or both of them.

THE WITNESS [Pathologist Henry]: One, the rounded contour of the base of the pipe seems to fit.

MR. ROUBIDEAUX: Exhibit--

WITNESS [Pathologist Henry]: 1 .

MR. ROUBIDEAUX: Exhibit 105.

THE WITNESS [Pathologist Henry]: I mean Exhibit 1 fits with the mark on Exhibit 105.

MR. ROUBIDEAUX: And the mark on 105 is designated as 1B?

THE WITNESS [Pathologist Henry]: 1B.

MR. ROUBIDEAUX: Okay.

THE WITNESS [Pathologist Henry]: The one end, the smaller end of Exhibit 2 appears to be a little bit smaller than mark 1B, the larger end, however, it appears to fit reasonably well and I would think it could be consistent with the mark on 1B.

MR. ROUBIDEAUX: All right. Doctor, now, let me call your attention to Exhibit 58 in which I'll point to you the area in the middle that is circled wherein there appears to be some kind of substance that has brushed off from that mark. Are either of these weapons consistent with that particular area on Exhibit 58?

THE WITNESS [Pathologist Henry]: Are you speaking of the indentation mark or are you speaking of the color?

MR. ROUBIDEAUX: The indentation mark and the color.

THE WITNESS [Pathologist Henry]: Okay. This is even further afield.

MR. LEFHOLZ: Again, objection on that basis, Your Honor.

THE COURT: I'll allow him to compare the indentation mark. The color, I think, will speak for itself.

MR. ROUBIDEAUX: Right.

THE WITNESS [Pathologist Henry]: Exhibit 1 would conceivably fit as far as the contour and the shape of the direction, but does not appear to fit for color, assuming that it hit a piece where some of the red color was present. Exhibit 2 does not fit as well. It feels like it's a little bit smaller, but conceivably on a glancing type, you could get it from here.

MR. ROUBIDEAUX: How about the elbow side?

THE WITNESS [Pathologist Henry]: The elbow side, it fits better like the other pipe did and it's almost similar at least visually in color.

MR. ROUBIDEAUX: Okay. I'll leave this here. I have nothing further, Your Honor.

THE COURT: State wish to inquire?

MR. LEFHOLZ: Just a couple questions, Judge. Dr. Henry, obviously we haven't shown you any specific items for you to make these kinds of comparisons, but do you have an opinion as to the scope of the number and type of items that also might make the same kind of comparison that you've just testified to?

THE WITNESS [Pathologist Henry]: Oh, I think basically it comes down to any object that's roughly of this shape, any type of pipelike object. It could be a pipe, you know, it could be anything of this general shape would fit the general pattern

of injuries and other than that one patterned injury on Helen Thomas' forehead, it would be very difficult to include or exclude any of them [o]n the basis of the wounds we have--I should say, exclude.

MR. LEFHOLZ: Would the number of those objects then be quite great?

THE WITNESS [Pathologist Henry]: That's correct.

MR. LEFHOLZ: How great?

THE WITNESS [Pathologist Henry]: Well, as great as any number of pipes you could find that would be roughly one inch or a little less in diameter.

MR. LEFHOLZ: Or any other hard metal object that's not necessarily a pipe but of the same diameter?

THE WITNESS [Pathologist Henry]: Right.

MR. LEFHOLZ: Okay. I have nothing else, Judge.

MR. ROUBIDEAUX: Of course, if these weapons were directly connected by confession with a person who has admitted to doing these crimes, then that would raise the odds quite a bit as to whether these are the instruments? Quite a bit, wouldn't it?

MR. LEFHOLZ: Well, I--

THE COURT: I'll sustain the objection as argumentative question.

Anything further, Mr. Roubideaux?

MR. ROUBIEAUX: Assume that a person connected with these crimes--

THE COURT: Excuse me, Mr. Roubideaux, we're talking about areas beyond his expertise, I think, that are not involved in this issue.

MR. ROUBIDEAUX: Well, he's commented on the possibility, but of course--

THE COURT: The facts surrounding the third party perpetrator are before the Court; and I don't know that this--I've already questionably allowed him to testify as to whether or not they fit in those objects as far as the underlying evidence concerning them.

MR. ROUBIDEAUX: I have no further questions.

MR. LEFHOLZ: I have no other questions.

THE COURT: Okay. Thank you. I'd like those pipes delivered to the Clerk, I think, for her preservation I guess at this point. Any further questions of the Doctor?

MR. LEFHOLZ: I have nothing further.

Transcript Jury Trial Volume VII, Day 7 (filed 10-1-84), pp. 1324-31.

(V)

Exclusion of third-party perpetrator evidence

All third-party perpetrator evidence was excluded in Luna's trial. The reasoning of the trial court for excluding the evidence was summarized (in proceedings outside the presence of prospective jurors) on the first day of trial:

Gentlemen, at this time the Court has had occasion to review the motion made in limine by the State wherein they request that the defense be precluded from presenting evidence as to the possibility of a third party committing the crime, other than Mr. Luna.

I have reviewed all the evidence submitted; and the last matter for review was the rough transcript, in effect substance of the final transcript of the final testimony of [Doug] Thomas. Is it David?

MR. LEFHOLZ: Doug Thomas.

THE COURT: Doug Thomas, which the Court did review.

The Court has reviewed all the affidavits submitted; and it is hereby the ruling of this Court--the finding of this Court, first, that having listened to the evidence submitted for the preliminary fact question as to the admissibility of evidence, relevancy of evidence in this light, the Court feels that the evidence submitted or purported by the Plaintiff is not sufficient to--by the Defendant is not sufficient to justify introduction in this trial of evidence to support the guilt of a third party.

The two people which the defense has sought to inculcate are Doug Thomas and Joe--

MR. ROUBIDEAUX: Leonard.

THE COURT: --Leonard. Neither of these individuals has been shown to have any relationship, knowledge or contact with the other. So any facts relating to one would not be imputed in any fashion by any stretch of the imagination or logic to the other.

Dealing with each of them individually, that in Joe Leonard's case while there is a purported statement to the effect that he acknowledged responsibility for the death of the decedents in this case, there is nothing to connect him to that death in any significant fashion; that the two primary evidences that would raise argument or that have been argued as support for that: the bloody hands on the morning of the slayings and the disappearance of two metal bars at the residence of one of the affiants--

MR. ROUBIDEAUX: [Mark] Valdez.

