

**Report of the Minnesota Conviction Review Unit Regarding the
1998 Conviction of Thomas Rhodes, Kandiyohi County
Cause No. 34-K6-97-001529**

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MINNESOTA
JUDICIAL
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Minnesota Attorney General's Office
Conviction Review Unit

Introduction

The Minnesota Attorney General's Office established a statewide Conviction Review Unit (CRU) in 2021 to conduct extrajudicial reviews of criminal convictions in cases with plausible allegations of actual innocence or manifest injustice. That same year, the Minnesota CRU began an investigation into Thomas Rhodes's 1998 conviction for first- and second-degree murder, a conviction for which he is serving a life sentence.

After a thorough, independent investigation, the CRU recommends his sentence be vacated because the State's two key expert witnesses provided inaccurate and scientifically unsupported testimony at trial, the State failed to disclose discoverable evidence, and the non-expert evidence would not support a conviction beyond a reasonable doubt for first-or second-degree murder. On the other hand, the CRU did find evidence supporting a conviction for the lesser-included offense of second-degree manslaughter. Thomas Rhodes has spent 23 years in prison, making him eligible for parole in seven years. He has served more than twice the maximum sentence for second-degree manslaughter.

Justice and transparency are the end goals of this process. The CRU's findings are thorough and lengthy. The CRU's investigation involved a substantial amount of time and resources. And because it is important to understand the underlying facts of the conviction and history of the case to see how a constellation of errors may have affected Thomas Rhodes's trial and how the CRU's investigation now casts doubt on his conviction, the relevant details are included below.

I.

Executive Summary

Tom and Jane Rhodes, their two sons, and their Alaskan Husky vacationed at Green Lake in the summer of 1996. On August 2nd, the last evening of their week-long stay, around 11:30 pm, Tom and Jane took one last boat ride under a full moon after their boys retired to the hotel room. Less than two hours later, Tom returned to the Northern Inn, where they were staying, visibly shaken, unable to speak in complete sentences, and soaked from head to toe. Tom managed to

convey enough information that the desk clerk called 911 to report that Jane had fallen out of the boat and Tom had been unable to find her.

A rescue operation began, and Tom assisted first responders. Together, they headed back onto the lake to look for Jane. Rescue operations continued for a couple of hours and began anew the next morning. Two fishermen found Jane's body about 13 hours later, floating near the shore, almost a mile north of where Tom had led rescuers the night before.

The medical examiner found unexplained trauma to Jane's face and head, triggering a homicide investigation. The injuries raised obvious suspicions: How did Jane fall from the boat? Why was Tom unable to find her? What could account for her injuries? And how did her body end up so far away from where Tom said she went overboard?

Ramsey County Medical Examiner, Dr. Michael McGee, performed the autopsy. He noted injuries to Jane's head, face, lips, neck, and bruises on her arms and legs. Dr. McGee found these injuries suspicious, yet he waited several months, for further investigation, before he was able to classify the death as a homicide. But as the investigation by the Attorney General's Office Conviction Review Unit discovered, the defense never knew that Dr. McGee could not determine the manner of death until he had received ample non-medical evidence of Tom's motive and demeanor.

Sixteen months after Jane's death, the grand jury indicted Tom Rhodes for first- and second-degree murder. Under an agreement with the Kandiyohi County Attorney, the Minnesota Attorney General's Office led the investigation and prosecution. The trial began seven months later in the Kandiyohi County District Court.

The prosecution and defense had competing theories of what happened to Jane. The defense argued that Jane accidentally fell from the boat while it was traveling at high speed, Tom turned back to find her, but the boat must have accidentally struck her on Tom's return. The State argued that the defense theory was impossible. Jane's injuries could not have resulted from an accidental fall from the boat and one blow as Tom returned.

The State relied on Dr. McGee, who, by the time of trial, was able to present compelling evidence of premeditated and intentional acts that led to Jane's death by drowning. Dr. McGee testified he found defensive wounds on Jane's arms. He found hemorrhages in Jane's neck that were caused by a grasping blow to her neck from a hand in the "V" position—a blow that would

have thrown Jane from the boat. He testified that the injuries to Jane's face and head were consistent with multiple strikes from a boat and could not have been caused by a single blow.

Tom's defense counsel did not directly challenge Dr. McGee's testimony even though most of it was objectionable as speculative, without foundation, or the result of leading questions. Instead, the defense presented its own medical expert who found Jane's injuries consistent with an accidental fall from the boat, an accidental strike from the boat as it circled back to find Jane, and consistent with injuries common in drowning victims who are found scraping the bottom of the lake and are susceptible to aquatic animals feeding on the drowning victim's flesh.

Unlike the defense, the prosecutor, vigorously challenged the defense expert, Dr. Lindsay Thomas, who was younger and less experienced than Dr. McGee, did not conduct the autopsy or view the microscopic slides, and, as the prosecutor argued, was a "nice person," but "was talking a lot of nonsense."

The prosecutor relied on Dr. McGee to prove premeditation but also argued that Tom lied to law enforcement about where Jane's body fell into the lake to thwart rescue efforts. According to the prosecutor, Tom delayed rescue efforts while feigning concern for his wife and faked his sense of urgency to find her. Tom's motive to kill, the prosecutor argued, was that he wanted a divorce, he was in debt, and Jane had recently accumulated several life insurance policies.

Not surprisingly, the jury convicted Tom of first-degree premeditated and second-degree murder. He was sentenced to life in prison.

Throughout every law enforcement interview and every court appearance—including trial and several attempts at post-conviction relief—Tom Rhodes maintained his innocence. After conviction, Tom filed four post-conviction petitions in the Minnesota courts and twice availed himself of federal habeas review. He raised claims of ineffective assistance of counsel and newly discovered evidence. Most of his claims centered on the medical evidence, which Tom Rhodes continues to argue is unfounded and inadequate to support a conviction. His claims have been denied by every court that has entertained them.

In 2014, lawyers from the Great North Innocence Project represented Tom in his fourth state post-conviction petition and his second attempt at federal habeas relief. In support, they

presented what they described as “newly discovered evidence”¹ from seven forensic pathologists who were not involved in the original proceedings, some of whom are nationally recognized experts in drowning deaths. None of these experts agreed with Dr. McGee’s opinions. These experts all agreed that the medical evidence did not support a finding that Jane’s death was the result of homicide.

The 2014 post-conviction petition also presented evidence that the State’s non-medical expert, Capt. William Chandler, gave inaccurate evidence about the lake’s temperature, an important fact that was the basis for the State’s claim that Tom lied about where Jane went overboard.

Despite evidence that both State experts had provided unfounded or inaccurate testimony at trial, the district court denied Tom Rhodes’s 2014 petition for post-conviction relief without an evidentiary hearing. The Minnesota Supreme Court affirmed the district court’s denial of the petition. The Court applied a heightened level of review to Tom’s newly discovered evidence claims because he brought them under the actual innocence exception to the two-year post-conviction time bar. The Court found that his claims did not warrant relief because, even if accepted as true, the evidence did “not prove by clear and convincing evidence that [Rhodes] is innocent. Rather, the literature and expert opinions simply support the general proposition that the victim’s injuries ‘*may* have been caused by . . . the natural drowning process.’”² The innocence exception to the State’s post-conviction time bars, the Court pointed out, “requires ‘more than uncertainty’ about Rhodes’s guilt.”³

The Court’s majority opinion drew a vigorous dissent. The dissenters disagreed with the majority’s piecemeal approach to assessing the new evidence, arguing that the Court should instead consider the new evidence as a whole, assessing how it “may push and pull on the remainder of the evidence at trial” or from earlier post-conviction proceedings.⁴ The dissenters favored a hearing on the new medical evidence because the non-medical expert evidence was

¹ Minn. Stat. §590.01 subd. 4(b)(2) (post-conviction two-year time bar is not applicable where “the petitioner alleges the existence of newly discovered evidence, including scientific evidence, that could not have been ascertained by the exercise of due diligence by the petitioner or petitioner’s attorney within the two-year time period for filing a postconviction petition, and the evidence is not cumulative to evidence presented at trial, is not for impeachment purposes, and establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted”).

² *Rhodes v. State*, 875 N.W.2d 779, 784 (2016).

³ *Id.* at 785.

⁴ *Id.* at 797-78.

incorrect, the evidence of motive was weak, the witnesses' testimony was inconsistent, and inconsistencies in Rhodes's statements were relatively minor.⁵

In June 2021, the Great North Innocence Project submitted Tom Rhodes's application to the CRU for review.

An extensive, independent investigation by the Conviction Review Unit (CRU) uncovered evidence that casts substantial doubt upon the expert medical testimony presented at trial. The CRU found evidence that Dr. Michael McGee provided medically unsupported testimony. In fact, the CRU could find no evidence to support Dr. McGee's opinions. Significantly, Dr. McGee would not agree to an interview to explain his findings. In stark contrast, the CRU found the defense experts compelling and cooperative. Each expert that the CRU asked to interview agreed and provided thoughtful explanations of their findings. The CRU also consulted an independent medical examiner who thoroughly reviewed the medical evidence and found Dr. McGee's opinions unsupported.

Most troubling, Tom Rhodes's case is strikingly similar to other cases where Dr. McGee's opinions led to wrongful convictions. Most recently, a federal district court in North Dakota issued a strongly worded opinion criticizing Dr. McGee's "false and inaccurate testimony" and calling it "so unmoored from a scientific basis that it should not have been received at all."⁶ In at least two other cases, state courts vacated convictions because of Dr. McGee's unreliable and false testimony. In each case, Dr. McGee followed the same unscientific pattern of reasoning backward from the circumstantial evidence to make a finding and then cloaking the finding in medical expertise. For example, in the North Dakota case, Dr. McGee opined that semen was present when the victim was thought to have been sexually assaulted even though the BCA's testing showed no evidence of semen.⁷ In a Wisconsin case, Dr. McGee found that the victim was strangled with telephone cord from the defendant's van when fibers from materials that could not have come from the cord were found in the victim's wound at autopsy.⁸ And in a Douglas County case, Dr. McGee concluded that a skull fracture was the immediate cause of an infant's death even though the fracture was healing, and the brain showed no signs of injury.⁹

⁵ *Id.* at 797-98.

⁶ *United States v. Rodriguez*, 2:04-CR-55 (N.D. Sept. 3, 2021).

⁷ *Id.*

⁸ *Wisconsin v. Zimmerman*, 669 N.W.2d 762 (Wis. Ct. App. 2003).

⁹ *Minnesota v. Hansen*, 21-KX-04-001222 (July 13, 2011).

In the Rhodes trial, Dr. McGee's opinions were given great deference, by the prosecution and the defense. His opinions were not scrutinized by the courts that reviewed the case post-conviction, nor by the prosecutors who litigated that case for twenty years but never consulted an independent expert to assess Dr. McGee's opinions. However, following the federal court's findings in *United States v. Rodriguez*, Dr. McGee's opinions warranted new and objective scrutiny. To that end, the CRU conducted its review.

Focusing on Dr. McGee's opinions led the CRU to an inevitable conclusion. Dr. McGee's opinions were not limited to the medical evidence that medical examiners routinely use when determining cause and manner of death. In the Rhodes case, Dr. McGee reasoned backward—from the non-medical evidence to the medical findings. Three documents show this process: 1) a memo of a meeting that occurred five months after the autopsy between Dr. McGee and the County Attorney; 2) an affidavit Dr. McGee prepared, with the input of the prosecutor, in response to Rhodes's fourth post-conviction petition; and 3) handwritten notes from the medical examiner's file that lists the underlying facts that led to Dr. McGee's specific findings.

These documents show that Dr. McGee could not rule out, by the medical evidence alone, the defense's theory that Jane's facial injuries were caused by an accidental fall and a single blow from the boat. Instead, he relied on evidence of a troubled marriage, a visit to a divorce attorney, recent insurance policies, Tom's inconsistent statements, and the location where the body was found.

When the CRU uncovered the process by which Dr. McGee came to his conclusions—evidence the defense did not have—the CRU saw the need to closely scrutinize both Dr. McGee's opinions *and* the non-medical evidence upon which his opinions relied.

The non-medical evidence that shaped Dr. McGee's opinions had serious flaws. The State's water-rescue expert, Capt. Chandler, opined that Jane's body could not have fallen into the lake where Rhodes reported and ended up where she was found 13 hours later. He based his opinion on lake depths and water temperatures. But his measurements turned out to be wrong. Like Dr. McGee's findings, Chandler's were based on speculation, not science, but the jury never heard that.

The State used witnesses from shore to corroborate Chandler's opinion that Jane did not fall into the water where Tom said. One group of shore witnesses testified that they saw a boat driving erratically and a woman on the boat screaming. The boat they saw was one-half mile north

of where Tom led rescuers. Another group of shore witnesses spotted a man and woman drifting on a boat in the same general area. Later, they saw only a man on the boat, circling, like he was looking for something. Based on testimony from these witnesses, the State argued that Tom lied to rescuers about where Jane drowned. However, the witnesses' statements contain unreconcilable conflicts.

As for lay witnesses, the State relied mostly on Mark Schroeder to prove the case of premeditated murder. Schroeder, a bouncer at the bar across the street from the hotel where the Rhodes family was staying, described a man thought to be Tom, displaying a cold and calculating demeanor when he returned to shore without Jane. Schroeder testified that he saw a man methodically pull his boat into the dock when he returned to shore alone, maneuvering it to face out toward the lake rather than straight into shore, as Tom had described. Schroeder testified the man stood in the water, leaning over the boat, like he was rummaging through the boat's compartments. Schroeder said he saw the man casually walk right past the crowded bar, not visibly shaken and not in a hurry. Based on Schroeder's testimony, the State argued that Tom purposefully delayed rescue efforts and faked concern for his wife. However, the CRU found Schroeder's account completely lacking in credibility. His account was contradicted by the first responders on the scene, a fact that was not presented to the jury at trial because the defense failed to investigate and failed to subpoena appropriate witnesses.

At trial, Schroeder's testimony, combined with Dr. McGee's testimony, painted a vivid picture of a premeditated act—a blow to Jane's neck with an open hand that knocked Jane from the boat, followed by at least two deliberate acts of driving the boat over Jane. Tom's acts were premeditated, the State argued, because you cannot run over a person twice accidentally. These cold, calculated acts matched Rhodes's demeanor when he returned to shore, at least, according to Mark Schroeder. Schroeder's testimony allowed the State to argue that Tom was calm and collected before he knew anyone else was watching him. Everything after that, the State argued, was an act.

Although the State's argument was highly persuasive, the CRU investigation found the supporting evidence lacking in reliability. Given that the jury was unaware that this highly persuasive evidence was also significantly flawed, the outcome in this case lacks integrity. Had the jury heard that the medical evidence could not rule out an accidental death, and that a single

blow from the boat was more likely the cause of Jane's injuries, there is a reasonable probability that the jury would have reached a different verdict on first- and second-degree homicide.

Although the CRU's investigation raises a reasonable doubt that Tom Rhodes committed first- and second-degree homicide, the CRU could not form a conclusion about whether Tom Rhodes is factually innocent of either crime. Like perhaps all cases built on entirely circumstantial evidence, there is no evidence that certainly or unequivocally demonstrates that Tom Rhodes did not commit the first- or second-degree murder.¹⁰ How does Tom prove he did not intend to kill his wife? He was the only witness to what happened. There is no scientific test, like DNA, the CRU can conduct. There is no video that captured Tom and Jane's boat outing. Tom cannot point to an alternative perpetrator, nor a solid alibi witness; he was there!

Nevertheless, Tom Rhodes is entitled to relief from his conviction for first- and second-degree murder because the prosecution unknowingly presented inaccurate and misleading evidence and failed to disclose material evidence that could have affected the judgment of the jury. The prosecution relied on Dr. McGee's testimony to present a persuasive argument that Tom intentionally knocked Jane from the boat with a blow to her neck and ran over her twice, causing her death. In fact, at trial the prosecutor argued that Dr. McGee's findings ruled out the possibility that Jane's death resulted from an accident. However, the prosecutor's file contains evidence that Dr. McGee could not rule out the defense theory that a single blow to Jane's head, from a flat hull, caused her drowning. At trial, Dr. McGee's testimony went unchallenged by the defense because the defense was unaware that Dr. McGee had originally concluded, like the defense's expert had, that the injuries to Jane's head were consistent with a single blow from boat. Had the defense had access to the undisclosed notes from the prosecutor's meeting with Dr. McGee, Rhodes's lawyers could have used them to effectively cross-examine Dr. McGee because, based on the medical evidence, Dr. McGee could not disprove the defense's theory that Jane died from a single, accidental strike from the boat. In other words, the failure to disclose the memo could have affected the judgment of the jury.¹¹ In addition to the prosecutor's failure to disclose material evidence, the

¹⁰ See *Rhodes v. State*, 875 N.W.2d at 792 (Anderson, J., dissenting) (arguing that the majority assessed Rhodes's post-conviction evidence under an inappropriately stringent application of the innocence prong of the newly discovered evidence exception and stating that "it would be impossible to meet such a standard in a circumstantial case").

¹¹ See *State v. Hunt*, 615 N.W.2d 294, 299-300 (Minn. 2000) (holding that failure to disclose discoverable evidence will result in vacation of a conviction when the undisclosed evidence "could have affected the judgement of the jury").

CRU found persuasive medical evidence discrediting the medical examiner's testimony, persuasive impeachment evidence calling into question the State's two most important shore witnesses, and the State's failure to disclose a statement that could have been used to impeach one of the shore witnesses' most incriminating statements. When these errors are assessed in the context of all evidence—including evidence raised in earlier post-conviction motions and evidence uncovered in the CRU's investigation—vacating the murder convictions in this case aligns with the constitutional requirements of due process and with prosecutor's duty to seek justice.

The CRU's investigation did, however, find that Tom Rhodes's actions could have created an unreasonable risk of, and consciously took a chance of, causing death or great bodily harm, evidence that would support a conviction for second-degree manslaughter. Jane was a passenger on a boat that Tom drove, at top speed, late at night, knowing Jane was not a good swimmer and was not wearing a life jacket. Tom continued to drive at top speed knowing there was another boat on the lake that was driving erratically with no lights. When Jane stood up in their small and unstable boat, Tom looked away. When she fell into the lake, he missed the throttle and "gunned" the boat quickly to return to her. With these and other circumstantial facts introduced at trial, the jury would not have to rely on Dr. McGee's testimony, Mark Shroeder's testimony, the water rescue expert's testimony, or the shore witnesses' testimony. These facts were undisputed, and most of them come from Tom Rhodes's own admissions. With these facts, the jury could find, beyond a reasonable doubt, that Tom created an unreasonable risk of causing Jane's death.

II.

The Conviction Review Unit's Investigation

In October 2021, the CRU gave the Rhodes case heightened priority after a federal district court issued an opinion overturning a death sentence in *United States v. Rodriguez*.¹² The *Rodriguez* court called into question the competency and credibility of Dr. Michael McGee, the State's principal witness and medical expert in the Rhodes case. Judge Ralph Erickson, an Eighth Circuit Judge, called Dr. McGee's sworn testimony about material evidence in the *Rodriguez* case "nothing more than rank speculation" with "no scientific support."¹³ The court found Dr. McGee's

¹² *United States v. Rodriguez*, 2:04-CR-55 (N.D. Sept. 3, 2021).

¹³ *Id.* at 10.

opinion “so unmoored from a scientific basis that it should not have been received at all.” The court also described Dr. McGee’s cause of death testimony as “unreliable, misleading, and inaccurate” and questioned “whether McGee knowingly gave a false answer . . . or entirely lacked competence in the area.”¹⁴

The 262-page opinion detailed Dr. McGee’s unsupported testimony. The opinion is unprecedented in its scathing critique of a medical examiner’s testimony and opinions. And it did not limit the critique to the *Rodriguez* case. The court found a pattern, noting “the public and troubling fact that longtime Ramsey County Medical Examiner Michael McGee has a well-documented history of providing false or inaccurate testimony in court.”¹⁵ The court’s opinion provided three examples. In two cases, *Minnesota v. Hansen* and *Wisconsin v. Zimmerman*, the convictions were overturned after defendants mounted post-conviction challenges to Dr. McGee’s testimony.¹⁶ The third example was the *Rhodes* case. The court described a common thread that ran through the three cases: “McGee interpreted the evidence from his autopsy in a manner that was subsequently determined by other physicians and forensic pathologists . . . to be unsupportable.”¹⁷

Upon review, the CRU found the same types of problems the *Rodriguez* and other courts have found with Dr. McGee’s testimony. Dr. McGee’s opinions—both pre- and post-conviction—were speculative, lacked scientific support, were formed through the biasing lens of non-medical evidence, and yet, went mostly unchallenged by Tom Rhodes’s counsel at trial. Like in *Rodriguez*, a chorus of reputable medical experts reviewed Dr. McGee’s findings and testimony. These experts

¹⁴ *Id.* at 22.

¹⁵ *Rodriguez*, at 51.

¹⁶ In *Minnesota v. Hansen*, 21-KX-04-001222 (July 13, 2011), after a post-conviction hearing in which five medical experts testified, all disagreeing with Dr. McGee’s opinion that the infant in Hansen’s care died from a skull fracture, the Douglas County District Court granted Hansen a new trial. The Court found that Dr. McGee gave false testimony at trial. Dr. McGee found the skull fracture, but he did not consider that the skull fracture was days old, and once he found a skull fracture, he “stopped looking for a cause of death, even though he could identify no anatomical injury sufficient to explain [the infant’s] death.” *Id.* at 5. In *Wisconsin v. Zimmerman*, 669 N.W.2d 762 (Wis. Ct. App. 2003), Dr. McGee testified at trial that the victim was strangled with a telephone cord while sitting upright, and the crime did not appear to be sex related. McGee’s opinions matched the State’s theory that Zimmerman, who was too drunk to have sex or engage in a physical altercation, strangled the victim while she sat in his van with phone cord he had in the back of his van. In post-conviction, Zimmerman’s medical expert demonstrated that Dr. McGee was wrong on every point, and in a second trial, Dr. McGee admitted on the stand that the phone cord could not have been the murder weapon.

¹⁷ *Rodriguez*, at 55.

found serious problems with Dr. McGee's findings and disagreed with his conclusion—that Jane Rhodes's death was a homicide.

The CRU found these experts highly qualified to render opinions in this case, and found their opinions well supported. However, the CRU did not simply accept applicants' expert evidence without scrutiny. The CRU conducted an independent review of all evidence in the case. To that end, the CRU took the additional step to retain an independent, highly respected medical examiner from out-of-state to assess the expert opinions in *Rhodes*. The CRU chose Dr. Sally Aiken, former long-time medical examiner in Spokane, Washington, and former President of the National Association of Medical Examiners. In the CRU's discussions with the Dr. Aiken, the CRU was careful to avoid providing information that may bias Dr. Aiken before she conducted her review. For example, the CRU did not mention the *Rodriguez* case or the criticisms of Dr. McGee's testimony in other cases. On the other hand, it was impossible for the CRU to avoid providing information about some of the State's non-medical evidence, such as evidence of Tom's affair and Jane's life insurance, because the testimony and reports of the various experts for the prosecution and defense contained references to the non-medical evidence.

Scope of Review

The CRU did not limit its investigation to Dr. McGee's opinions and the medical evidence in the case. When the CRU investigates a potential wrongful conviction, it takes a fresh look at all relevant evidence. The CRU interviews witnesses, consults with experts, and uses the most up-to-date science and technology to re-evaluate the relevant evidence. This includes forensic science, as well as social science research on issues like memory, confirmation bias, and faulty eyewitness identification.

The CRU reviewed the following:

- Grand Jury Transcripts
- Trial Transcripts
- Post-Conviction Transcripts
- All pleadings, including exhibits and affidavits
- All court opinions
- The entire prosecutor's file

- Various scientific articles on drowning, subgaleal hemorrhage, neck hemorrhage, ear witness reliability, memory, body recovery from water, drowning death investigations, and injuries from boating accidents
- Various textbooks on forensic science, boating accidents, and drowning
- A PowerPoint presentation from the Great North Innocence Project
- Court opinions from other cases and jurisdictions regarding Dr. Michael McGee's opinions and testimony
- Minnesota court opinions, statutes, and rules relating to the issues in the case

The CRU interviewed the following people:

- Dr. Lindsey Thomas, defense expert at trial and post-conviction
- Dr. Carl Wigren, defense expert in post-conviction
- Dr. Victor Weedn, defense expert in post-conviction
- Gene Ralston, expert in search and recovery of drowning victims
- William Klumpp, former Assistant Attorney General who participated in the 2014-2016 post-conviction litigation
- E.R., Tom and Jane Rhodes' eldest son, who testified at trial and post-conviction
- J.R., Tom and Jane Rhodes' youngest son
- Joseph Friedberg, experienced criminal defense lawyer who served as an expert for Rhodes in post-conviction proceedings
- William Chandler, expert on body recovery operations that testified at trial
- Dr. Jeffrey Jentzen, defense expert in post-conviction
- Dr. Sally Aiken, independent expert retained by the CRU
- Prof. Cheryl Wattley, independent criminal law expert consulted by the CRU
- Alton Rime, first responder who was not called to testify at trial or post-conviction

Special Considerations for Review

An investigation that takes place two decades after the relevant events offers both challenges and opportunities. In the past two decades, science has advanced, making us aware of the conditions more closely associated with the reliability of particular forms of evidence.

Research shows that humans are subject to predictable biases in our decision-making, and we are not well-equipped to identify or control those biases when they are affecting us.¹⁸ In this report, the CRU attempts to contextualize the evidence that was available or presented at trial with newer understandings of human perception and decision-making to determine whether the evidence tends to undermine confidence in the conviction.

Circumstantial evidence

To prove guilt beyond a reasonable doubt in an entirely circumstantial case, “the circumstances proved [must be] consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except for that of guilt.” *State v. Jones*, 516 N.W.2d 545, 547–549 (Minn. 1994) (quoting *State v. Pilcher*, 472 N.W. 2d 327, 335 (Minn. 1991)). A conviction based on circumstantial evidence may stand “only where the facts and circumstances disclosed by the circumstantial evidence form a complete chain which, in light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt.” *Id.* (quoting *State v. Wahlberg*, 296 N.W. 2d 408, 411 (Minn. 1980)).

In the Rhodes case, the State had the burden to prove, beyond a reasonable doubt, not only that Tom Rhodes murdered his wife through an intentional, premeditated act, but it also had to disprove any rational hypothesis that Jane’s death resulted from an accident. Therefore, the prosecution set out to prove that Tom Rhodes’s version of events was not only unlikely, but impossible. If Rhodes’s version offered a rational hypothesis of innocence, the jury would have been required to acquit.

Memory science and the retelling of remembered events¹⁹

Research has shown us that memory does not record our experiences like a video camera. Instead, the accuracy of our memories depends on how information is acquired, encoded, and retrieved. At the acquisition stage of memory formation, reliability is based on whether the witness had a good view and was paying attention to the relevant details for the time required to form a

¹⁸ For a general description of cognitive biases and references, see <https://nobaproject.com/modules/judgment-and-decision-making>.

¹⁹ For a good explanation and collection of resources on this topic, see *Eyewitness Testimony and Memory Biases*, at <https://nobaproject.com/modules/eyewitness-testimony-and-memory-biases#content>.

memory. Attention to the relevant details is required, but so is focus. Many witnesses fail to retain a memory of events that happen right in front of them because their attention is focused on something else.

Once acquired, memories are not perfectly retained. Images and sounds encoded into memory are not stored in perfect condition and can be forgotten, revised, and distorted with time. Lastly, retrieving a memory is not like hitting re-play on a recording device. Memories are not simply retrieved; they're reconstructed using current knowledge. Every time a witness revisits a memory, there is opportunity for revision and distortion that takes place outside of the witness's awareness. Witness interviews can also affect the retrieval process and contaminate the memory. As memory researcher Elizabeth Loftus said in a 2013 TEDTalk, "Memory works like a Wikipedia page. You can go in there and change it, but so can other people."

Misinformation, whatever the source, can corrupt memory even more easily when witnesses recall events in a social setting. This problem arises in cases where multiple witnesses discuss an event. Naturally, witnesses tend to talk to each other after witnessing an unusual event. But because each witness has a different perspective, they are likely to see or notice different things. They also remember things differently. When witnesses talk to each other about the event, they may reinforce common memories of the event and they may also contaminate each other's memories of the event.

Eyewitness testimony is a potent form of evidence for convicting the accused, but it is subject to unconscious memory distortions and biases even among the most confident of witnesses. Memory can be remarkably accurate or remarkably inaccurate. Without objective evidence, the two are indistinguishable. Some basic rules of thumb for investigations of events that happened long ago are:

- memories recorded close to the time of the event are the most reliable,
- everyone's memories are subject to distortions when they recall an event and these distortions do not necessarily mean the witness is lying,
- two people can witness the same event and have different memories of it,
- objective evidence that corroborates the memory is the best evidence that it is accurate.

Confirmation bias and criminal investigations

When the CRU investigates, it realizes that confirmation bias has been described as a leading factor in wrongful convictions.²⁰ Confirmation bias occurs when people more readily believe or give heightened importance to information that supports their hypothesis and discount or ignore information that casts doubt on their hypothesis. The CRU acknowledges that biases are inevitable in investigations, and the CRU looks for signs of confirmation bias that may explain the decisions of the witnesses, the investigators, the prosecution, the defense, and the judge. The CRU also recognizes its own review is susceptible to confirmation bias, and it tries to incorporate systems that reduce confirmation bias in the investigative process.

III.

The Facts Surrounding Jane Rhodes's Death

Tom and Jane Rhodes had been married 15 years when Jane died. They had two sons, aged 14 and 9. Their marriage had ups and downs. The year before their Green Lake vacation, Tom Rhodes had ended a relationship with another woman after Jane discovered it. Jane and Tom had considered divorce and visited a divorce attorney once, but they never returned. Instead, Tom stopped seeing the other woman, and they bought a new house at Jane's suggestion. Jane got a new job and a new car to replace her older car. They also traded in their older, larger boat for a newer, smaller boat.

The week before her death, Jane spent time with Tom, their boys, and their Alaskan Husky on Green Lake. Although she was not a good swimmer, Jane enjoyed being with Tom and the boys on the boat because the boys enjoyed the water. According to the owner of the inn where they stayed and others who saw them interact, Tom, Jane, and the boys were getting along well. (GJ. 365.)²¹ During the week at Green Lake, Tom and Jane would go out on the lake to have some alone time after their boys settled in to watch a movie in the late evening. (B. 0247.)

²⁰ Rossmo, D. Kim, Pollock, Joycelyn M., *Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective*, 11 N.E. U.L.R. 797 (2019).

²¹ This Report will identify the record with the following abbreviated citations: Grand Jury Transcript (GJ. [page #]), Trial Transcript (T. [page #]), Post-Conviction Hearing Transcript (PC. [page #]), and Bates stamped discovery the State provided to the Rhodes defense counsel (B. [page #]).

On their last evening together, Jane and Tom left the Northern Inn around 11:30 pm, according to the innkeeper and the Rhodes's oldest son. (GJ. 366.) They went to the lake where they had their small Baja Blaster jet boat stored and went for a ride in the moonlight around 11:40 pm. (B. 0246.) Tom returned to the Northern Inn around 1:00 am, soaking wet, crying, and convulsing. According to the clerk behind the desk, Tom was having trouble speaking, but the clerk called 911 and was able to communicate that Tom's wife had fallen off their boat in Green Lake, and he had been unable to find her. (B. 0257-60.)