THE COURT: -- witnesses, not affiants, I guess; that those are insufficient to establish any probability or possibility even of guilt directly.

The South Dakota Supreme Court has indicated that mere statements of--I don't know--it's a South Dakota case, I don't recall right offhand, but reference to a statement alone of culpability is not sufficient. There has got to be a train of facts which in some fashion points out the guilt of the third party. There is no train of facts or evidence that the Court can find that sufficiently points to any motive or contact of any kind indicated by Joe Leonard with the decedents, no proximity in any fashion, generally, in terms of relationships, exposure that would suggest that Mr. Leonard had any purpose, reason, desire, inclination to enter the house of Helen Thomas and Lynn Luna nor any motivation whatsoever to commit a killing of the two individuals. The Court perceives the threats, if they were made, to be in the matter of an ego trip on the part of the individual perhaps. I can only speculate since I've only gotten this from Mr. Valdez; and that there is some question raised as to the statement of Mr. Valdez. Although I'm not passing on that, I'm taking it in and of itself as a basis on which I'm determining this on Mr. Leonard's statement as to

a third party perpetrator. The arguments are remote, disconnected to the motivation and the detailed facts of the crime.

In addition, as to Doug Thomas, the threats that were made are remote in time; that there's no evidence to establish acts on his part. I guess the strongest points, as I recall them, made by the defense are the questions concerning the knowledge of Doug Thomas concerning the time of the death, what happened the morning of the death, and what his statements were where he was at that time. There was some question about it and some contradiction. That, the Court recognizes; however, the evidence submitted and offered by the Defendant does not establish a train of facts that would indicate or point out the guilt of Mr. Thomas and is insufficient in the mind of this Court—based on the Beets case and other authorities--to allow the defense to introduce this evidence as in the mind of the Court it could be confusing and distract from the evidence relating to specifically Mr. Luna's guilt or innocence in this case.

The defense purports to offer evidence of two separate individuals, neither of which could have apparently committed the crime in concert, neither of which are tied together, to prove three different people may have committed a crime which only one of them could have committed, would be confusing for the jury.

The State is purporting, of course, Mr. Luna was committing the crime; the defense would be purporting that two other people separately or individually could have committed the crime.

Based on all of the facts submitted to the Court, the arguments of counsel, and the affidavits, the Court feels this is an insufficient showing of motive, opportunity, or underlying facts to have commission of the crime by either of these two individuals; and it would be confusing for the jury to bring in such collateral evidence. Therefore, the Court will grant the State's motion in limine to preclude evidence of a third party perpetrator.

Needless to say, it does not seem convenient for you to establish your client's innocence and I realize that in light of balancing the situation, but I don't see that it would be a problem. I guess we all know where we're coming from; and the evidence would be somewhat disconnected so I trust there wouldn't be any real problems in preparing the defense, other than the third party perpetrator. If there is a problem in that area, let me know ahead of time so the Court can prepare its rulings or understandings if we cross wires in some fashion as to third party perpetrators versus the question of defense of your client. I'm simply letting that ride at this point. I trust there won't be any confusion or problems in the evidence as you present it.

MR. ROUBIDEAUX: Well, at this point there doesn't seem to be any problem. We do want to offer some additional evidence, and we'll get that together as soon as we can.

THE COURT: It's recognized this matter is also a particular matter for the Court; and any additional evidence you want to submit, I will receive and review.

Transcript of Jury Trial Volume I, Day 1 (filed 10-1-84), pp. 86-91. On the eighth day of trial, the trial court reiterated its ruling prohibiting the presentation of third-party perpetrator evidence:

At this point it's the finding of the Court as a preliminary factual finding that there has not been established or shown to this Court by counsel for the defense any train of facts or significant suggestions that a third party may have been responsible for this crime. The third parties referred to up to this point are Joe Hawkins--

MR TSCHETTER: Joe Leonard.

THE COURT: Joe Leonard, excuse me, Doug Thomas, and there are--there's existent hair fibers that have, as I understand it, have not been identified as to any individual.

MR. ROUBIDEAUX: Right.

THE COURT: And of which Joe Leonard and Doug Thomas have been excluded as being possible matches for those hair fibers found on the victim. So, that suggests third party or fourth potential third party perpetrator if one would assume that the hair fibers may have come from the person of the victim--of the assailant.

MR. ROUBIDEAUX: The murderer.

THE COURT: At this point going down the evidence, first, certainly as to the hair fibers, no one has been attached to those so I can't relate those to the particular third party perpetrators suggested being Mr. Leonard and Mr. Thomas.

As to Joe Leonard, the evidence is skimpy at best. It's inconsistent. In fact, with reason in the mind of this Court that Mr. Leonard would have been involved in the crime. The fact that he had, I believe, been around at 2:30 in the morning, was seen in the Common Cents Store about half a block from the scene of the crime, with an explanation that he had smashed his hand against the wall or struck a wall with this hand. There is also reference to the fact that there appeared to be scrapes on his hand and there is no evidence of the assailant injuring himself in any fashion. In addition, the evidence submitted up to this point indicates that a towel was used at the sink by the assailant. If Mr. Leonard had blood of the victims on his hands, it would have no longer been there in any substantial form. It's inconceivable by this Court an individual immediately thereafter within a half a block of a heinous murder would walk into a public place, speak to a security guard, and have blood on his hands. That's inconsistent with any attempt to hide or conceal a crime of such magnitude.

In addition, that the evidence suggests in this case that there is a cleansing of the hands of the perpetrator by the existence of the towel by the sink and the sink itself with pictures of the sink, I think, which reflect a suggestion there was a cleaning at that time. In addition, the bars that were referred to and suggested by Mr. [Mark] Valdez by implication to have been taken by Joe Leonard, it's again inconsistent to imagine an individual would take two bars to commit murder of this type since it would be very inconvenient to carry a bar in each hand.

Secondly, the manner in which those bars were apparently or allegedly returned is inconsistent with one individual taking the bars and using those bars.