Deputy Kveene arrived at the Northern Inn about five minutes after the 911 call. Dep. Kveene said in his report that Tom ran through the door of the Northern Inn toward him as soon as Kveene arrived. Tom was wearing a gray sweatshirt and light-colored shorts. His eyes were bloodshot. Kveene and Tom quickly went to the Rhodes' boat. They discovered that Tom left the boat key at the Northern Inn. Tom wanted to run back to the Inn to fetch the key, but Kveene called Dep. Strom, who retrieved the key from the Inn. (B. 0005.)

When they received the boat key, they were joined by first responder Tony Rime. The three of them got into the boat, which Rime later described as sitting on sand and facing in toward the shore. (B. 0420-21.) Dep. Kveene drove the boat into the lake, and Tom directed Kveene to head in a northwesterly direction. Although Tom had first told Dep. Kveene he thought he and Jane were about 1000 yards from the shore, Kveene stopped when Tom "felt like we were in the right area." (B. 0005.) As they were searching, Tom expressed uncertainty about where Jane fell into the lake. When Kveene aligned the boat straight east of the water tower in Spicer, Tom said he could not remember for sure if they had been north of the water tower. (B. 0006.)

Dep. Kveene, Tony Rime, and Tom searched for Jane using flashlights. Dep. Kveene questioned Tom about what happened to Jane. Tom told him that he and Jane went out on the boat. Although he could not remember what time, he thought it was around midnight. When they got out on the lake, they shut the boat off for a while. Then Tom started the boat again and began driving in a northwesterly direction. It appeared that Jane was trying to pick something off the floor of the boat, maybe an earring.²² She stood and turned—he thought to sit down—but fell over the edge. The boat was going fast because he was speeding up to get the boat to plane out. Tom could not see Jane and eventually jumped in the water. He did not shut the boat off, so it continued

²² When Kveene, Rime and Tom Rhodes returned to the dock, Rime found a gold-colored clip-on earring on the floor of the boat. (B. 0006.)

to circle. When he got back into the boat, he zigzagged looking for her. He estimated that he searched for about 20 minutes. Tom said that at some point another boat went by him, Tom flashed his lights at the boat, but the boat did not stop. (B. 0005-0006.)

Kveene asked Tom why he called 911 from the Northern Inn rather than from Little Melvin's, the bar closest to where Tom had left the boat. Tom explained that when he returned to shore the lights at Little Melvin's had shut off, and Tom assumed that the bar had closed. (B. 0006-07.)

Dep. Roe and Dep. Strom met Dep. Kveene, Tony Rime, and Tom on the water. Dep. Strom described Tom as "very upset" and "somewhat confused about where this incident had occurred." (B. 0010.) Although Tom wanted to stay on the lake to search for Jane, Kveene and Tom returned to the Northern Inn where Kveene gave Tom a portable breath test, which was negative for alcohol. (B. 0007.) Dep. Strom joined other boats that had arrived to help in the search. Dep. Roe placed a marker in the spot where the incident "possibly occurred." (B. 0010.) This spot was later determined to be 400 yards off the shore, rather than 1000 yards, as Tom had originally estimated.

At the Northern Inn, Detective Cruze interviewed Tom at around 2:00 am, and Cruze's report contains more details than Tom had provided earlier. Tom said he and Jane had left the hotel at about 11:30 pm. They went out on the lake, as they had on other evenings, after the boys went to bed. The wind had picked up and waves started coming up. They started heading back toward the Northern Inn traveling about 40 mph when Jane leaned over to pick something up. Tom turned to look right—away from Jane—and heard her say something like "Oh shit." Tom looked back and saw Jane fall off the back left side of the boat. Tom said he turned the boat off and listened. He thought he heard a gasp. Tom got in the water to search for Jane and spent about 15 to 20 minutes trying to find her. (B. 0018.)

Perry Weiland, a volunteer emergency medical technician and a full-time pastor, was asked to stay with Tom at the Northern Inn. Weiland counseled Tom not to wake his sons until later in the morning. When Tom did wake his sons to tell them what happened, Weiland was there. Weiland described the boys as walking around in a daze, crying and hugging their dad. Weiland thought their behavior "was very normal for what had just taken place." (B. 0186.)

Although the rescuers hadn't found Jane's body, they temporarily called off the search about two hours after it began. (B. 0012.) Records show the search was suspended because of the

windy conditions. (T. 890.) Before ending the search, Tom twice suggested the search move further north. (B. 0006, 0728.)

Rescue operations resumed at 7:30 am the morning of August 3rd. (B. 0018.) Authorities erected a tent on the lakeshore that operated as a command center. Around 11:00 am, Dale DeRung, who was renting a cabin on the lake, approached authorities at the tent. Dale said that he and his wife saw a boat drifting on the water around 11:30–11:40 pm that evening. They heard conversation and laughing coming from the boat. They came back out on the deck around 12:15 am. They saw the boat slowly circling and moving in a zigzag pattern. After receiving this information, the search for Jane’s body moved approximately a half-mile²³ north of the original location. (B. 0012.)

At 1:30 pm on August 3rd, approximately twelve hours after the search began, two fishermen found Jane’s body floating in the water against the shore almost a mile from the spot where the search started. The fishermen described how Jane’s body appeared—face down in the water—against the shore, with her head pointing to the north. Her body was removed from the water before any photos were taken. (B. 0018-19.) Dep. Roe said he was not surprised that the body was discovered where it was. (T. 889, 923.)

Det. Cruze saw Jane’s body after it had been removed from the water. He described bruising to her eyes and a swollen and cut lip. Det. Cruze reported that “due to the trauma done to the face of Jane Rhodes,” the body was sent to Ramsey County Medical Examiner, Dr. Michael McGee, for autopsy. (B. 0019.) Dr. McGee found what he determined to be multiple traumatic injuries to Jane’s face, head, neck, and arms, and what had first been seen as a tragic accident turned into a homicide investigation. (B. 0021.)

Law Enforcement’s Investigation of a Potential Homicide

Two groups of shore witnesses provided law enforcement with information about a boat they saw the evening and morning of Jane’s drowning. Each group recounted seeing a boat on the lake, but the two groups described very different types of activity. The first group was Dale DeRung’s family. Three days after the incident, Det. Cruze interviewed Dale, his wife, Karen, and

²³ The report says the search moved a mile north, but other evidence shows the distance between where the search began and where the search relocated as a result of Dale DeRung’s input was about one-half mile.

their daughter, Kristy. Karen told him that around 11:30 to 11:40 pm they heard a woman's scream and then laughing coming from the lake. They could not see a boat from the driveway where they were standing. They walked to the lakeside of the house to see what the screaming and hollering was about and saw a boat that was drifting in the water, about 200-300 yards away from the shore. (B. 0275.) They described the woman's laughter, "as if she had a few drinks," "definitely up beat," "definitely nothing of fright." (B. 0272, 0277.) At midnight, the DeRung's daughter took the dog for a walk and saw the boat drifting on the water and heard the woman on the boat laughing. (B. 0278-80.) Later, around 12:15-12:30 am, Dale and his wife, Karen, saw the same boat they had seen earlier, but with only one passenger, a man, slowly circling, zigzagging, and then slowly heading back toward Little Melvin's. (B. 0263-0281.)

The DeRungs described the boat as mostly white, two-toned, with stripes on it, low to the water, with fairly low sides. The back of the boat had a very long pole with a white light.²⁴ Dale DeRung described the conditions that evening as windy and moderately choppy. The boat the DeRungs saw was either drifting on the water, circling, or slowly zigzagging, like the driver was looking for something. (B. 0274-0277.)

The second group of shore witnesses included Andrea Iverson, her husband, John, her sister-in-law, Lisa Iverson, and Lisa's boyfriend, Paul Bolle. They were staying together in Lisa's lake house north of Little Melvin's. Det. Cruze spoke to them at 7:19 pm the evening Jane's body was found. John and Paul reported seeing a boat driving erratically between 10:30 pm to 11:30pm, and they all saw the same boat, again, around midnight, still driving erratically, whipping fast corners, about 400 yards from shore. (B. 0117.)

A few minutes before midnight, Andrea said she was alone on the deck of the house for two to five minutes when she heard someone moaning for about a minute and then a woman's voice saying "stop," "no," "it hurts." Andrea noticed a boat on the lake that was maneuvering erratically, making sharp turns out in front of the lake house. (B. 0120.) She called the others up to the deck, and they noticed the boat was the same one John and Paul had seen earlier, running the same kind of erratic maneuvers. (B. 0116-0117.) None of the others heard any alarming sounds from the boat after they joined Andrea on the deck, and they all left for Little Melvin's just after midnight. (B. 0126.)

²⁴ The DeRungs' description matched the characteristics of the Rhodes' boat.

None of the shore witnesses remembered seeing other boats on the lake, and none could identify the boat they saw as the Rhodes' boat.²⁵ The Iverson group could not identify how many passengers were on the boat they saw. None could identify Tom or Jane Rhodes as passengers. There is no evidence investigators made any attempt to interview other people who could have provided more information about the boat and its passengers or whether there were other boats on the lake that evening even though there were people in Little Melvin's, on the beach near Little Melvin's, and in homes lining the lake who may have heard or seen something.

Five days after Jane's body was recovered, investigators interviewed the bouncer from Little Melvin's, Mark Schroeder.²⁶ Schroeder recalled that shortly before 1:00 am on August 3rd, he was sitting outside the door to the bar facing the lake when he noticed a small boat pull up—a little, white-ish, two-seater jet boat. The driver jumped out, was waist deep in water and fishing through compartments in the boat. Schroeder did not think the boat was tied to the dock, and he said the boat was facing toward the lake. He said the man he saw was wearing light colored shorts and a light-colored t-shirt. The man walked past Schroeder without looking at him. The man was headed toward the Northern Inn, he was not wearing a life jacket, and he did not “show any sense of urgency.” (B. 0250-51.) Schroeder said that after about 10-15 minutes, the man came back to the boat with a deputy. The man was still wearing a light-colored t-shirt and shorts. The man and the deputy got in the boat, put on their life jackets, and left immediately. (B. 0251.) When shown a picture of Tom's boat, Schroeder could only say that it was “possibly” the boat he saw. He claimed only to have seen the back of the boat. When asked if he would recognize the man from the boat if he was shown a photo, Schroeder said “possibly.” (B. 0254.) There is no evidence that investigators ever showed Schroeder a photo of Tom Rhodes.

Three days after Jane's body was recovered, Dr. McGee completed the autopsy and contacted Det. Cruze. Dr. McGee was concerned about what he believed was trauma to Jane's face and head. He also identified a cut or tear to Jane's lip and a circular impression around the lip injury. (B. 0021-22.) The investigation first pursued a theory that Jane was assaulted while on the boat. That theory was consistent with what Andrea Iverson said she heard—a woman saying “stop,” “no,” “it hurts.” Dr. McGee asked the Bureau of Criminal Apprehension to examine the

²⁵ The Iverson group's descriptions of the boat varied widely. One member of the group said they all discussed what type of boat it could have been while on the deck watching it maneuver before they left for Little Melvin's. (B. 0125.)

²⁶ It appears that Det. Cruze learned about Mark Schroeder through Perry Weiland. (B. 0187.) Cruze interviewed Schroeder on the same day he recorded his interview with Weiland. (B. 0023.)

boat for evidence of what could have caused the circular injury near Jane's lip. (B. 0021-22.) The BCA extensively tested the boat and a circular drink holder from the boat found no evidence of bodily fluids such as blood. (T. 963-66.)

As the investigation proceeded, people came forward with evidence of motive. Witnesses told investigators that two years before Jane's death, Tom had an affair with another woman. Jane discovered the affair. Tom and Jane met with a divorce lawyer who assessed how much Tom or Jane would pay in child support if they split up. Tom and Jane never met with the attorney again. Both Tom and the woman he had an affair with said they had strong feelings for each other, and she admitted they had met in a hotel room once and had kissed. Both claimed that they never had sex. The woman Tom had an affair with told investigators that Tom broke off the relationship because he wanted to make things work with his wife and family. (B. 0245.) After the affair had ended, Tom and Jane bought a new house, a new car, and a new boat in the months leading up to Jane's death. On paper, the Rhodes incurred more debt. They also purchased more life insurance. In fact, in the months before Jane's death, they signed up for several new policies totaling \$233,135 in potential payout if Jane died an accidental death. (T. 1015.)

The investigation also focused on Tom Rhodes's credibility. After Dr. McGee conducted the autopsy, investigators interviewed Tom again on August 15th and recorded the interview. Tom's account differed in ways that the investigators found troubling. For instance, in earlier statements Tom said Jane stood up and leaned forward to pick something up, he looked away, and when he looked back all he saw was her feet going overboard near the back of the boat. In the August 15th statement, Tom said Jane started to get up, she was moving forward, he looked away, and when he looked back, he saw Jane go over on the side of the boat near the front deck. (B. 0205.) Tom also revealed, for the first time, that when Jane fell, he missed the throttled before he was able to slow the boat, turn around, and accelerate back where he thought he could see her. (B. 0208.) As for his location on the lake when Jane fell, he took "a pure guess" that he had been driving 4 to 5 minutes to the north from where he and Jane had been drifting. (B. 0207.) When asked if the deputies had been looking for Jane in the correct area, Tom, for the first time, said that he led Dep. Kveene to the spot where he and Jane *started* heading north after they had been drifting, not where she fell in. (B. 0208.) Tom also added that after Jane went overboard, "I'm not sure about this but I think I went once further north and – and, ah, stopped the boat and called her name." (B. 0212.) When the detectives asked Tom about whether he had any extramarital affairs,

he denied it. Although he admitted that their marriage had some problems, Tom said they had seen a counselor and were getting along better than they ever had at the time of the incident. (B. 0217.) Several times Tom denied seeing anyone other than his wife—sexually or otherwise. (B. 0221-22.)

Several weeks after the incident, Det. Cruze, Det. Hartog, and Det. Follmann tested the Rhodes's boat on Green Lake. They noticed that even in lighter winds and going as slow as the boat could go, Cruze had a hard time standing in the boat. (B. 0049.) They noted that the rails of the boat rose only as high as their knees. When the boat was going full throttle, Cruze could not stand up for fear of falling over the side.²⁷ (B. 0050.) The boat had quick acceleration and turned very sharply. (B. 0049.) Even when sitting, Det. Hartog noted that he had to hang on tightly as the boat was doing fast turns, or else he felt like he would have fallen out. When they drove the boat 100 to 200 yards away from shore—closer than the shore witnesses had estimated²⁸—a detective on shore could hear voices from the boat but could not make out what they were saying.²⁹ (B. 0050.)

On October 10th, more than two months after investigators conducted their August 5th recorded interview with Tom, a claim representative from State Farm interviewed him. Tom's interview revealed more inconsistencies. Where Tom had earlier said he did not hear a thing when Jane fell off the boat, he told the claims rep that Jane let out a “muffled” or “cut-off” scream before she hit the water. (B. 0240.) Tom also added that before Jane went overboard, she had gotten up from her seat and put a sweatshirt in a fishnet area in the front of the boat while the boat was going 35-40 mph, and her standing and moving to the front of the boat did not make him feel uncomfortable. (B. 0237-38.) Later, according to Tom, Jane stood to reach for something in front of her, he looked away, and she fell into the lake. He told the claims representative that when Jane fell, he panicked, missed the throttle, slowed down, turned to the left, and “accelerated real quick”

²⁷ This finding squares with a test Dr. Wigren described in an interview with the CRU. Dr. Wigren is a forensic pathologist who prepared a report for the Great North Innocence Project. He took his son with him on a test run of a boat just like the Rhodes' Baja Blaster. Dr. Wigren said that they had to attach his son to the boat with bungie cords so that he would not fall out. CRU Interview with Dr. Wigren.