Further, there is no linkage whatsoever to Mr. Leonard and the victims in this case. If there were assume[d] to be some removal of the bars for the purposes of the assault, they would thereupon suggest a strong belief there was some kind of

preparation or anticipation of the commission of the assault by Mr. Leonard, which is not consistent with the total lack of identification with the victims. The reference [by the defense] to Mike [Micheal] Matren not supporting Mr. Leonard's testimony or statements—Mr. Leonard's statements are very vague and he's obviously had expressed, at least in the course of statements—that he was intoxicated and his recollection is extremely vague and there is a specific reference during the course of his statements, I believe, that Mr. Matren was sent back to the camp, I believe he called it, before he left the bar, so it's not consistent with Mr. Matren's testimony.

There is nothing in the mind of this Court that reasonably ties in any fashion Joe Leonard to the offense other than he was in the vicinity with the blood on his hands, but the blood is reasonably explainable and there is no reason or support for the position of the plaintiff [sic] to involve collateral testimony relating to Joe Leonard.

As to Doug Thomas, there is no evidence of involvement of Doug Thomas with the murder. There is evidence of threats made to Doug Thomas quite some time ago. The Court does not find . . . Rhonda Lawrence's statement inconsistent with Doug Thomas. She said he left early in the morning, the crime was—appears to have been committed, based upon the pathology testimony, between approximately midnight and 4:00 or so.^[190] That would not be consistent that he would be sleeping with or being with Rhonda Lawrence and then leaving in the morning hours, which I can only interpret to be sometime after 4:00 since he had chores to do relating to picking up parts of a bed, I believe. Also that Miss Lawrence's statement—there is no reason to believe she would lie to perjure herself on behalf of Mr. Thomas. She's being married to a third individual, although she has still expressed an affection for Mr. Thomas.

There is evidence in the record to support there was a sincere emotional distress felt by Mr. Thomas when he obtained from law enforcement also the fact that his mother and sister were killed and that he apparently cried at that time. The fact that he inquired about his mother and sister under the context of the case is not inconsistent in that there is evidence to suggest that he was aware of threats that may have been made by the Defendant against Helen Thomas and Lynn Luna; and that they would be individuals who he would anticipate could be in jeopardy based upon those threats and comments; and therefore his immediate concern about his sister and mother are consistent with one's responsible state of mind under the circumstances of Doug Thomas at that time.

There is no evidence to reasonably suggest that there was a vehicle in question where reference was made to someone seeing that vehicle in the early morning hours. I can't remember exactly the details on that, but the State has presented

¹⁹⁰ The record shows that the time of death was, approximately, sometime between 12:30 a.m. and 6:30 a.m. on May 1, 1983. Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), pp. 1253, 1257 (Pathologist Robert Bloemendaal arrived at the crime scene at approximately 10:30 a.m.); Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), p. 1343 (Pathologist Bloemendaal estimates the time of death to be between 4 and 10 hours prior to his arrival at the crime scene).

affidavits which contradict the position of the Defendant significantly; and the Court is inclined to accept those as being reasonably adequate and accurate.^[191]

So, therefore, the only things to tie Doug Thomas is threats made at a considerable time before the death of the parties. There is very little gain to be obtained by Doug Thomas at the time. There is no evidence of any recent issues involving Doug Thomas and the decedents that would suggest a motivation to commit a murder of those two.

There is no physical evidence in any fashion to tie Doug Thomas to the crime and only by innuendo and speculation could one seek to draw some kind of tie between Doug Thomas and the crime.

It is the feeling of this Court that to allow collateral evidence of other individuals potentially committing the crime at this point is inappropriate in that it could be confusing to the jury. It is not sufficient to reasonably establish a possibility of the commission of a crime by either Joe Leonard or Doug Thomas. There is considerable lack of motivation, opportunity or facts to support either of these individuals as possibly committing the crime; therefore, the Court feels that it is inappropriate to exclude this evidence to avoid confusion and unduly tying up the Court process and to insure that the jury is able to focus on the facts of the case itself without what appears to this Court to be irrelevant evidence concerning other relationships or facts that exist, which are not pertinent to the incident in question.

Under all these factual findings by the Court, which I previously stated are findings by the Court as preliminary fact findings, the Court concludes that it would be inappropriate to present any of this evidence to the jury; and therefore the Court will deny the presentation of further evidence on third party perpetrator or any evidence on third party perpetrator again reinforcing the previous decision by the Court.

MR. ROUBIDEAUX: May we make a short statement, Your Honor?

THE COURT: Yes.

MR. ROUBIDEAUX: Your Honor, we, of course, disagree with the Court's interpretation of the evidence. We think that it's a matter for the jury. The evidence will indicate that the sink blood was attributable to Grandma Nicksic after she discovered the bodies.

Joe Leonard was intoxicated at the time he went in the Common Cents Store with blood on his hands, which would indicate why he might be too careless as far as that matter was concerned; and that, in fact, he even tried to pick a fight with a security guard there, showing his violent nature.

We have submitted to the Court a long list of burglaries that Joe Leonard has engaged in. We've submitted evidence that there is some missing money in the house that would be a primary reason for Joe Leonard to have been in the house; and that the bars--we are certainly not trying to say that they were both used. We're saying that either/or were used. The testimony of the pathologist is that either one would be consistent with the injuries that were not only incurred on the

¹⁹¹ While there do not appear to be any such affidavits preserved in the court record, perhaps the trial judge was referring to what may have been a photo line-up involving Ruth Beardsley.

bodies, but also [the damage] on the boards that were taken into evidence by the State.

As to Doug Thomas, we certainly feel that those threats are significant. He stands to be the only person to gain from the death of the two women. He and Lynn Luna were the only heirs under the will and with her death, he's the sole heir under the will. We've shown that the estate papers establish that Helen Thomas's estate was estimated by her attorney at \$100,000 and that the estate of Lynn Luna was estimated at \$60,000 in the estate papers. It's significant also that Doug Thomas, although he said he had no contact with his mother for a whole year, there is a loan of \$5,000 that he still owes her from amounts that he borrowed from her from time to time. It's difficult to see how there could be no contact, with him borrowing that money.

We think the evidence establishes—the only evidence as far as in this case with the time of death is between 12:00[a.m.] and 1:00[a.m.]. There is no evidence in the record to show 12:00[a.m.] to 4:00[a.m.].^[192] There is, by Doug Thomas' own—he indicates that he left Rhonda Lawrence's place at 11:30[p.m.] in the evening.