²⁸ Dale DeRung reported the boat being 300-400 yards away. John Iverson estimated the boat was 400 yards from shore.

²⁹ The report does not note how fast the boat was going and whether they were driving erratically during this test run. Andrea Iverson, who heard a woman's voice and said she could hear what the woman was saying, described the boat she saw as driving like it may have been pulling the woman on an inner tube, with the engine revved the entire time.

to get back to where he thought she fell out.³⁰ (B. 0230.) Tom added that he did not have a flashlight on board, so he was using the lights from the boat to look for Jane. Most concerning was that in earlier statements Tom had not mentioned calling out for Jane after she fell in—which seemed odd to investigators. In the August 5th statement, Tom was not sure whether he called Jane’s name. But on October 10th, Tom told the claims rep that that he was yelling for his wife—“I remember yelling, Jane, it’s Tom, . . . yell or make a sound.” (B. 0230.) Tom added that he continued to zigzag the boat, shutting off the motor and yelling for his wife. (B. 0230.) Also in the October 10th statement, Tom admitted to having an affair with another woman, Kathy Mason, but he said he had not seen or talked with her for over a year. (B. 0242.)

In January 1997, five months after the drowning, Dr. McGee met with the Kandiyohi County Attorney. Dr. McGee had not yet determined the cause and manner of Jane Rhodes’s death. Dr. McGee had concluded that the bruising on Jane’s head and face must have occurred before her death. He had concluded that blunt force trauma caused the bruising, but he could not determine whether the injuries resulted from “one blow or multiple blows.” He believed these injuries could’ve been caused by a hit from a flat boat hull. McGee also found hemorrhage in the tissues of the neck with no corresponding bruising to the surface of the neck. He found the neck hemorrhage inconsistent with strangulation but consistent with “being pushed out a boat” with a “flat hand.” He did not believe the neck hemorrhage could be caused by a flat boat hull. Finally, Dr. McGee hadn’t determined what caused the injury to the corner of Jane’s mouth, but he believed she was likely struck by something round. After the meeting, the County Attorney believed Dr. McGee would be changing the manner of death from pending to homicide. The County Attorney prepared a memo summarizing the meeting.³¹ The memo was provided to one of the trial attorneys from the Attorney General’s Office, and the CRU found the memo in the prosecutor’s file. The memo contained an instruction to consider the document work-product non-discoverable.³²

³⁰ Turning left in the boat was a new detail Tom added in the October 10th interview. It seems odd. When boat drivers want to turn quickly and safely, they turn to their right. In turning left, the driver is turning into an area that they cannot see as well, and they can be blinded to what’s in their path. Turning left in a jet boat is not only slower than turning right, but it can also be more dangerous. Tom was not only turning to a side that gave him less visibility of the water in his path, he also was turning into the dark because the moonlight was illuminating the right side of the lake from his vantage point. He was actually turning the boat into the dark, on the opposite side of the boat from where he had been looking.

³¹ Supplement 5.

³² The January 8th memo summarizing Dr. McGee’s preliminary opinions about the autopsy findings was never provided to the defense even though Dr. McGee’s opinions, as set forth in that memo, could have provided support

Neither the memo nor a summary of Dr. McGee's statements was provided to Rhodes's defense counsel before trial or during post-conviction proceedings.

In March 1997, Detective Sergeant Daniel Hartog of the Kandiyohi County Sheriff's Department sought an expert on drownings and body recovery. Sgt. Hartog asked Captain William Chandler, who was a member of the Hennepin County Sheriff's Office water rescue team, to provide an opinion about whether, given the conditions on August 3, it was "possible for Jane Rhodes's body to come to the surface where it did from the location that the officers were first given as to where she had fallen out of the boat by her husband, Tom Rhodes." (B. 0307.) Det. Hartog provided Capt. Chandler with a map of the lake noting the location where the search began, the location where the search moved after Dale DeRung spoke with investigators, the location where the body was found, and the wind direction.³³ (B. 0308.) Capt. Chandler concluded: "[I]t is my opinion that the victim[']s body could not have surfaced in the area it was recovered in if it had entered the water where the husband claims." (B. 0309.) Capt. Chandler was not asked and did not attempt to answer an equally important question—whether Jane's body could have surfaced where it did had she drowned in the area Dale DeRung had identified.

Sometime before his grand jury testimony, Dr. McGee finalized the autopsy report.³⁴ He recorded the manner of death as homicide. On December 9, 1997, the grand jury returned an indictment, and Tom Rhodes was tried in 1998.

IV. The Trial

The State convicted Tom Rhodes of first-degree, premeditated murder, which required the jury to find that Tom planned, prepared, or determined to cause Jane's death prior to committing the act.³⁵ In other words, Jane's death was not the result of an accident or some negligent act.

for the defense's theory of the case—a single blow by the boat caused the injuries to Jane's face and head. No one from the prosecutor's office now disputes that Dr. McGee's statements should have been disclosed as part of the discovery process, and the CRU found no evidence that the State intentionally suppressed the memo.

³³ Supplement 8.

³⁴ Dr. McGee's autopsy protocol contains no date. There is no specific date in the Medical Examiner's file identifying the date Dr. McGee finalized his autopsy report. From the County Attorney's notes summarizing his meeting with Dr. McGee in January 1997, it is clear Dr. McGee had not yet finalized his report at that time.

³⁵ Minn. State. 609.02.

At trial, the State’s theory of the case was simple—Tom Rhodes “murdered Jane Rhodes because he couldn’t stand to be married to her any longer and couldn’t afford a divorce.” (T. 820.) The State set out to prove that Tom tried to throw Jane off the boat by making high-speed turns. When that was not successful, he struggled with her on the boat, inflicting defensive wounds. Ultimately, he knocked Jane out of the boat with a blow to her throat and ran over her again and again until he knew she was dead. (T. 106, 648, 828.) He feigned an accident, lied to authorities about how Jane ended up in the water, delayed seeking help to find her, and lied about where she went into the water to prevent rescue crews from finding her.³⁶

The defense countered that the Rhodes’ marriage had improved, that Jane’s death was a tragic accident, and that if Jane suffered any trauma before drowning, it was from falling out of the boat and then being accidentally struck by the boat as Tom returned to look for her. The injuries to Jane’s body were entirely consistent with an accidental drowning and “travel injuries” commonly found on drowning victims. And although Tom, understandably, may have been confused about where he was when Jane fell from the boat, he made an honest and appropriate effort to assist rescuers in locating her.

The evidence in the case was entirely circumstantial, and the State set out to prove beyond a reasonable doubt that Tom Rhodes intended to and did cause Jane’s death with premeditation, and that the defense’s theory of an accidental fall was an impossibility.

Four witnesses were essential to proving that Tom Rhodes committed first-degree, intentional homicide: Dr. McGee, Captain Chandler, Mark Schroeder, and Andrea Iverson.

The State began and ended the trial focusing on the medical evidence. Dr. McGee anchored the State’s case. Dr. McGee, who at the time was a well-respected forensic pathologist, provided compelling testimony to support the State’s theory that Jane’s fall from the boat was not an accident. Dr. McGee testified that he found trauma to Jane’s face, bleeding under Jane’s scalp, black eyes, a bruised forehead, bruised cheeks, a laceration on her lip, bruises on her legs, defensive wounds on her arms, and internal bleeding in her neck. (T. 577-78.) He opined that the injuries to Jane’s face could not have been caused by a single blow. (T. 614, 626.) Dr. McGee testified that the internal bleeding found deep within Jane’s neck tissue—an injury with no

³⁶ See State’s Memorandum of Law in Opposition to Rhodes’s Fourth Petition for Postconviction Relief, p. 2 (July 1, 2014).

corresponding external marks—was consistent with being struck by a hand in the “V” position.³⁷ (T. 640-41.) The prosecutor and Dr. McGee provided the jury with a dramatic re-enactment of the how Tom must have used his hand to deliver a blow to the neck that knocked Jane overboard.³⁸

Dr. McGee testified that all wounds, except the wounds on Jane’s hands, occurred before Jane died, and none of these antemortem wounds were consistent with accidental drowning. (T. 578.) Dr. McGee opined that the pattern of trauma to Jane’s face was consistent with being struck at least twice by the boat, and he disagreed that a single strike could have caused the injuries. (T. 626.)

Dr. McGee concluded that the cause of Jane’s death was drowning, but he went further than that. He also testified that, had she not drowned, she could have died from her injuries because of the “tremendous amount of soft tissue hemorrhage present.” (T. 643-44.)

The State relied on Capt. Chandler to prove that Tom intentionally misled rescuers about where Jane fell into the lake. Capt. Chandler testified that once a body submerges, it goes straight to the bottom. (T. 1107, 1112.) Once on the bottom, bodies do not resurface until they begin to decompose. Decomposition depends on the temperature of the water, and it takes longer in colder temperatures. (T. 1117.) Capt. Chandler testified that the temperature at 40 feet deep, the depth of the lake where Tom first led rescuers, was 39.2 degrees. At that temperature, it would have taken several weeks, rather than 13 hours, for Jane’s body to float to the surface. (T. 1119-20.) Capt. Chandler opined that Jane could not have drowned where Tom first led rescuers and surface where she did—almost a mile north of that point. In his opinion, Jane must have drowned in ten feet of water or less. (T. 1145.)

The State called several shore witnesses to corroborate Cpt. Chandler’s testimony and establish that Tom lied about where Jane went overboard. The State relied on one witness in particular—Andrea Iverson. Andrea, like the others at the Iverson cabin—spotted a boat driving erratically on the lake about a half-mile north of where Tom originally led the first responders. At trial, Andrea testified she heard moaning sounds coming from a boat, then she saw the boat picking up speed and driving erratically. She heard a female voice saying, “No. Stop. It hurts.” She testified

³⁷ One of Rhodes’s post-conviction experts opined that Dr. McGee’s testimony about the neck injury was “the most paramount of the entire trial” and the prosecutor’s question about a blow to the neck from a hand in the “V” position was “the murder question: That’s the question: Did he kill her?” *Rhodes v. State*, 875 N.W.2d 779, 793 n.2 (Minn. 2016).

³⁸ *State v. Rhodes*, 627 N.W.2d 74, 80 (Minn. 2001).

that the female said this “[i]n a scream, kind of scary, out of control.” (T. 752.) The State used Andrea’s testimony to support its theory that a struggle must have taken place on the Rhodes’ boat before Jane went overboard.

Mark Schroeder, the bouncer from Little Melvin’s, provided evidence of premeditated murder. His testimony supported the State’s theory that Tom delayed seeking help to thwart rescue efforts and was faking his concern for his wife’s well-being. Schroeder testified that while sitting outside the door of the bar at around 12:50 am, he noticed a white jet boat pulling up to the dock in front of Little Melvin’s. The boat had one male occupant who docked the boat so that it was facing out toward the lake. He saw the man in the water, reaching into the boat for something, then walking past Schroeder toward the Northern Inn. (T. 840-42) Schroeder testified that the man was not in a hurry and did not ask for help. Schroeder said he later saw the same man return to the dock with a deputy and get back into the same boat. (T. 845)

The State presented motive evidence too. Witnesses testified that Tom had a relationship with another woman in 1995. (T. 526-27, 678, 682.) Jane discovered the relationship, and Jane and Tom visited a divorce attorney in May 1995. (T. 539, 667.) The attorney calculated what each would have to pay in child support if they divorced. Tom would have had to pay \$742 in child support from his net monthly income of \$2,476. (T. 673.) A witness testified that although Tom and Jane decided to stay married, Tom placed conditions on Jane. She had to lose weight, change her hair, and have sex with him more often. (T. 528, 541.)

In addition to the marital troubles, the State argued that Tom would receive a financial “windfall” if Jane died an accidental death.³⁹ The State presented evidence that after the Rhodes bought a new house, a new boat, and a new car, their household debt increased from \$57,743 to \$104,099. (T. 992.) Just four months before Jane’s death, around the same time the Rhodes purchased the new house, car, and boat, they also took out life insurance policies. The policies included mortgage insurance on the home, and credit life insurance on the boat and car. In addition, Jane signed up for life insurance totaling \$80,000 when she started a new job. That brought the total value of life insurance on Jane to \$233,000, which included a seven-year-old policy for \$50,000, but it did not include a \$50,000 policy Jane applied for less than two weeks before her death. (T. 1006-09.) The last policy did not pay out because the insurance company received the application too late.

³⁹ State’s Memorandum of Law in Opposition to Rhodes’s Fourth Petition for Postconviction Relief, p. 4.

In closing argument, the prosecutor summarized the evidence that proved Tom committed a premeditated murder. Tom knocked Jane out of the boat, ran her over once, and then ran over her again. Andrea Iverson heard Jane screaming, “No, stop it, that hurts.” Mark Schroeder saw Tom walking slowly past Little Melvin’s instead of running and hollering for help. Tom went on a life insurance buying binge just before Jane’s death. The Rhodes had visited a divorce lawyer the year before Jane’s death, but Tom dropped the idea when he learned he could not afford a divorce. And not only did Tom change his story several times, but he also misled law enforcement about where Jane’s body fell into the lake. (T. 1329-36.)

Defense counsel’s strategy was to present alternative expert opinions rather than attacking the State’s experts directly. Defense counsel did not challenge Dr. McGee’s opinions in cross-examination. Instead, the defense offered its own medical expert, Dr. Lindsey Thomas, a less experienced medical examiner who had not been present for the autopsy. Dr. Thomas testified that Jane’s injuries were consistent with Tom’s account—that Jane fell off the side of the boat while it was moving fast. (T. 1197-99, 1205-06.) The injuries to Jane’s face and head could have been caused by a falling from the boat followed by a single strike from the boat. (T. 1205.) The areas of bleeding on both sides of Jane’s head were caused by the seepage of blood from a single blow, not indicative of multiple blows. Dr. Thomas opined that the bruises to Jane’s legs and neck could have come from her fall from the boat. (T. 1197-99.) The injury to Jane’s lip looked more like a post-mortem injury that was the result of fish or turtles feeding on the flesh near her mouth. (T. 1202.) Finally, Dr. Thomas did not agree that the bruises on Jane’s arms were defensive wounds because they weren’t symmetrical. (T. 1207.)

In addition to Dr. Thomas, the defense presented an expert in boating accident reconstruction, Dale Morry. Mr. Morry testified that most people have difficulty finding a particular location on a lake, and darkness makes it even harder because points of reference are not obvious. To return to a particular spot on a lake you need three or four points of reference. (T. 1248.) When a person has only one point of reference, the margin for error is going to be very large. (T. 1251.) Mr. Morry also testified that although the rule of thumb is that people sink when they drown, some people float. (T. 1252.) Therefore, when you are searching for a drowning victim, if you don’t find them at the location where it is assumed they fell in, you start moving with the direction of the energy, which in this case would have been the direction of the wind. (T. 1254.) Mr. Morry also testified that drowning victims who float can be hard to see in the dark

because they can float just below the surface. He opined that a body floating just below the surface could easily elude searchers, especially given the wind speed and wave action the morning of Jane's drowning. (T. 1261.)

In closing arguments, defense counsel focused on the absurdity of the State's theory that Tom would plan the murder of his wife for a year and then execute his plan by erratically driving their boat close to shore residences for over an hour, with Jane screaming loudly, as if to announce: "Hey, folks, I'm going to kill Jane in a little bit. Stay tuned." (T. 1355.) Counsel illuminated the shore witnesses inconsistent accounts, noting that John Iverson spotted the same boat driving erratically at 10:45 pm, which was before the Rhodes had left the Northern Inn. (T. 1367.) Defense counsel also devoted a significant part of closing argument to challenging Dr. McGee's opinion that that boat struck Jane more than once. Counsel highlighted the evidence from Dr. McGee's testimony where he found that the injuries to Jane's head and face were symmetrical. Counsel argued that two strikes by the boat could not produce such symmetrical injuries, especially if the first strike knocked Jane unconscious. (T. 1404-07.) Finally, counsel addressed the motive evidence, highlighting the complete lack of evidence that Tom carried on a romantic relationship outside his marriage after he and Jane reconciled. (T. 1410-1413.) Counsel put the debt and insurance into context, emphasizing testimony that the life insurance Jane carried was not out of the ordinary. Neither was their household debt, which was less than twice the amount of their gross income. Counsel argued that the Rhodes had moved on and changed their lives for the better, moving to a new house, trading in a car and boat for upgrades. Although they took on more debt, most families look at their actual monthly expenses. How much can they afford? And although the Rhodes accumulated more debt, they got a new house, new car, and new boat for just \$179 more in payments per month. This, counsel argued, is nothing unusual. (T. 1411-20.)

Defense counsel argued that the State had not proven, beyond a reasonable doubt, that Tom Rhodes committed first- or second-degree murder. (T. 1420-21.) As for second-degree manslaughter, a charge that defense counsel requested, counsel argued that although Tom Rhodes probably caused the death of his wife by turning the boat around and speeding back to find her, he was thinking about saving his wife. He was not recognizing a strong probability that his act of trying to save his wife would cause her injury. (T. 1422.)

The jury deliberated and convicted Tom Rhodes on the first two counts—Murder in the First Degree and Murder in the Second Degree—and he received an automatic life sentence. The

jury did not complete the jury verdict form on the lesser included charge, Manslaughter in the Second Degree.⁴⁰

Post-conviction Proceedings

Tom Rhodes's attorneys filed four post-conviction petitions in state court. The court granted only one hearing in 2002. Eleven witnesses testified for Rhodes, and the State called five witnesses. Three experts—Drs. John Plunkett, Ronald Wright, and Lindsey Thomas—testified that Dr. McGee's opinions were unsupported by the medical evidence. Brian Hunter provided corroboration for Tom's claim that he beached the boat near Little Melvin's and ran across the street to the Northern Inn, and three defense lawyers testified that defense counsel's strategy to refrain from objecting to Dr. McGee's testimony was unreasonable. The court denied relief on all claims.

In 2014, Tom Rhodes, with the assistance of the Great North Innocence Project, filed his fourth post-conviction petition. The petition presented evidence that Capt. Chandler provided inaccurate testimony at trial about the water temperature in the lake. The petition also offered evidence from scientific articles published in 2009 and 2011 that supported the defense claim that the bleeding in Jane's neck was not caused by a blow to the neck. To support these claims, Tom Rhodes offered supporting affidavits from seven experts who independently reviewed the evidence and agreed that Dr. McGee's trial testimony had been wrong in several critical respects.

Dr. Judy Melinek, a forensic pathologist from San Francisco, would have classified Jane's death as an accident. Dr. Melinek found "nothing definitive or even alarming in the traumatic injuries to Mrs. Rhodes body that would exclusively rule in homicidal injury," and she disagreed with Dr. McGee's findings on the neck hemorrhages—citing recent medical articles showing that these hemorrhages are a "common post-mortem artifact."

Dr. Jeffrey Jentzen, a forensic pathologist on faculty at the University of Michigan, found no evidence of a struggle. Dr. Jentzen opined that Dr. McGee misinterpreted the dark, purplish appearance of Jane's face for trauma when it actually resulted from lividity. Dr. Jentzen, who authored one of the articles on post-mortem neck hemorrhages, concluded that the hemorrhages in Jane's neck occurred during the drowning process or after Jane's death.

⁴⁰ Verdict Form, July 29, 1998.

Dr. Valerie Rao, Chief Medical Examiner in Jacksonville, Florida, saw no indication of defensive wounds and concluded that Jane's neck hemorrhages could have been caused by a face-down floating position or improper handling of Jane's body during or after it was removed from the water.

Dr. Ronald Wright, a forensic pathologist in Ft. Lauderdale, Florida, determined that Jane's neck "could not have been struck by a blow" because of the depth of the hemorrhages in her neck which were surrounded by tissue that showed no signs of damage from trauma. He concluded from his review of the medical evidence, "there is nothing which causes me to conclude that this is other than an unfortunate accidental drowning."

Dr. Bruce Hyma, Chief Medical Examiner for Miami-Dade County, concluded that the subgaleal hemorrhage "does not appear to be post-mortem," and it could have occurred when Jane fell out of the boat. The bleeding in Jane's neck did not appear, to him, to have been caused by external pressure. Instead, the bleeding could have been caused by a face-down floating position.

Dr. Victor Weedn, chair of the Forensic Sciences program at Georgetown University, found nothing to "suggest or contradict [Tom's] story that [Jane] accidentally fell overboard." He attributed the bleeding in the neck tissues to a face-down position and "dependent lividity."

Dr. Carl Wigren conducted a full review of the medical evidence and traveled to Green Lake to conduct and record a video re-enactment. The re-enactment showed that a woman roughly the size of Jane Rhodes floated downwind at a rate of speed that would have traveled nine-tenths of a mile in less than 13 hours, and that was in light winds. He cited studies that showed that females with Jane's body type were much more likely to float than what Capt. Chandler had testified to at trial. And Jane's shoes would have "increased her tendency to float." Dr. Wigren found that the neck hemorrhages were "not consistent with blunt force injury to the neck but rather the active process of drowning."

Armed with seven affidavits from highly qualified medical experts, Tom Rhodes alleged that his fourth post-conviction petition satisfied the newly discovered evidence exception to the two-year time bar. The court denied his petition because Rhodes's evidence did not "prove by clear and convincing evidence that [Rhodes] is innocent," and the Minnesota Supreme Court upheld the trial court's decision.⁴¹ The Court determined that Rhodes's conviction was "independently supported by nonmedical (i.e. nonscientific) evidence," including "motive evidence, testimony as

⁴¹ *Rhodes v. State*, 875 N.W.2d 779, 786 (2016).

to Rhodes' conduct, and inconsistencies in Rhodes' statements."⁴² A strongly worded dissent disagreed with the majority about the significance of Dr. McGee's testimony: "In my view of the State's entirely circumstantial case, this testimony by Dr. McGee—that Jane's neck hemorrhaging was caused by external force—was the most critically incriminating evidence of the entire trial."⁴³ The dissent would have granted an evidentiary hearing to determine, by subjecting Dr. McGee to cross-examination, whether Dr. McGee's opinion was "equally qualified compared with the forensic experts offered by Rhodes."⁴⁴

V.

The Findings from the CRU Investigation

The CRU's comprehensive analysis of whether Tom Rhodes was wrongly convicted focused on two main questions:

Does the **medical** evidence support a finding that Jane Rhodes's death could not have resulted from an accident?

Does the **non-medical** evidence support a finding that Jane Rhodes's death could not have resulted from an accident?⁴⁵

Based on its investigation, the CRU concluded that the medical evidence could not prove beyond a reasonable doubt that Jane's death resulted from an intentional, premeditated act rather than an accident. Likewise, while the non-medical evidence raises strong suspicions about Tom Rhodes's role in his wife's death, without the medical evidence from Dr. McGee, the non-medical evidence does not prove, beyond a reasonable doubt, that Tom Rhodes intentionally ejected his wife from their boat, ran over her at least twice, and purposefully delayed rescue attempts. Therefore, the lack of medical and non-medical evidence of premeditation or intent to cause death undermines confidence in the conviction for first- and second-degree murder.

The CRU's investigation did not find sufficient evidence to undermine confidence in the conviction for the lesser-included offense of second-degree manslaughter, which required the jury

⁴² *Id.* at 790.

⁴³ *Id.* at 793.

⁴⁴ *Id.* at 795.

⁴⁵ In a circumstantial case, the State must disprove all rational hypotheses of innocence. *State v. Jones*, 516 N.W.2d 545, 547–549 (Minn. 1994). Here, the defense's hypothesis was that Jane accidentally fell from the boat, and Tom Rhodes accidentally struck her as he returned to look for her.

to find that Tom created an unreasonable risk of causing, and consciously took a chance of causing, death or great bodily harm.⁴⁶

The Medical Evidence

The most critical evidence supporting the State's conviction was testimony from the medical examiner. Dr. McGee concluded that Jane's death was a homicide. Had Dr. McGee ruled the death an accident or undetermined, it is hard to see how the State could have indicted or convicted Tom Rhodes for murder. A determination at autopsy other than homicide would mean that the medical examiner held at least a reasonable doubt about the manner of death.

The State's evidence supporting premeditated murder was not ironclad. Although various witnesses heard a woman scream and saw a boat being driven erratically, no witness could identify Jane, Tom, or the Rhodes' boat on the water that evening, and only one witness heard what sounded like a woman in distress. Law enforcement and other witnesses who interacted with Tom during the rescue operation found his behavior consistent with a person who lost his wife in an accident. When Jane's body was found, Dep. Roe, the deputy who specialized in lake rescues, was not surprised by where it was recovered. It was only after the medical examiner viewed Jane's body that opinions about Tom Rhodes shifted, turning the focus of the investigation to whether Tom Rhodes had a motive to murder his wife. The motive evidence was not strong either. Tom had an affair that he ended a year before Jane's death. And although Jane was insured for just over \$233,000, most of the insurance was associated with Jane starting a new job and the family moving into a new home.⁴⁷

Tom's shifting accounts about what happened on the evening his wife drowned were troubling. However, in hindsight, memory research in the last two decades have led us to expect changes in recollection each time a witness tells his story. In fact, two justices on the Minnesota Supreme Court described the inconsistencies in Tom's account as "minor." Though notable, these inconsistencies, alone, would not support a conviction for premeditated or intentional murder.

⁴⁶ Minn. Stat. 609.205(1) (1995) (Manslaughter in the Second Degree). Rhodes's counsel requested the lesser included offense at the conclusion of trial. The State objected arguing there was no evidence of negligence, only evidence of premeditation and intentional act. The court included the lesser-included offense over the State's objection.

⁴⁷ A life insurance agent the CRU consulted said the amount of insurance Tom would have recovered was a "net loss" given the age of their sons, Jane's salary, and their ordinary household debt. This opinion was in line with the Rhodes' insurance agent who had encouraged them to acquire more life insurance.

Taken in context of all other evidence in the case, Dr. McGee's testimony was the linchpin that held the circumstantial evidence together, giving it meaning and power.⁴⁸ His opinion was crucial to the conviction, and the CRU focused substantial time attempting to understand the opinions of all the forensic pathologists who provided reports or testimony in the case—both at trial and in post-conviction proceedings. The CRU interviewed four defense experts and read all expert opinions and supporting articles. The experts the CRU interviewed explained their findings, they referenced research, and they provided tangible examples.

To better understand Dr. McGee's findings and reasoning, the CRU requested an interview with Dr. McGee. He declined.

To fairly assess Dr. McGee's opinions, the CRU retained a highly respected independent expert, Dr. Sally Aiken, to review the medical evidence and expert opinions in the case. The CRU was careful to provide no biasing information to Dr. Aiken about Dr. McGee. For example, the CRU did not mention the court opinions that found Dr. McGee unreliable and not credible. Neither did the CRU explain why it prioritized the Rhodes review. The CRU waited until *after* receiving Dr. Aiken's report ask to Dr. Aiken if she knew Dr. Michael McGee. She did not. The CRU asked Dr. Aiken if she had read or heard about the district court's opinion in *United States v. Rodriguez*. She had not. In fact, she knew nothing about Dr. McGee's reputation before she completed her review and report.

Dr. Aiken has been a forensic pathologist since 1983. She has performed more than 9,600 autopsies, including regularly performing autopsies on drowning victims. Dr. Aiken recently retired from the Medical Examiner's Office in Spokane, Washington, where she served as Chief Medical Examiner for many years. Before retirement, she was a clinical faculty member in the University of Washington's Pathology Department. She has received numerous honors and awards, published in medical journals, and presented on topics related to forensic pathology. She became the president of the National Association of Medical Examiners in 2020 and chaired its board of directors in 2021. Although retired, Dr. Aiken regularly conducts autopsies in counties where there is a need for forensic pathologists. (Attachment 1, Aiken CV.)

The CRU provided Dr. Aiken with the following instructions to guide her review:

⁴⁸ Expert testimony can have powerful effects on the jury. Unlike lay witnesses, experts are allowed to give their opinions about how the evidence fits with and supports the State's theory of the case. That is one reason expert evidence has been subjected to more stringent gatekeeping to ensure that their opinions are based on sound methodology.

The CRU is requesting a review of the medical evidence in [the Rhodes] case to determine which medical opinions are strongly supported by the evidence and which medical opinions are not supported by the medical evidence or only weakly supported by the medical evidence. The review would also include the basis for these determinations. If appropriate, the review will present a differential diagnosis, listing the most likely cause and timing of the injuries to Jane Rhodes's body, and the most likely manner of death.

For her report, Dr. Aiken reviewed the following materials:

1. Photographs: autopsy, boat, body from scene (on boat ramp), overall photographs from first funeral home, clay model
2. Affidavits: Dr. Hyma, Dr. McGee (for 1st PC hearing), Dr. Thomas, Dr. Wright, Dr. Plunkett, Dr. Jentzen, and Dr. Rao
3. The final autopsy report (date of examination: 8/6/96) and related documentation including death scene checklist
4. Reports: Dr. Melinek, Dr. Wigren, Dr. Weedn, Investigating Officer Mike Roe, Dr. Thomas, and Dr. Wright (for 2nd PC motion)
5. Summary of boat test
6. Memo and notes from Dr. McGee interview (1997)
7. Dr. McGee testimony, trial, and post-conviction
8. Dr. McGee grand jury testimony
9. Dr. Thomas trial testimony
10. Dr. Thomas post-conviction testimony
11. Dr. Wright post-conviction testimony
12. Dr. Plunkett post-conviction testimony
13. Heggie TW. Lake tourism fatalities: a 46-year history of death at Lake Powell. J Travel Med 2018; 1-5.
14. Alexander RT, Jentzen JM. Neck and Scleral Hemorrhage in Drowning. J Forensic Sci 2011; 56(2): 522-5.
15. Pollanen MS, Perera SD, Clutterbuck DJ. Hemorrhagic Lividity of the Neck. AM J Forensic Med Pathol 2009; 30(4): 322-26.

On June 6, 2022, Dr. Aiken provided the CRU with her report, and on June 7, the CRU met with Dr. Aiken by phone to review her findings. (Attachment 2, Dr. Aiken's Report.)

Dr. Aiken's independent review concluded that "the available medical evidence does not support inflicted injury leading to drowning."

Dr. Aiken agreed with some of Dr. McGee's opinions and disagreed with some of the defense experts' opinions. Dr. Aiken noted problems with Dr. McGee's autopsy and opinions. The problems Dr. Aiken identified also appeared in earlier McGee cases in which convictions have

been vacated. For example, Dr. McGee failed to photograph or measure many of the injuries that formed the basis of his opinions. He did not attempt to date injuries that were significant to his analysis. Dr. Aiken found some of his testimony “not credible,” “not well supported by the medical evidence,” “conjecture,” and the product of “circular reasoning.”

Three crucial conclusions from Dr. Aiken’s report are:

- The autopsy findings do not support a conclusion that Jane Rhodes’s drowning was caused by an inflicted injury rather than an accident;
- There is no evidence that would support or exclude a finding that Jane was pushed from the boat; and
- A single blow from the boat is the most likely cause of Jane’s face and head injuries.