That's all we have, Your Honor.

THE COURT: At this point the Court will renew its decision, making a particular point that the issues involving Doug Thomas are very remote in time; that all the issues submitted as third party perpetrator are weak in probative value and not related to the facts in the case as presented before the Court at this time; and therefore the Court will renew its decision to deny the submission of such evidence.

Transcript of Jury Trial, Volume VIII, Day 8 (filed 10-1-84), pp. 1505-14. On appeal, Luna presented the question of “[w]hether [his] constitutional rights to compulsory process and due process were violated by the trial court's exclusion of third-party perpetrator evidence,” *State v. Luna*, 378 N.W.2d 229, 231 (S.D. 1985). After conducting an analysis utilizing a constitutional balancing test borrowed from the Ninth Circuit Court of Appeals, the South Dakota Supreme Court held that the trial court did not err when it excluded the third-party perpetrator evidence:

Luna first urges that the trial court violated his Sixth and Fourteenth Amendment rights by excluding certain third-party perpetrator evidence that he sought to introduce.

....

Luna alleges that the trial court erred in relying on dicta from *State v. Beets*, 57 S.D. 486, 233 N.W. 917 (1930), as the rule in South Dakota and urges a number of more recent federal cases and the writings of Professor Wigmore in support of a far more

¹⁹² The record shows that the time of death was, approximately, sometime between 12:30 a.m. and 6:30 a.m. on May 1, 1983. Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), pp. 1253, 1257 (Pathologist Robert Bloemendaal arrived at the crime scene at approximately 10:30 a.m.); Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), p. 1343 (Pathologist Bloemendaal estimates the time of death to be between 4 and 10 hours prior to his arrival at the crime scene).

liberal rule. The State argues that the *Beets* decision contains the proper rule for South Dakota and attempts to align it with the federal authorities. The *Beets* rule appears to be that for a third-party perpetrator theory “[t]o be available as a defense the proof that another is guilty must show that as a consequence thereof defendant is not guilty.” 57 S.D. at 490, 233 N.W. at 918. Furthermore, the evidence must meet admissibility requirements of genuineness.

We note that since *Beets* we have adopted the Rules of Evidence. SDCL 19-12-3 is an exact codification of Federal Rule of Evidence 403: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.” SDCL 23A-22-2 makes civil rules of evidence applicable also to criminal cases, except as otherwise provided in Title 23A. The State suggests that since SDCL 19-12-3 was not relied on by Luna it is not before the court. We disagree. When the rules of evidence were adopted in 1978, they became the criteria for admissibility of evidence. SDCL 19-9-1. It is noteworthy that neither *Beets*, nor any of the cases wherein this court has discussed SDCL 19-12-3 since its adoption, were approached from the perspective of constitutional rights. The latter cases were all decided on the basis of the statutory application of the rule and none of the latter involved exclusion of third-party perpetrator evidence.

In assessing the third-party perpetrator evidence, as offered by Luna, the trial court pointed out that:

- (1) Joe Leonard and Doug Thomas were excluded as possible matches for hair samples found on the victims.
- (2) Even though Leonard showed up at a store at 2:30 a.m. with blood on his hand there was no evidence to show that the perpetrator injured himself in any fashion and it was obvious from the sink and towel at the scene that the perpetrator cleaned his hands before leaving.
- (3) Leonard walked with blood on his hands into a store and accosted a security guard a few blocks from where Luna contends he had just committed a heinous crime. The trial judge found this inconsistent with any theory of Leonard's guilt.
- (4) Although Leonard was alleged to have taken two metal bars, possibly the murder weapons, the judge determined that it would be inconvenient to walk with a bar in each hand. He also determined that the manner in which the bars were returned was inconsistent with Luna's theory.
- (5) There was no linkage between Leonard and the victims.
- (6) Inconsistencies in Leonard's story were explained by the fact that he was drunk.
- (7) Threats made by Thomas were too remote.

- (8) On the night of the murders Thomas was with a woman until 4:00 a.m.; she corroborated the alibi and there was no reason to believe she would perjure herself on his behalf.
- (9) There was evidence to support testimony that Thomas was emotionally distressed at the deaths.
- (10) The fact that Thomas asked about his mother and sister's condition could have been based on his knowledge of Luna's threats on their lives.
- (11) No physical evidence ties Thomas to the crime.

With respect to Leonard, the evidence appears to show that he was a “street person” who lived in a camp on the mountain on Skyline Drive near Dinosaur Park. While he was apparently employed from time to time distributing fruit, he also relied on sales of his “drawings” for his income. He also was a regular habitue of the local bars and liquor stores. As he put it, his normal evening practice was to go to a bar, get roused, go to the next bar, cause a little trouble and get roused, continuing until he got back to the mountain. “[I]f not, I'd go to detox ... or jail.... That was the schedule.” With respect to his bloody hand, his recollection was that he had gone to the Oasis Bar, gotten rowdy and was ejected. That made him angry and he slammed his fist into a concrete wall. As for the proximity of the Common Cents Store to the scene of the crime, it is noteworthy that the store is located on Rushmore Road, a portion of U.S. Highway No. 16 leading southward from downtown Rapid City to the tourist attractions to the south of the city. It is a highly commercialized area of the city. We particularly note that the State first attempted to connect Leonard with Luna, there being some indication that both had been in the Oasis Bar on the evening immediately preceding the murders. When Leonard denied any acquaintance with or knowledge of Luna, the police apparently gave up on that theory. Artful defense counsel then picked up the ball and tried to run with it.

We find the case of *Perry v. Rushen*, 713 F.2d 1447 (9th Cir.1983), persuasive. The *Perry* Court noted that the Sixth Amendment guarantees the accused “ ‘compulsory process for obtaining witnesses in his favor.’ ” *Id.* at 1450. The Sixth Amendment is imposed on the states by the Fourteenth Amendment and compulsory process implicitly prevents the state from arbitrarily excluding such testimony. *Perry, supra*, citing *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The *Perry* Court further noted that the defendant's general Fourteenth Amendment right to due process also restrains the operation of state rules of evidence. The Ninth Circuit panel, citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), noted that due process is in essence the right of a fair opportunity to defend against the accusations. State evidentiary rules may not be applied mechanistically to defeat the ends of justice. The opinion goes on to emphasize that the defendant's general right to present evidence is undeniably strong; yet the State's legitimate interest in reliable and efficient trials is often compelling. See *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The *Perry* Court summarized the rules as follows:

Where the state interest is strong, only the exclusion of critical, reliable and highly probative evidence will violate due process. When the state interest is weaker, less significant evidence is protected.
... [T]he court must balance the importance of the evidence against the state interest in exclusion.

713 F.2d at 1452.

We then balance the equation in the manner suggested in *Perry*. We start by giving due weight to the substantial state interest in preserving orderly trials, and judicial sufficiency, and in excluding unreliable or prejudicial evidence.

Regarding Luna's theory, we find the evidence with respect to Leonard highly unreliable and of little probative value. His life style has been previously described and there is no indication that it changed after the date of the crime. There is no evidence of any sudden influx of wealth from the proceeds of the crime. There is no evidence of any connection between Leonard and Thomas, only baseless innuendo. As to the circumstances of Thomas, we agree with the trial court's determination that he had an alibi. Taking the evidence as we evaluate it, not as trial counsel represented it in his affidavit, we agree with the decision of the trial court:

There is considerable lack of motivation, opportunity or facts to support either of these individuals as possibly committing the crime; therefore, the court feels that it is appropriate to exclude this evidence to avoid confusion and unduly tying up the court process and to insure that the jury is able to focus on the facts of the case itself without what appears to this court to be irrelevant evidence concerning other relationships or facts that exist, which are not pertinent to the incident in question.

The trial court did not commit error by excluding the third-party perpetrator evidence offered by Luna.

State v. Luna, 378 N.W.2d 229, 232–34 (S.D. 1985) (footnote omitted). Ultimately, the South Dakota Supreme Court determined that the trial court did not commit error when it excluded third-party perpetrator evidence based on a constitutional analysis. In conducting its constitutional analysis, the court applied a balancing test utilized by the Ninth Circuit in *Perry v. Rushen*, 713 F.2d 1447 (9th Cir. 1983)—a test which does not address whether third-party perpetrator evidence is admissible on account of relevancy rules.¹⁹³ While the South Dakota

¹⁹³ In the case of *United States v. Espinoza*, 880 F.3d 506 (9th Cir. 2018), the Ninth Circuit explains that the balancing test adopted by the court in *Perry v. Rushen*, 713 F.2d 1447 was a test for determining whether the defendant's constitutional rights had been violated by exclusion of the third-party perpetrator evidence; hence, the test in *Perry* was not a test for determining whether third-party perpetrator evidence is admissible on account of fundamental standards of relevancy under the federal rules of evidence—an issue which the *Perry* court acknowledged was addressed in a different case: *United States v. Armstrong*, 621 F.2d 951 (9th Cir. 1980). *Espinoza*, 880 F.3d 506, 512-13 (9th Cir. 2018).

Supreme Court mentioned the rules of evidence, including SDCL 19-12-3,¹⁹⁴ *Luna*, 378 N.W.2d 229, 232, the court did not proceed to examine whether the evidence was admissible under state rules of evidence. Hence, no court has determined whether the third-party perpetrator evidence in *Luna* is admissible under the South Dakota Rules of Evidence. Additionally, in reaching their decisions on whether the third-party perpetrator evidence was admissible, neither the trial court nor the South Dakota Supreme Court had the benefit of the 2020 serology and DNA testing or the subsequent testing testified to in April, 2025, nor did the courts realize they were relying upon certain material errors when reaching their decisions. The supreme court noted the trial court's assumption that the perpetrator's hands were cleaned at the sink, and with a towel, at the crime scene¹⁹⁵—one of the main reasons evidence concerning Joe Leonard and his bloody hands were excluded from the trial. If the courts were correct that the perpetrator's hands were cleaned at the sink, and with a towel, *then the new evidence completely exonerates George since the DNA from the towels at the crime scene was of female origin.*¹⁹⁶ If the courts were instead incorrect about the perpetrator's hands being wiped clean at the crime scene, then one of the main reasons the courts had for excluding Joe Leonard—because he actually *had* bloody hands—has been undermined. Additionally, one of the main reasons evidence concerning Doug Thomas was excluded from the trial was due to the assumption that he was at Rhonda's apartment until at least 4 a.m. on the night of the murders. As set out above, the trial court stated that

¹⁹⁴ SDCL 19-12-3 was replaced by SDCL 19-19-403 in 2016. Both versions of the evidence rule, however, are almost identical. SDCL 19-12-3 stated as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

SDCL 19-19-403 states:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

¹⁹⁵ *State v. Luna*, 378 N.W.2d 229, 232 (“Even though Leonard showed up at a store at 2:30 a.m. with blood on his hand there was no evidence to show that the perpetrator injured himself in any fashion and it was obvious from the sink and towel at the scene that the perpetrator cleaned his hands before leaving.”)

¹⁹⁶ Exhibit 2, DCI Forensic Laboratory report dated January 22, 2020 (filed 10-31-22); Transcript of Motion Hearing held October 27, 2022 (filed 11-15-22), pp. 33-47 (DNA on towels is of female origin); As for the DNA from the blood sample from the sink, the major contributor was determined to be of female origin and the minor component of DNA profile was not suitable for comparisons. *Id.*; Order Authorizing Filing of Copies of Materials in Habeas File to Criminal File.

[a]s to Doug Thomas, there is no evidence of involvement of Doug Thomas with the murder. There is evidence of threats made to Doug Thomas quite some time ago. The Court does not find . . . Rhonda Lawrence's statement inconsistent with Doug Thomas. She said he left early in the morning, the crime was—appears to have been committed, based upon the pathology testimony, between approximately midnight and 4:00 or so.¹⁹⁷ That would not be consistent that he would be sleeping with or being with Rhonda Lawrence and then leaving in the morning hours, which I can only interpret to be **sometime after 4:00** since he had chores to do relating to picking up parts of a bed, I believe. Also that Miss Lawrence's statement—there is no reason to believe she would lie to perjure herself on behalf of Mr. Thomas. She's being married to a third individual, although she has still expressed an affection for Mr. Thomas.