Neck Hemorrhage

Dr. Aiken disagreed with Dr. McGee’s testimony that internal contusions in Jane’s neck were consistent with a blow by a hand in a “V” position. Dr. Aiken found this conclusion not supported by medical evidence. One problem Dr. Aiken identified is that Dr. McGee did not properly document his findings. Of the three areas of hemorrhage, only one was measured and only one was photographed. Dr. Aiken found the areas of hemorrhage were either routine findings that are artifactual (posterior pharyngeal wall), could be explained by the body being found face down (sternocleidomastoid muscles), could be explained by a blow to the face or mouth (hyoid bone), or could be explained by a combination of these mechanisms. Most importantly, Dr. Aiken found that Dr. McGee’s conclusion regarding the neck hemorrhage did not explain the findings in a way that comports with the physical forces and the structures of the neck. Dr. Aiken explained that the hemorrhages were tiny and found deep within the tissues of the neck, too deep to be affected by the force of the blow described by Dr. McGee. Furthermore, a blow that would affect the deep tissues of the neck would also cause injury to the skin and soft tissue surrounding the hemorrhage, especially to the area around the injury’s vector, where the force of the blow was delivered. But those tissues showed no evidence of trauma. Therefore, the medical evidence does not support a finding that Jane suffered a blow to the neck from a hand in the “V” position.⁴⁹

⁴⁹ Dr. Aiken’s opinion about the neck injury is significant because, as defense expert Paul Engh testified in the post-conviction hearing, there was no foundation for Dr. McGee’s opinion that the neck injury was caused by a hand in the “V” position, yet that was “the murder question,” and the “case was over after [Dr. McGee] testified.” (PC. 85, 93.)

Defensive Wounds

Dr. McGee testified that he found defensive injuries on Jane's arms.⁵⁰ Dr. Aiken described this testimony as "conjecture." According to Dr. Aiken, the first problem with Dr. McGee's finding is that he did not document it. Dr. McGee did not photograph both of the small bruises on Jane's arms, and he did not examine either of them microscopically, which is the only way to accurately determine whether the bruises were acute rather than days to weeks old. Finally, Dr. Aiken did not think the bruises looked like typical defensive injuries because of their size and location. Dr. Aiken explained that one expects to see bruises at autopsy from daily living, and these arm bruises were not atypical.

Multiple Strikes to the Face and Head

Dr. Aiken disagreed with Dr. McGee that the bleeding under Jane's scalp and the abrasions to her face must have been caused by more than one blow from the boat. In fact, Dr. Aiken found the injuries more likely to have resulted from one blow than multiple blows because of the symmetry of the injuries. She likened the injuries to those commonly seen in falls or motor vehicle collisions where a passenger hits a broad, flat surface.

Dr. Aiken, like Dr. McGee, found a pattern injury to Jane's eyes—likely the result of being struck by a flat object while wearing glasses. Dr. Aiken also agreed that the eye contusions and the subgaleal hemorrhage were premortem injuries. She disagreed with Dr. McGee's opinion that the abrasions covering Jane's face had to occur premortem and must have been the result of more than one blow. She described Dr. McGee's finding as "circular reasoning." Dr. Aiken found it plausible that the abrasions on Jane's face were caused either by the flat boat hull, from rubbing against the bottom of the lake, or from a combination of both.

When the CRU met with the prosecutor who handled the Rhodes case in the 2014-2017 post-conviction litigation, he expressed the belief that the bleeding under Jane's scalp, the subgaleal hemorrhage, could not have resulted from a single blow because the bleeding was not evenly spread throughout the scalp. The CRU asked Dr. Aiken to explain how a single blow could cause a subgaleal hemorrhage to spread unevenly into the back and sides of the head, with clear

⁵⁰ Dr. McGee's opinion about defensive wounds was speculative and unsupported but, as defense expert Joseph Friedberg testified in the post-conviction hearing, the opinion was highly prejudicial to the defense. Defensive wound is a "catch word for jurors." It tells the jury that "Mr. Rhodes was assailing his wife prior to going over. Case over." (PC. 18.)

separation in the areas of bleeding. Dr. Aiken explained that the subgaleal hemorrhage often acts like a balloon. With pressure, the blood can squeeze unevenly from the initial area of bleeding into other areas. Medical examiners often see the same uneven pattern of bleeding that was seen in Jane's autopsy, and they do not interpret the separate areas of bleeding as multiple blows, especially in a person whose body was found face down in the water, which allowed the bleeding to seep into other areas under the scalp.⁵¹

Location where Jane's body was discovered

A major component of the State's theory of the case was that Tom lied to rescuers about where Jane fell off the boat. Dr. McGee was never asked in the grand jury, at trial, or in subsequent proceedings to opine on the location of Jane's body when it was found near shore. However, Dr. McGee did rely on location evidence to conclude that her death was a homicide.⁵² Dr. McGee did not expound on how he concluded that the body was found in the "wrong location." There is no evidence from the Ramsey County Medical Examiner's file of reports or other information from which to conclude that Jane's body was found in the wrong location.⁵³

On the other hand, Dr. Aiken read the reports of all experts in the case and relied on her experience with drowning cases when she concluded that Jane's body *could have* floated nine-tenths of a mile from the point where her body entered the water to where she was found 13 hours later. Dr. Aiken noted that, in her experience, boat drivers have difficulty re-locating the site of an incident, at night, on a lake. Dr. Aiken also noted that some bodies do not sink after drowning. Bodies that float, like Jane's, tend to be female, with a higher content of body fat. She also found persuasive a study provided by defense expert Dr. Wigren. The study demonstrated that a person wearing tennis shoes—like the ones Jane was wearing—would more likely float because the tennis shoes added buoyancy. Jane's shoes, her clothing, and her body habitus made it more likely that her body, compared to other drowning victims, would float. Finally, Dr. Aiken found Dr. Wigren's

⁵¹ It is important to note the Dr. McGee did not rule out a single blow based on his interpretation of the subgaleal bleeding. That is clear from the prosecutor's meeting notes, recorded five months after the autopsy. However, the defense did not know about Dr. McGee's inability to rule out the single-blow theory, because the State did not disclose to the defense the January 8, 1997, memo of the County Attorney's meeting with Dr. McGee.

⁵² See Notes attached to February 10, 2020, letter from Keith Ellison to Dr. Michael McGee, "Wrong location of body from story." Attachments 3 & 4.

⁵³ It is possible that Dr. McGee relied on Capt. Chandler's opinion that Jane's body could not have entered the water where Tom claimed she did because, as Chandler revealed at trial, he met twice with Dr. McGee and the prosecutor. However, the prosecutor did not disclose the fact or the substance of those meetings to the defense.

experimental simulation persuasive. In the simulation, an actor was placed in the same conditions Jane would have been in, but with lighter wave action than the day of the incident. The result was that the actor's body drifted at a rate of speed that would have traveled over nine-tenths of a mile in less than 13 hours.⁵⁴

While Dr. McGee found the location of Jane's body supported a determination that she was the victim of homicide, Dr. Aiken did not find the location a reason to change the determination from accidental drowning to homicide. And where Dr. Aiken provided support for her opinions, Dr. McGee has never revealed the basis for the opinion that Jane's location when recovered weighed in favor of homicide as the manner of death.

Subgaleal hemorrhage as a potential cause of death

At trial, Dr. McGee testified that although he thought Jane's cause of death was drowning, she could have died from the blow to her head that caused a subgaleal hemorrhage.

Q. Doctor, assume that Jane Rhodes had not in fact died of drowning, that she came or was brought to a hospital emergency room with all the other injuries that you have described. Do you have an opinion about what her outcome would have been?

A. I think it would be guarded. She has – from just the injuries present, without the drowning, she has a tremendous amount of soft tissue hemorrhage present . . . Mrs. Rhodes has a tremendous amount of hemorrhage present in her facial area and especially in her scalp area. I believe if she came into an emergency room she would be guarded, and at the very least would need transfusions.

Q. Could those injuries alone have led to her dying?

A. It is conceivable she could die from these, yes.

Dr. Aiken found this testimony *not credible*. Dr. Aiken estimated that the amount of bleeding that had accumulated between Jane's skull and scalp was "not physiologically significant." She concluded, "Subgaleal hemorrhage itself is occasionally lethal in infants, due to their smaller blood volume and comparatively larger head size, but distinctly unusual as a cause of death in adults, and I am unable to find any such case report in the medical literature."

⁵⁴ Appendix to Rhodes's Memorandum of Law in Support of Petition for Post-conviction Relief, March 21, 2014, at A-20-31.

Accident or Homicide?

Dr. Aiken found support for the defense theory that Tom could have accidentally hit Jane with the boat when he returned to find her. Dr. Aiken noted that Jane was wearing a brown sweatshirt and jeans and concluded that she would be hard to find in the lake at night, especially considering that Tom probably traveled at least 80 yards past her before he could turn the boat around. In the CRU's meeting with Dr. Aiken, she provided examples of water-ski deaths where the boat driver returned to the skier but accidentally ran over the skier. These fatal accidents are not entirely uncommon—and that is in daylight with the skier wearing a life jacket.

In addition, Dr. Aiken found no evidence that an assault took place on the boat or that Jane was physically forced off the boat. She found an accidental fall was entirely plausible. However, Dr. Aiken noted that autopsies can rarely make a distinction between a fall or a push. An unwitnessed push rarely causes injury to the body. The default conclusion on manner of death is accident when the *medical evidence* does not support a finding that a person's fall was the result of an intentional push.

Contrary to the State's theory at trial, the autopsy findings do not rule out an accidental fall, a single blow to the forehead, and an accidental drowning.

Given Dr. Aiken's report, it is impossible, based on the medical evidence, to rule out an accidental death. Dr. Aiken is the *tenth* expert who has reviewed Dr. McGee's findings and determined that his classification of Jane's death as a homicide was unfounded. The medical evidence supports the plausibility of an accidental death and does not support an intentional push from a blow to the neck or multiple blows from a boat after her fall into the water. While Dr. McGee's trial testimony was material to the State's conviction, it rested on unreliable, speculative, and unfounded conclusions. Dr. McGee's opinions in the Rhodes case did not conform to those generally accepted in the medical community and would not have been admissible if the defense had lodged appropriate objections.

Defense counsel did not challenge Dr. McGee's credibility and findings at trial, and the post-conviction courts found counsel's strategy not unreasonable.

At trial, defense counsel failed to challenge Dr. McGee's testimony despite its speculative nature. Defense counsel deferred to Dr. McGee and his credentials while allowing the State to

belittle Dr. Thomas.⁵⁵ The jury could see, from the way the prosecution and defense counsel treated the expert witnesses, that they gave more credit to Dr. McGee's credentials and opinions than to Dr. Thomas's, which aligned with defense counsel's strategy to not challenge Dr. McGee directly because he was a "formidable witness."

Defense counsel's strategy was to get Dr. McGee on and off the stand as quickly as possible, using cross-examination not to attack his findings, but to emphasize the findings that were consistent with the defense's theory of an accidental death. The post-conviction court found this strategy was not unreasonable, even though the only fact the defense was able to establish on cross-examination was that Dr. McGee found particulate debris in Jane's nostrils—evidence that her nose rubbed against the bottom of the lake. (T. 647).

Since trial, new evidence from other cases casts doubt on Dr. McGee's competence and credibility. Today, there is no doubt that failing to challenge Dr. McGee's competence and unfounded opinions would be an unreasonable trial strategy.

The State failed to disclose material evidence that could have been used to neutralize Dr. McGee's testimony.

The CRU's investigation shows that defense counsel was denied discoverable evidence, and there is a reasonable probability that the evidence would have changed the verdict or that the evidence would have affected the jury's judgment.⁵⁶

In its investigation, the CRU discovered a memo from Kandiyohi County Attorney Boyd Beccue. The memo summarized a meeting between Mr. Beccue and Dr. McGee that occurred on January 8, 1997. The meeting took place five months after Dr. McGee performed the autopsy. The

⁵⁵ Compare defense counsel's closing argument. "The prosecution wants you to think Dr. Thomas is a nice woman but not much of a doctor. . . . And I think Dr. McGee is a bright man, he seems very professional, very prepared, very rehearsed," (T. 1403) with the prosecutor's closing argument, "I'm going to be blunt. Lindsey Thomas is a nice person, she's a pleasant person on the stand, but when she talked about fish and turtle bites, she was talking a lot of nonsense." (T. 1403.)

⁵⁶ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) requires the prosecution to disclose evidence favorable to an accused where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Evidence is material if there is "any reasonable likelihood [the suppressed evidence] could have affected the judgment of the jury" and where the evidence "undermines confidence in the conviction." *Wearry v. Cain*, 136 U.S. 1002, 1006 (2016). And "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 113 (1976)). Minnesota applies a test more favorable for defendants who were not provided discoverable evidence prior to trial. *State v. Hunt*, 615 N.W.2d 294, 299-300 (Minn. 2000) (holding that failure to disclose discoverable evidence will result in vacation of a conviction when the undisclosed evidence "could have affected the judgement of the jury").

memo shows that after all the medical evidence was assessed, Dr. McGee *could not* “**determine whether the injuries [to Jane Rhodes] were the result of one blow or multiple blows,**” and the “**large blunt-force trauma needed to cause the face and head bruising is certainly consistent with the bottom of a boat.**” (Attachment 5.)

The memo should have been provided to the defense under the Minnesota Rules of Criminal Procedure 9.01. Had the memo been provided, the defense would have had an effective tool to support its single blow theory. Dr. McGee *could not rule out a single blow* based on the medical evidence. With this memo in hand, the defense would have been able to elicit Dr. McGee’s agreement that the single blow theory could not be ruled out. (T. 626)

At trial, defense counsel failed to elicit any testimony from Dr. McGee that would have supported the defense’s theory that Jane’s injuries could have been inflicted by a single blow from the boat. This left the prosecutor with unchallenged evidence to support the State’s case for premeditated murder. In fact, the prosecutor argued in response to the defense’s motion for directed verdict, “Dr. McGee has testified that the trauma suffered by Mrs. Rhodes in the area of the head **could not have been inflicted by a single blow.** The evidence shows that **this boat had to be driven over Mrs. Rhodes more than once.**” (T. 1158.)

Yet, if the State had provided the defense with the January 8 memo, defense counsel could have used it to demonstrate that the State failed to meet its burden to disprove the rational hypothesis of a single, accidental blow. The State would not have been able to effectively disprove the defense’s single, accidental blow hypothesis through Dr. McGee.

Given the memo, the State would not have been able to effectively argue, as it did, in closing:

- “The evidence shows that this *boat had to be driven over Mrs. Rhodes more than once.*” (emphasis added). (T. 1158.)
- “[I]f there's more than one strike, there's premeditation.” (T. 1348.)
- “And the physical evidence also tells us that during those 15 minutes, the defendant ran his wife over with that boat twice.” (T. 1345.)
- “One last question on premeditation. Is it possible, as I will argue the evidence shows, to knock someone out of a boat, run them down with that boat, bring the boat around and run them down again and not consider what it is that you are doing? Knocking someone out of a boat and running them down would probably be

enough. *Coming back and running them down again makes premeditation a slam dunk.* Enough on premeditation." (T. 1329.)

The State rested its case for premeditated murder on a medical finding of multiple blows from the boat. But if the defense had been provided the January 8 memo, it could have effectively challenged and exposed the State's unsupported argument that "the physical evidence tells us that . . . the defendant ran his wife over with that boat twice." Instead, the defense could present evidence of Dr. McGee's agreement that a single blow could not be ruled out, and in this entirely circumstantial case, the failure to disclose the January 8 memo could have affected the jury's judgment.

The State failed to disclose evidence that Dr. McGee's opinion was based on non-medical evidence conveyed to him throughout the course of the State's fifteen-month investigation.

In addition to the January 8 memo, the CRU's investigation found additional evidence that Dr. McGee's opinions were not based on the medical evidence and the evidence from the scene. Instead, Dr. McGee relied on the *non-medical* evidence—from the State's ongoing investigation—to rule out the defense theory of the case.

Written five months after Dr. McGee completed the autopsy, the January 8 memo shows that Dr. McGee had not yet found enough evidence to rule Jane's death a homicide. This raises the question: What evidence caused Dr. McGee to change his mind? The answer to that question did not become apparent until Dr. McGee provided an affidavit in post-conviction litigation.