Transcript of Jury Trial, Volume VIII, Day 8 (filed 10-1-84), pp. 1508-09 (emphasis added). And the supreme court noted that “[a]s to the circumstances of [Doug] Thomas, we agree with the trial court’s determination that he had an alibi.” *State v. Luna*, 378 N.W.2d 229, 234. The time of death was sometime between 12:30 a.m. and 6:30 a.m. (approximately).¹⁹⁸ Hence, if Doug had been with Rhonda until “sometime after 4:00,” in the morning, that does not establish an alibi covering the entire time period at issue. Moreover, the record contradicts any conclusion that Doug was with Rhonda until “sometime after 4:00” in the morning. In his 1983 Statement, Doug stated that he left Rhonda’s apartment “about 11:30, to twelve,”¹⁹⁹ and in his 1984 Deposition, he indicated that he left Rhonda’s place between 1:30 and 2:00 in the morning.²⁰⁰ Additionally, Rhonda’s roommate, Tamela, testified that Doug was not at Rhonda’s apartment on the night of the murders—rather, she (as well as her child and Rhonda’s child), Bernie, and Dennis were with

¹⁹⁷ The record shows that the time of death was, approximately, sometime between 12:30 a.m. and 6:30 a.m. on May 1, 1983. Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), pp. 1253, 1257 (Pathologist Robert Bloemendaal arrived at the crime scene at approximately 10:30 a.m.); Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), p. 1343 (Pathologist Bloemendaal estimates the time of death to be between 4 and 10 hours prior to his arrival at the crime scene).

¹⁹⁸ The record shows that the time of death was, approximately, sometime between 12:30 a.m. and 6:30 a.m. on May 1, 1983. Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), pp. 1253, 1257 (Pathologist Robert Bloemendaal arrived at the crime scene at approximately 10:30 a.m.); Transcript of Jury Trial Volume VII, Day 7 (filed 10-1-84), p. 1343 (Pathologist Bloemendaal estimates the time of death to be between 4 and 10 hours prior to his arrival at the crime scene).

¹⁹⁹ Statement from Douglas Olin Thomas on 5-1-83 (filed 8-12-91, nunc pro tunc 5-8-84), p. 8 (time Doug left Rhonda’s apartment).

²⁰⁰ Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), p. 25 (Doug woke Rhonda up between 1:30 and 2:00 to say he was going to leave).

Rhonda that night instead. And even the prosecution acknowledged Rhonda told them that Bernie and Dennis were the men at her place that night.²⁰¹

It is also worth noting that since the time of Luna's trial, the South Dakota Supreme Court has provided guidance in regard to the admission of third-party perpetrator evidence under the rules of evidence. When deciding whether evidence of a third-party perpetrator is admissible, a trial court must decide whether the evidence is relevant—and, if it is relevant but its admissibility is challenged, whether the probative value of the evidence is substantially outweighed by unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence (i.e. the considerations listed in SDCL 19-19-403):

The State argues that the circuit court misinterpreted this Court's third-party perpetrator cases when it analyzed the admissibility of Hernandez's third-party perpetrator evidence because the court did not perform what the State deems to be the necessary three-part analysis. The State asserts that in addition to examining the relevance of the proffered evidence and conducting a balancing test under SDCL 19-19-403 (Rule 403), the court was required to determine whether there is a connection between the alleged third-party perpetrator and the crime at issue by considering the third party's proximity to the crime and opportunity and motive to commit the crime. Hernandez responds that the circuit court applied the proper legal standard by examining whether the evidence is relevant and whether the evidence survives the Rule 403 balancing test. Hernandez maintains that there is no heightened standard beyond this that must be met in order to admit third-party perpetrator evidence.

When considering the admissibility of Hernandez's proffered third-party perpetrator evidence and the State's opposition thereto, the circuit court relied primarily on *State v. Larson*, in which this Court emphasized that “[t]he general rule requires the court to balance the importance of the evidence against the state's interest in exclusion.” 512 N.W.2d 732, 739 (S.D. 1994). In *Larson*, the Court concluded that this standard, and not one stricter, was appropriate. The *Larson* Court explained:

The state asserts that, to be admissible under *State v. Braddock*, 452 N.W.2d 785 (S.D. 1990), the evidence must establish that the third person: (1) was in the proximity of the crime scene; (2) had a motive to commit the crime; and (3) had the opportunity to commit the crime. This Court

²⁰¹ Deposition of Tamela Lec Lester dated 4-11-84 (filed 4-18-84), p. 22 (prosecutor notes prior discussion with Rhonda and informs Tammy of Bernie's last name).

does not read *Braddock* to require this heightened foundation. *Braddock* simply reinforced [*State v. Luna*, 378 N.W.2d 229 (S.D. 1985)]’s probative versus prejudicial balancing requirement and simply noted that “evidence that a third person in the proximity of a crime had the motive and opportunity to commit the crime is [of course] admissible.”

Id. (second alteration in original). Although this Court in *Davi v. Class*, 2000 S.D. 30, ¶ 36, 609 N.W.2d 107, 115, seemed to require a consideration of these three factors, we later clarified our third-party perpetrator law in *Packed*, stating:

[W]e must emphasize that there is no special rule in South Dakota dealing solely with third-party perpetrator evidence. Relevant evidence is admissible; irrelevant evidence is inadmissible, subject to the considerations of SDCL [19-19-403]. SDCL [19-19-402]. Labelling an offer “third-party perpetrator” evidence will not automatically exclude it. When third-party perpetrator evidence is challenged as unfairly prejudicial, confusing, or misleading, trial courts are required to apply, on the record, the probative versus prejudicial balancing test of SDCL [19-19-403] in deciding to admit or exclude such evidence.

2007 S.D. 75, ¶ 22, 736 N.W.2d at 858–59.

We now reiterate that the proper test for admissibility of third-party perpetrator evidence is: (1) whether the evidence is relevant under SDCL 19-19-401, and (2) whether the probative value of the evidence is substantially outweighed by the risk of unfair prejudice or the other considerations listed in SDCL 19-19-403. Within the relevance analysis, a circuit court may consider the alleged third-party perpetrator's opportunity to commit the crime, proximity to the crime, motive to commit the crime or lack thereof, or any other pertinent factors. And in conducting the Rule 403 balancing analysis, courts should take into consideration judicial efficiency concerns, cumulative evidence issues, and the avoidance of minitrials before the jury. However, as noted in *Larson*, there is no additional multi-factored test that must be met for admissibility of third-party perpetrator evidence. 512 N.W.2d at 739.

State v. Hernandez, 2023 S.D. 17, ¶¶ 25-27, 989 N.W.2d 525, 533–34. Additionally, our state supreme court has explained that, while there are circumstances under which exclusion is permitted, the admission of relevant evidence is favored:

A “court may exclude relevant evidence if its probative value is substantially outweighed” by the danger of “unfair prejudice[.]” SDCL 19-19-403 (Rule 403). “The law favors admitting relevant evidence no matter how slight its probative value.” *State v. Bunker*, 2001 S.D. 116, ¶ 11, 633 N.W.2d 606, 609. The “admission of ... evidence is favored under [Rule 403], and the judicial power to exclude such

evidence should be used sparingly.” *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 30, 764 N.W.2d 474, 484.

State v. Kihega, 2017 S.D. 58, ¶ 22, 902 N.W.2d 517, 524. Similarly, the supreme court has stated that

[i]n *State v. Wright*, 1999 SD 50, ¶ 15, 593 N.W.2d 792, 799, we wrote that SDCL 19–12–3 (Rule 403):

‘favors the admission of evidence in the absence of strong considerations to the contrary.’ Larson, § 403.1 (1998 Supp). As juries should hear all relevant evidence, judges must sparingly invoke discretion to exclude evidence under this rule. See *United States v. Betancourt*, 734 F.2d 750, 757 (11th Cir.1984) (Rule 403 is an ‘extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly probative evidence’ and ‘in criminal trials relevant evidence is inherently prejudicial’), *reh’g denied*, 740 F.2d 979 (11th Cir.1984), *and cert. denied sub nom.*, *Gerwitz v. United States*, 469 U.S. 1021, 105 S.Ct. 440, 83 L.Ed.2d 365 (1984); *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir.1983) (trial judge must take special care to use Rule 403 sparingly); *United States v. Thevis*, 665 F.2d 616, 633–34 (5th Cir.1982) (Rule 403 is ‘extraordinary remedy’), *reh’g denied*, 671 F.2d 1379 (5th Cir.1982), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982).

....

The law favors admitting relevant evidence no matter how slight its probative value. South Dakota's Professor Larson explains: “It is sufficient that the evidence has a tendency to make a consequential fact *even the least bit* more probable or less probable that it would be without the evidence.” Larson, § 401.1, p. 109 (emphasis added). Weighing evidence is primarily a jury function. *State v. Holzer*, 2000 SD 75, ¶ 26, 611 N.W.2d 647, 655. Only when prejudice must be balanced against probative value will a court weigh the evidence. Even then, the law favors admissibility. See *Wright*, 1999 SD 50 at ¶ 14, 593 N.W.2d at 799 (“Once the evidence is found relevant ... the balance tips emphatically in favor of admission unless the dangers set out in Rule 403 ‘substantially’ outweigh probative value.”).

State v. Bunger, 2001 S.D. 116, ¶¶ 8, 11, 633 N.W.2d 606, 608–09.

On account of guidance from the South Dakota Supreme Court, which was unavailable at the time of the 1984 trial, regarding how third-party perpetrator evidence is to be analyzed under state rules of evidence—including the high court’s clarification that the law favors the admission of relevant evidence—and the new testing results in this case, it appears likely that a trial court would now admit Luna’s third-party perpetrator evidence if a new trial were to take place.

3. Compelling evidence

As noted above, once the DNA test results have been considered *with all other evidence in the case*, there must be compelling evidence that a new trial would result in acquittal of the felony offenses. SDCL 23-5B-15.

The analysis of the Court will start with a conclusion. None of the DNA testing results place George Luna at the crime scene. It is the complete lack of DNA evidence in this case that would surely give a jury pause under a full analysis of the circumstantial case the State had put together at the original trial. DNA, or lack thereof, especially a complete lack, compounded by the fact there was not one drop of the victims blood in any way associated with or on George Luna, would be compelling evidence in a modern (meaning with the assistance of DNA evidence used by the *Defendant* in this case) jury trial that would result in an acquittal. There is no DNA analysis of blood evidence linked to the Defendant *because there was no blood found on the Defendant, his clothes, his boots, or in his truck.* There is in fact a complete lack of any biological materials linked to George Luna at the crime scene - *now proven by DNA analysis.* The Court concludes the standard under SDCL 23-5B-15 has clearly been met.

3a. “ All the the other evidence in the case....”

The record shows that Lynn felt threatened and reported instances of physical abuse by George. George himself admitted to physical aggression (a slap to the face) toward Lynn and testimony was presented that he made threatening remarks in regard to both Lynn and Helen. The record also indicates that George wanted to take Baby Luna into his physical custody—yet the infant was left behind, without an able caregiver, after the murders. George was the only person who knew of his whereabouts between 2:00 a.m. when he left a Rapid City bar until 3:30 a.m., on the evening of the crimes, when he checked into a hotel in Sturgis. The crimes involved a copious amount of blood splatter, yet no blood from the crime scene was found on Luna, his clothing—including his boots—or anything else associated with him, including his truck. The glass analysts in the case disagreed on whether the microscopic glass particles on Luna’s clothing (shirt and jeans) could have come from the crime scene—and the prosecution’s analyst, who thought the glass particles could have come from the crime scene, was unable to determine that the particles did in fact come from the crime scene. Helen’s gloves (the van gloves), which George used to wear when he lived at Helen’s house (and which George thought he left behind when moving out), were found in his van. While the glass examiner for the prosecution testified that he found microscopic glass particles on the van gloves that could have (but did not necessarily) come from the crime scene, the glass examiner for the defense not only found no such glass particles associated with the van gloves—he found no glass particles *whatsoever* in the evidence containers associated with the van gloves (and T-shirt). Glass was present on both sides of the door to the crime scene. One of George’s boots had glass fragments imbedded in the sole, but the glass was not from the crime scene. In summary, none of the 2020 or 2025 serology or DNA testing results placed George at the crime scene. These new test results completely exonerate George if, as assumed by the trial and supreme courts, the perpetrator’s hands were cleaned at the sink and with a towel since the blood at issue is now known to be of female origin and there is no DNA on the towel to link George Luna to the bloody towel left at the scene. And if the courts were instead mistaken and the perpetrator’s hands were *not* cleaned prior to leaving the crime scene, then the exclusion of third-party perpetrator evidence related to Joe Leonard on account of him *having* bloody hands was in error. An examination of the record reveals that the trial and supreme courts mistakenly believed that Doug had an alibi spanning the six-hour period within which the crimes occurred. Taking into account the mistaken assumptions relied on by the