Dr. McGee's affidavit criticized the defense experts for "focusing completely on the autopsy findings" and "not consider[ing] the circumstances or the results of the investigation surrounding Jane Rhodes's death." And Dr. McGee revealed that his "opinion that the manner of death was homicide was based on multiple sources of information and not just the autopsy findings." The affidavit did not, however, reveal what other sources of information he relied upon to form his opinions.⁵⁷

In January 2020, Attorney General Keith Ellison sent Dr. McGee a letter asking him: "Exactly what sources of information and specifically what information did you use in reaching

⁵⁷ *Rhodes v. State*, 34-K6-97-1529, Memorandum of Law in Opposition to Fourth Petition for Postconviction Relief, July 1, 2014, Affid. of Dr. Michael McGee.

your conclusion that the manner of death was a homicide?” In the Ramsey County Medical Examiner’s file, the CRU found notes in Dr. McGee’s handwriting attached to a copy of the Ellison letter. The notes contained the following list that appears to be responsive to Ellison’s question: “insurance – 6 months prior to death,” “troubled marriage and affair,” “sought attorney for divorce,” “wrong location of body from [Tom’s] story,” and “report of cries from lake with erratic driving at night.”⁵⁸

The CRU interviewed Dr. Sally Aiken, again, after finding Dr. McGee’s notes. Dr. Aiken said it can be biasing for a medical examiner to consider evidence unrelated to the scene, the autopsy, and the medical history. For example, she explained that in this case it would be appropriate for a medical examiner to consider how the body was found and what the boat was like, i.e., did the boat have a flat hull that could account for the forehead injury.

In Dr. Aiken’s opinion, it would be biasing for a medical examiner to consider things that were not part of the scene investigation, like insurance or a troubled marriage. Otherwise, she explained, “It’s like saying the death is suspicious, therefore it’s a homicide.” Dr. Aiken said typically medical examiners conduct the autopsy and determine the manner of death and gather appropriate evidence. That usually happens well before the law enforcement investigation is complete. It would be unusual for a medical examiner to have access to the entire investigation before determining cause and manner of death.

The CRU found Dr. McGee’s reliance on the non-medical, circumstantial evidence problematic for at least three reasons. First, neither Dr. McGee nor the State disclosed to the defense the non-medical basis for Dr. McGee’s opinions. Therefore, the defense could not effectively cross-examine Dr. McGee on how he arrived at his opinions. Second, when non-medical evidence becomes the basis for medical expert findings and opinion, there is no independent corroboration; the reasoning becomes circular, and there is no way to determine the accuracy of the non-medical evidence that formed the basis of Dr. McGee’s opinions. The significance of the non-medical evidence becomes heightened by the medical findings when the medical findings depend on the non-medical, circumstantial evidence. Yet, the jury remains unaware of the circularity. Third, when medical examiners provide expert opinions to the jury that

⁵⁸ Attachments 3 & 4.

are based on non-medical findings, their opinions invade the province of the jury.⁵⁹ For example, whether recent purchases of life insurance and a somewhat recent affair proves, beyond a reasonable doubt, that Tom planned Jane's murder is a question for the jury, not for the medical examiner.

Dr. McGee went well beyond the proper role of the medical examiner when he gave testimony in the Rhodes case. Unfortunately, the defense was left in the dark, unable to effectively cross-examine the basis for his opinions or to object that Dr. McGee's opinions invaded the province of the jury.⁶⁰

The Non-Medical Evidence

In the absence of reliable medical evidence to support the conviction, there is a reasonable probability the State could not secure a conviction for first-degree, premeditated murder because the remaining evidence reviewed by the CRU would not disprove a reasonable hypothesis that Jane Rhodes died from an accidental fall and single strike from the boat. A new look at this non-medical evidence is warranted because the non-medical evidence became the basis for the State's expert opinions as well. The entire case, it now seems, rested on the circumstantial, non-medical evidence.

⁵⁹ Other states have excluded medical examiner's opinions on cause and manner of death when it is based largely on statements of lay witnesses or information obtained through law enforcement investigation and not based on scientific, technical, or specialized knowledge. *See, e.g., State v. Vining*, 645 A.2d 20, 20–21 (Me.1994) (concluding that the opinion that the victim died of homicide was not a product of the ME's expertise but an "assessment of the credibility and investigatory acumen of the police" when "[she] conceded that there was no physical evidence that [the victim's] death had been caused by a human agent as opposed to an accidental fall"); *State v. Jamerson*, 708 A.2d 1183, 1189, 1195 (N.J. 1998) (holding a forensic pathologist's opinion that a car crash was a homicide as opposed to an accident was inadmissible because his opinion was based on "circumstances leading up to the accident that were within the understanding of the average juror," such that his opinion "could not be of assistance to the jury"); *People v. Eberle*, 265 A.D.2d 881 (N.Y. 1999) (holding a medical expert's opinion that an infant's death was caused by "homicidal suffocation" as opposed to sudden infant death syndrome was inadmissible when "the results of the autopsy equally supported two possible causes of death" because her opinion was not based on the medical evidence, but rather on her review of "statements by defendant and other individuals").

⁶⁰ For a similar analysis in another jurisdiction, see *Bond v. Commonwealth of Virginia*, 311 S.E.2d 769, 772 (Va. 1984) ("The ultimate question was whether the decedent jumped intentionally, fell accidentally, or was thrown to her death. The facts and circumstances shown by the testimony of lay witnesses were sufficient to enable a jury to decide that question. The expert's opinion was based largely, if not entirely, upon the same facts and circumstances.").

No reliable evidence supports the theory that Tom Rhodes was intentionally trying to throw his wife overboard by driving the boat erratically, then inflicting defensive wounds, before finally knocking her overboard with a blow to the neck.⁶¹

The State argued at trial that Tom Rhodes tried to throw his wife off the boat by driving erratically, and when that failed, he struck her neck with his hand, sending her overboard. (T. 1344.) To support this theory, the prosecutor relied on two groups of shore witnesses. One group saw a boat driving erratically on the lake around the time Tom and Jane Rhodes were taking their last boat ride. These witnesses heard a woman screaming, and, most importantly, one witness heard a woman say “No,” “Stop,” and “It hurts.” Later, another group saw a man, alone, slowly circling the boat before heading back toward Little Melvin’s. The State’s case relied upon the jury finding that both groups of witnesses were watching the Rhodes’ boat. (T. 1341.)

After carefully reviewing the shore witnesses’ statements, the CRU found little evidence to support for the State’s theory that the two groups of shore witnesses were watching the same boat and that Tom and Jane were the boat’s passengers. Nor did the CRU find support for the theory that Tom tried, unsuccessfully, to knock Jane off the boat by driving erratically.

There were two groups of shore witnesses—the **DeRungs** and the **Iversons**.⁶² Neither group identified the Rhodes’ boat as the boat they saw, and neither identified the people on the boat as Jane or Tom. The two groups offer stark contrasts of the boat’s behavior, and their timelines are unreconcilable. Considering the timeline and witness descriptions, the most reasonable conclusion is that these two groups were looking at two different boats.

The witnesses in the **DeRung** group never witnessed a boat driving erratically. The three members of the group saw the same boat at three different times. Each time the boat was drifting or slowly zigzagging and circling. On the other hand, none of the **Iversons** witnessed a boat that was drifting or slowly circling. They saw the same boat twice, and both times it was driving erratically, in a pattern with sharp turns and high speeds, engine revving.

⁶¹ This characterization of the State’s theory comes from the State’s Memorandum of Law in Opposition to Fourth Petition for Postconviction Relief, July 1, 2014, at 2.

⁶² The Iverson’s house was located at 311 Lake Ave, in Spicer. The DeRungs house was at 337 Lake Ave. The records in this case do not mention the distance between these two houses that both backed-up to the lake, but a search in Google Maps shows that the DeRung’s house was .1 mile north of the Iverson’s house. And it was the DeRung’s house that law enforcement marked on the map as the spot where they moved the search on the morning of August 3rd.

The timeline of what the witnesses saw and heard provides a better understanding of what these two groups of witnesses saw and when they saw it:

- John **Iverson** witnessed a boat on the lake driving erratically when he got to his sister's house. In his statement to law enforcement, John said he went down to the shore with Paul Bolle around **10:30 or 11:00 pm**. The boat was already there, making quick, tight turns. He recalled that he and Paul watched the boat driving in patterns of eights and nines—a pattern familiar to him from competition waterskiing. The boat caught their attention because of the erratic driving, and the people on the boat were screaming, like they were partying or whooping it up. John thought the boat was about 400 yards from shore. They eventually left the shore and went into the lake house while the boat continued to drive erratically. (B. 0116-19.)
- Around **11:30 pm**, Tom and Jane left the Northern Inn heading to the lake for a boat ride.⁶³
- Around **11:30-11:40 pm**, Dale **DeRung** heard a woman scream and then laughter, like the woman had been drinking. (T. 801, 814, 829) He was not able to see the lake at the time, but when he went to the lake side of the house, he saw a boat. He could not make out the people on the boat but assumed one was a woman because he had heard a woman scream. (T. 801) Dale's wife, Karen, also heard a scream followed by laughter. (T. 829) Neither of them recalled seeing a boat being driven erratically.
- A few minutes before **12:00 midnight**, Andrea **Iverson** was on the deck of their lake house, she heard moaning that lasted about a minute, and she thought it was people having sex. She looked out to the lake and saw a boat driving erratically. Andrea said she realized the people on the boat could not have been driving the boat and having sex. Next, she recalled hearing a woman scream and a woman's voice saying, "no, stop, it hurts." (B. 0120-22.) At trial, Andrea testified that she heard the woman's voice and the screaming as the boat

⁶³ Evidence about when the Rhodes left the Northern Inn came from Tom and other witnesses. The owner of the Northern Inn thought they left after 11:30pm. The owner's wife said she saw them down by the beach at around 11:40 pm. The owner's mother, who rented the Rhodes' her lift for the week, said she saw them after 11:00 pm. She knew the news had ended, and Roseanne was on the TV. (B. 0047-48.)

whipped around erratically. (T. 752) Andrea watched the boat for about two to three minutes and then called the rest of the Iverson group out to the deck.

- Around **12:00 midnight**, Kristy **DeRung** heard a woman laughing, and she saw a boat drifting. She could not describe the boat, but she did not think it looked like a pontoon. (B. 0278-81.)
- Around **12:00 midnight**, Robbie Lahr, Kristy **DeRung**'s boyfriend, heard a woman laughing and saw a boat drifting about 200 yards from shore. He could not hear the conversation between the people on the boat and could not identify the boat. (B. 0199.)
- Between **12:00 – 12:05 am**, Lisa **Iverson**, John Iverson, and Paul Bolle joined Andrea on the deck. They all watched a boat drive erratically for about five minutes. They did not hear a woman saying anything that sounded distressing. John and Paul recognized the boat as the same boat they had seen earlier. None in the group could describe what the boat looked like. The Iverson group went to Little Melvin's at 12:06 am. (B. 0109-10.)
- Around **12:15 am**, Dale and Karen **DeRung** saw the boat they had seen earlier. Now there was just one man on the boat. They watched as the boat was slowly circling, and then going back and forth. Dale described the man on the boat as wearing a light-colored shirt. They watched the boat slowly heading toward Little Melvin's. Dale DeRung described the boat as light colored, with a red stripe, with low sides, without an outboard motor, and with a long rear light pole. He estimated that the boat was about 200 to 300 yards away from shore. (B. 0272-78.)

Given the timeline and statements from the two groups of shore witnesses, it is unlikely both groups were watching the Rhodes' boat for several reasons.

First, witnesses confirmed that Tom and Jane did not leave the Northern Inn for their boat ride until around 11:30 pm. From the Northern Inn, they had to travel to Alice Shemon's lift, where they were keeping the boat for the week. Alice Shemon was certain that Tom and Jane did not take the boat out before 11:00 pm. Therefore, the Rhodes could not have been driving erratically in

front of the Iverson's lake house at 10:30 pm or 11:00 pm when John **Iverson** and Paul Bolle first saw the boat driving in patterns of sharp turns. The boat John and Paul saw could not have been the Rhodes' boat.

Second, the boat Andrea **Iverson** heard around midnight could not have been the Rhodes' boat because John Iverson and Paul Bolle identified the boat they saw at midnight as the same boat they had seen driving erratically at 10:30 or 11:00 pm.

Third, the boat spotted by the Iversons behaved extremely different from the boat the DeRungs saw. The **DeRungs** consistently described the boat they saw as either drifting or slowly zigzagging and circling. On the other hand, each time the **Iversons** saw the boat, it was driving erratically in patterns with sharp turns and engine revved. At trial, the State argued that each witness saw the Rhodes' boat. But the timeline does not fit. There is no space in the timeline for the boat to shift gears so dramatically from continually running high-speed sharp turns and screaming, to drifting and laughing, to high-speed sharp turns, to drifting and laughing, to slowly zigzagging and circling. Specifically, both Kristy **DeRung** and her boyfriend saw the boat drifting and heard a woman laughing at the same time Andrea **Iverson** claimed to have seen the boat erratically making sharp turns with a woman yelling, a woman distressed.

Additionally, when Detectives Cruze, Hartog, and Follman tested the Rhodes' Baja Blaster jet boat, Det. Hartog had to grasp the handles of the boat tightly, otherwise he felt like he was going to be thrown from the boat. (B. 0049-50.) Jane did not swim well and was described as timid and cautious around boats. It is hard to image that Tom was unable to throw Jane off the boat driving in sharp circles for at least an hour (as witnessed by the Iversons). And if he had tried, it is unlikely that Jane would have been heard whooping it up, laughing, and screaming like she was having fun considering she would have been hanging on the boat for dear life for at least an hour. And had Jane spent an hour fending off attempts to throw her from the boat, she would not be laughing afterwards, as Kristy DeRung and her boyfriend described.

The State argued that when Tom's attempts to throw Jane out of the boat through erratic driving failed, he assaulted her, inflicting defensive wounds on her arms, and finally knocking her out of the boat with a blow to the neck. But when the detectives tested the boat, Det. Cruze found it hard to stand where Jane would have been standing without falling off. The rails of the boat came up only to the height of his knees. (B. 0049-50.) There was no need to eject Jane with a blow. Given the wave action that evening, it would have been difficult just to stand without losing one's

balance. It is hard to imagine how Jane could have fended off blows to her legs and arms, in a very small, unstable boat.⁶⁴

Although the prosecutor argued that Tom eventually knocked Jane off the boat with a blow to her neck, there was no evidence of a struggle found on the boat or on Tom's body. The BCA thoroughly searched the boat and found no blood. Tom had no scrapes or bruises, as would have been expected had he tried to force Jane from the boat with several blows to her body.⁶⁵

Neither does Andrea Iverson's testimony support an inference that there was a physical struggle between Tom and Jane. If Andrea did hear a woman's voice saying "no, stop, it hurts," it probably was not from the Rhodes' boat because John Iverson identified the same boat on the water before the Rhodes left the Northern Inn. In addition, Andrea said she heard the woman's voice while the boat was being driven erratically, meaning that Tom would have been driving the boat, not engaged in hand-to-hand combat.

The evidence does not support a finding that Tom and Jane had a physical altercation on the boat or that Jane was pushed from the boat. But, of course, the absence of evidence does not prove the death was accidental either. As Dr. Aiken explained in her report,

[i]n the practice of Forensic Pathology, the question of whether an individual was pushed or fell from standing, or from a boat into water, or from a window or bridge onto a hard surface presents occasionally. An unwitnessed push ordinarily causes no injury to the body. Autopsy alone rarely can make the distinction between a fall or a push, and this death is no exception to that conundrum.⁶⁶

No credible evidence supports a finding that Tom Rhodes delayed seeking help, only pretending to be distraught and concerned about his wife.