courts, the rules of evidence, and the current state of case law related to third-party perpetrator evidence, it seems likely that a trial court would now admit Luna's excluded evidence if a new trial were to take place. Even without a re-consideration of the third-party perpetrator evidence, the DNA evidence, or complete lack thereof tying the Defendant to the scene weighs strongly against the State when considered with all the other evidence in the case.

George's third-party perpetrator evidence consists of evidence that two individuals, Doug Thomas and Joe Leonard—either together or separately—may have been responsible for the crimes. In regard to Doug Thomas, George sought to present evidence that Doug displayed previous threatening behavior toward Helen, was estranged from both victims, lacked an alibi for the entire time period in question, was observed near the crime scene prior to the arrival of law enforcement, arrived at the crime scene after the bodies were discovered and accurately guessed what had happened, recounted a series of events regarding his activities on the morning the bodies were discovered that conflicted with information provided by other witnesses, and incurred financial gain from Helen's estate.²⁰² In regard to Joe Leonard, George sought to present evidence that Joe had an extensive criminal history,²⁰³ removed at least one if not two pipes Mark Valdez had used as door latches on his garage (either of which the State's pathologist believed could have caused the victims' injuries), appeared with blood on his hands and shirt cuff ("spotted up to the cuff")²⁰⁴ at a convenience store located ½ block from the crime scene at 2:30 a.m. on the evening of the murders, threatened the store's security guard, left one of the aforementioned pipes under Mark's davenport, and later admitted to Mark he killed both women.

Upon consideration of the DNA test results with all other evidence in the case, the Court does not find *unassailable* evidence that a new trial would result in acquittal of the felony offenses in this case, but it does find *compelling* evidence of the same—and that is the test. SDCL 23-5B-15.

As perhaps an afterthought, worth noting by this Court, while intrinsic juror testimony may not be made to impeach a verdict, there is a lack of guidance as to how such testimony can be considered, if at all, for the purposes of determining whether the test under SDCL 23-5B-16 has been met. Accordingly, the Court only mentions, but does not rely upon, the following intrinsic statement submitted after the trial by a juror:

²⁰² While the record establishes that Doug benefitted or stood to benefit from Helen's estate, the record does not clarify how Lynn's estate was distributed. Deposition of Douglas Owen [Olin] Thomas dated 5-4-84 (filed 6-14-84), pp. 11-12 (discussion of Doug's beneficiary status related to Helen's estate); Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 7 (Last Will and Testament of Helen M. Thomas (attachment to Petition to Admit Will to Probate) (Doug designated as beneficiary in Helen's will).

²⁰³ As noted previously, Joe's criminal history included charges of sex perversion, kidnapping, resisting arrest, glue sniffing, possession of marijuana, violation of probation, sodomy, inhalation of fumes, burglary, possession of marijuana, carrying a firearm without a license, possession of prohibited weapon, defrauding an innkeeper, wandering upon the streets, inhalation of poison fumes, drunk driving, entry without consent, possession of dangerous drugs, attempted burglary, resisting arrest, fleeing from an officer, disorderly conduct, loitering, battery, and possession of narcotic controlled substance(s). Additional Evidence Third Party Perpetrator (filed 6-12-23, nunc pro tunc 5-23-84), Exhibit 9 (FBI record).

²⁰⁴ Additional Evidence Third Party Perpetrator p. 5 (filed 6-12-23, nunc pro tunc 5-23-84) (describing blood spotting on Joe Leonard).

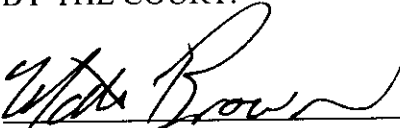
When I became the lone holdout [against voting guilty] I was tired and confused after 20 hours of deliberation. The other jurors pressured me by saying "If he didn't do it, who did?" . . . If I had stopped to reconsider the whole picture I would never have voted for conviction since the evidence was so unsatisfactory, contradictory and conjectural. My better judgment was overcome by reference to newspaper articles and jury pressure tactics. . . . I understand now there was evidence of a third party perpetrator which we were not allowed to hear. The evidence consisted mostly of hearsay and speculation and there never was firm hard evidence of Defendant's guilt. It is my opinion that if there was even a remote possibility in evidence of someone else being responsible there never would have been a conviction of George G. Luna.

Affidavit (filed 8/12/91, nunc pro tunc 9-26-84).

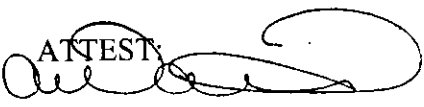
The Motion for a New Trial is **GRANTED**.

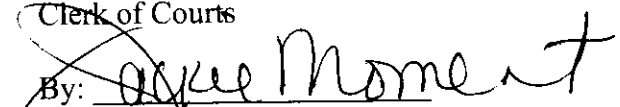
Dated this 31st day of October, 2025.

BY THE COURT:

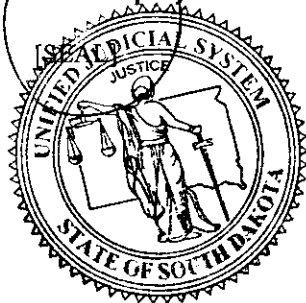

Matthew M. Brown
Circuit Court Judge

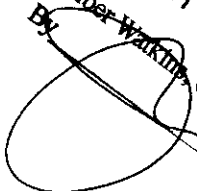
ATTEST:


Clerk of Courts

By: 

Deputy



FILED
Pennington County, SD
IN CIRCUIT COURT
OCT 31 2025
By:  Amber Watkins, Clerk of Courts
Deputy