A defendant's demeanor is often powerful evidence, swaying the jury's decision on guilt or innocence in homicide trials, and the Rhodes case was no exception. The evidence on demeanor favored Tom Rhodes. The defense presented evidence that Tom Rhodes was distraught, crying, and in a rush to find his wife. (T. 702-04, 712, 722, 901-03, 10052, 1059, 1226.)

⁶⁴ Attachment 6, photos of the Rhodes' boat.

⁶⁵ CRU interview with Dr. Sally Aiken; Affidavit of Dr. Valerie Roa, ¶ 4, filed on June 11, 2014, in *Rhodes v. State*, File No. 34-K6-97-001529.

⁶⁶ Attachment 2, at 9.

To counter the demeanor evidence, the State offered Mark Schroeder's testimony to prove that Tom's behavior was consistent with guilt.⁶⁷ Tom Rhodes told law enforcement that he brought the boat to shore by Little Melvin's. In a hurry, he beached the boat, tied it to the dock, and ran across the street to the Northern Inn. The State offered Mark Schroeder, the bouncer at Little Melvin's, to prove that Tom was lying. According to Schroeder, Rhodes did not beach the boat and run to the Inn, he was not in a hurry to find help, and he was not distraught or crying, even though his wife was either dead or in grave danger. (T. 1344-45.)

The CRU's investigation found no evidence to support Mark Schroeder's account. Instead, the CRU found several credible witnesses whose accounts were consistent with each other and directly contradict Mark Schroeder's account. These inconsistencies and contradictions were not presented at trial. In post-conviction proceedings, they were presented piecemeal, such that the court never had the opportunity to assess the constellation of evidence regarding Tom Rhodes's return to shore.

At trial, Schroeder testified that he saw a jet boat pull up to the dock around 12:50 pm. The boat had one passenger, a man. (TT. 840) According to Schroeder, the boat came to rest against the dock facing out toward the lake, which meant the man had to slowly turn the boat around before parking it at the dock. (T. 841-42.) The man driving the boat got into the water, stood on the side of the boat, leaning in as if he was accessing something in a compartment near the middle of the boat. (T. 841-42; 844-45.) Schroeder testified that the man was wearing a light-colored t-shirt and shorts, and the man walked at normal speed toward the Northern Inn. He did not run, he did not look distraught, he was not crying, and he did not ask for help. (T. 842-43.) At trial, Schroeder testified that he saw the same man return to the dock with a deputy about 20 minutes later. The man and the deputy got into the same boat the man had gotten out of. (T. 840, 844-45.) Schroeder said—in his original statement and in grand-jury testimony—that the man and the deputy *immediately* drove the boat away from the dock. But at trial, the prosecutor did not ask him what happened after the man and the deputy got into the boat.

The prosecutor used Schroeder's testimony at trial to make a powerful closing argument:

⁶⁷ The State also presented evidence at trial from two witnesses who claimed that although Tom Rhodes cried when speaking about his wife, he did not produce tears. However, there is no evidence in any contemporaneous reports that Tom cried without tears. This memory of Tom crying without tears was not recorded anywhere in any reports. It only came to light after the prosecutor interviewed the witnesses a week or two before trial. (T. 704, 710-11, 957.) This "no tears" evidence seemed to be the State's attempt to counter the overwhelming evidence that Tom had the demeanor of someone who had just lost his wife in a tragic accident. Demeanor evidence can have a powerful effect on juries.

Now what does defendant do, the defendant who's allegedly numb with grief and with shock? . . . Eventually, he gets to the dock outside Little Melvin's. Does he beach the boat? No, he does not. He reverses the boat, and we know that because it winds up facing out to the lake, not into the shore. He ties it up, he hops over the side, messes about for awhile. We know that from Mark Schroeder's testimony. . . . Then he walks unhurriedly, and without showing any sign of being distraught, past Mark Schroeder, a guy who has absolutely no reason at all to lie, and proceeds in the direction of the Northern Inn. (T. 1344-45). . . . [W]e know from Mark Schroeder's testimony . . . that defendant was not a traumatized accident victim. (T. 1350.)

The CRU finds it hard to understand why the prosecutor relied on Mark Schroeder to establish facts material to the State's case when Schroeder got so many important details about Tom's coming into shore and returning to the boat flat wrong, and his statements conflicted with law enforcement at the scene.⁶⁸

To start, Mark Schroeder could not identify the most basic details of what he allegedly saw. Schroeder could not identify the man he saw as Tom Rhodes, despite Tom being only ten feet away from him.⁶⁹ (T. 849.) Nor could Schroeder identify the boat he saw as the Rhodes' boat, even after being shown a photograph. (B. 0254.) When he originally gave a statement to investigators, he claimed he only saw the back of the boat, but much later, at trial, he was able to describe the boat's color scheme. (T. 840.)

Schroeder's memory morphed. When Schroeder gave his statement a few days after the incident, Schroeder told investigators that he did not think he saw the boat tied to the dock. (B. 0250.) In his grand jury testimony, Schroeder recalled that the boat **was** tied to the dock.⁷⁰ (GJ. 179-80.) He originally said there was no light at Little's Melvin's back door where he sat. At trial he testified there was light coming **through** the back door.⁷¹ (T. 844.)

⁶⁸ In meeting with the CRU, the prosecutor who handled the post-conviction litigation explained that first responders have better memories for events because of their training. Yet, the trial prosecutors relied on Schroeder's testimony even though it directly contradicted what the first responders recalled.

⁶⁹ To understand how close 10 feet is, the holes for the popular cornhole bean bag toss game are 30 feet apart. The stakes in horseshoes are placed 40 feet apart. The length of a Chevy Spark is 12 feet.

⁷⁰ The prosecutor did not ask Schroeder about whether the boat was tied to the dock at trial.

⁷¹ One of the State's arguments was that if Jane's death was accidental, Tom would have gone into Little Melvin's seeking help rather than passing by to get to the Northern Inn. Tom said he thought Little Melvin's was closing when he pulled up to shore. Either way, the CRU does not see the significance of this factual dispute. Running across the street to the Northern Inn—where Tom was familiar with the owner's family—would have taken less than 30 seconds, according to Tony Rime, the first responder who lived in a house on the lake. CRU Interview with Tony Rime. The CRU is perplexed by the emphasis the State placed on Tom passing by a noisy bar at 1am, that would have been populated with people who had been drinking, rather than running across the street to a calm and familiar environment with a desk clerk on hand to assist.

Schroeder said the man who walked past him toward the Northern Inn was wearing a light-colored t-shirt and shorts, just like Tom had been wearing. But he did not notice the man carrying anything with him. (T. 848.) This conflicts with Norm Westby's statement that Tom carried a sweatshirt and a life jacket into the Northern Inn. (B. 0257.)

Schroeder said the same man he saw walking to the Northern Inn wore the same light-colored t-shirt when he returned to the boat. (B.0255.) This conflicts with all other witnesses in the case who saw Tom either changing into a sweatshirt or wearing one upon his return to the boat. Specifically, Norm Westby, the clerk at the Northern Inn, remembered Tom changing into a sweatshirt at the Inn, and Dep. Kveene recalled that Tom was wearing a sweatshirt when he met Tom at the Inn. (B. 0005, 0261.)

In each statement Schroeder provided, he said the man he saw come back to the boat was accompanied by one deputy, and he saw two men (allegedly Tom and the deputy) get into the boat and head onto the lake. However, the first responders confirmed that Tom was accompanied by Dep. Kveene *and* first responder Tony Rime. (B. 0005 0009, 0410-412.) But Tony Rime did not testify at trial, so it would not have been apparent to the jury that Schroeder was wrong about the number of people who left in Rhodes's boat.

In his testimony to the grand jury, Schroeder claimed that when the man he saw and the deputy returned to the dock, they quickly got into the boat, put on life jackets, and *immediately* took off onto the lake. (GJ. 182-83, 185-88.) This testimony conflicts with other law enforcement witnesses who were on the scene. Dep. Kveene recounted a long delay between the time he and Tom arrived at the boat and when they took off into the lake. Dep. Kveene testified that when he and Tom got into the boat, they realized they did not have the key. They had to wait for someone to bring them the key. (B. 0005, 0009.) Then, Dep. Kveene was unable to get the key working, and Tom had to get into the water to assist Kveene in activating the ignition. (B. 0005, PC. 40.)

Most importantly, however, Mark Schroeder was wrong about the most essential part of his testimony—the way the boat was facing. Schroeder recalled that the boat was not beached, as Tom had claimed. Instead, Schroeder testified that the boat was facing the lake. (B. 0250-52; T. 325, 335.) This was a key fact for the State, and based on this fact, the prosecutor argued in closing that Tom was not a panicked, grief-stricken husband. He was a cold, calculated killer. As the prosecutor described, "*He reverses the boat, and we know that because it winds up facing out to the lake, not into the shore. He ties it up, he hops over the side, messes about for a while. We know*

that from Mark Schroeder's testimony." (TT. 1344) Yet, this fact, that the boat was facing toward the lake, was contradicted by every law enforcement witness at the scene.

At trial, the defense did not call Tony Rime as a witness even though Mr. Rime could have discredited Schroeder's testimony. The jury was left with no evidence that supported Tom's story that he beached the boat and ran to the Inn. In post-conviction proceedings, however, this fact became an issue. (T. 1344-45.) In the hearing on Tom's first petition for post-conviction relief, Dep. Kveene testified that Tom's boat was facing into shore, not facing the lake. (PC. 46.) Kveene testified that Tom had to get into the water to push the boat and turn it around before they could head out onto the lake to search for Jane. (PC. 45-48.) But without Mr. Rime's testimony, Kveene's testimony did not carry much weight.

Mr. Rime's statement—that the boat was pointing toward the shore—corroborated Dep. Kveene and Tom and contradicted Schroeder. In fact, in Tony Rime's statement given before trial, he recalled that the boat was pulled onto the beach near the dock when he, Kveene, and Tom arrived at the boat. And he remembered there being sand underneath the boat. (B. 0421.) The CRU spoke with Tony Rime on June 1, 2022. Mr. Rime said he could not remember whether the boat was tied up or on the beach, but he did remember the boat was facing into the shore.⁷²

Brian Hunter testified in Tom Rhodes's post-conviction hearing. He too provided testimony that corroborated Dep. Kveene, Tony Rime, and Tom's recollection and impeached Mark Schroeder's testimony. Mr. Hunter testified that he saw a boat come into shore near Little Melvin's around 1:00 am. The driver beached the boat, jumped out, and ran to the Northern Inn. Hunter and his girlfriend walked over to the Northern Inn and saw the same man talking to the clerk in a "hysterical" manner that was hard to understand. Hunter identified the man as Tom Rhodes.⁷³ (PC. 8-9, 19.)

After full review of all documents in the case and an interview with a first responder on the scene, the CRU found Mark Schroeder's statement, given five days after the incident, provably wrong on the material facts. Law enforcement officers and a first responder on the scene provided facts that directly contradicted Schroeder's account. Yet, instead of discarding Schroeder as an

⁷² CRU Interview with Alton Rime, June 1, 2022. The CRU was unable to interview Mark Schroeder, and Rhodes's defense counsel was unable to interview him before Rhodes's filing his post-conviction petition because Mr. Schroeder died before 2014.

⁷³ Brian Hunter's recollection conflicts with his girlfriend, Nicole Smith's, recollection. Ms. Smith did not recall seeing a boat pull up on the beach and a man run to the Northern Inn, but she did recall seeing him "hysterical," "dripping wet," and trying to talk to the hotel clerk. (PC. 58-59, 83.)

unreliable witness, the prosecutor avoided the details upon which Schroeder could have been impeached. First, the prosecutor did not ask Schroeder how many men got into the boat. Nor did the prosecutor ask whether, once in the boat, the men took off immediately. In addition, the prosecutor chose not to call Tony Rime to testify in the grand jury or at trial. The prosecutor could not avoid calling Dep. Kveene as a witness, but the prosecutor avoided questions that would elicit evidence that contradicted Schroeder's account. For example, the prosecutor did not ask Dep. Kveene which way the boat was facing.

Defense counsel could have undermined Schroeder's credibility by calling Tony Rime as a witness. After all, the defense had Rime's statement and could have subpoenaed him to testify. But defense counsel failed to challenge Schroeder's testimony in any meaningful way.

The CRU found no credible evidence to support Mark Schroeder's testimony that Tom Rhodes circled his boat around to face out into the lake, rummaged through compartments on the boat, and walked unhurriedly toward the Northern Inn with indifference to the situation at the time.

Although there is evidence that Tom Rhodes may have purposely misidentified the location where Jane fell into the lake to thwart rescue attempts, put in context, this evidence is weak.

At trial, the State set out to prove that Tom was lying about where Jane entered the water. The State's evidence for this proposition is that Jane's body could not have ended up where it did if she had fallen into the water where Tom first directed rescuers to look. But this argument was a false construct, and it infected the trial and post-conviction proceedings.

All experts interviewed by the CRU agreed that rescuers should not rely, without skepticism, on the person who witnessed the accident when searching for a potential drowning victim. Finding a particular spot on a lake at night is extremely difficult, especially if the person is not familiar with the lake or is under stress. The experts agreed that a person needs more than one point of reference when trying to return to a specific spot on a lake. At least three points of reference are necessary. The experts agreed that a search for a drowning victim should encompass a wide area around the point where the person was last seen, and the search area should move with the direction of the wind.⁷⁴

⁷⁴ Capt. Chandler said in the interview that Hennepin County's practice is to establish a half-mile perimeter.

The experts agreed that seeing a drowning victim on a lake at night can be extremely difficult. That is why, Capt. Chandler explained in an interview with the CRU, Hennepin County's searches always include a helicopter. Capt. Chandler said it is easier to see a body from a higher vantage point. Some experts explained that spotting a body when the moon is full can be more difficult than when the sky is darker because the light reflects off the water. (T. 1263-64; CRU Interview with Gene Ralston.) Dr. Aiken pointed out that Jane's clothing would have been harder to see on a lake and that had Jane been knocked unconscious by her fall, she would not have resurfaced.⁷⁵

When Tom Rhodes returned to shore, according to all witnesses but Mark Schroeder, he behaved as someone who was experiencing an extremely stressful situation. He was new to Green Lake, having never been there before the week of the incident. He did not have more than one point of reference for where Jane fell overboard. And he gave obviously inaccurate estimates about the distance he was from the shore to the first responders, who never questioned his judgment the evening the search began.

According to the information provided by the investigators, for the first two hours of the search, the search was limited to the area where Tom believed Jane fell in. Although the wind was blowing 10 to 14 knots in a northwesterly direction, the available evidence shows that the search area remained near and to the southeast of Tom's original spot.⁷⁶ The search did not move north when Tom twice suggested the location of Jane's fall could have been further north. And the search did not move to the northwest despite the steady winds that would have pushed a body in that direction. Instead, the search only moved north late the next morning after Dale DeRung told rescuers what he saw the previous evening. Had Jane fallen into the lake where Tom originally identified, it is unlikely the rescuers would have found her because when they returned to the lake, the wind would have already pushed her body further north.

One of the defense experts, Dr. Wigren, conducted a simulation that showed it was possible for a floating body to travel nine-tenths of a mile in under 13 hours with winds of 10 to 14 knots, gusting to 17 knots. His simulation showed it was possible for Jane's body to travel from the point

⁷⁵ CRU Interview with Dr. Aiken.

⁷⁶ Supplement 7, Dep. Roe's detailed map.

Tom originally identified to the shore where she was found.⁷⁷ The evidence developed post-conviction supports the possibility that Jane drowned where Tom said she fell into the lake.

It is also possible, and probably more likely, that Jane fell into the lake where Dale DeRung suggested—four-tenths of a mile north of where Tom originally led rescuers. The DeRung’s description of what they saw the night of the incident is closely aligned with Tom’s account. First, the timing was right. They first saw the boat after 11:30 pm, and the boat was drifting. Tom’s original statement said he and Jane were drifting in the boat after they went onto the lake just after 11:30 pm. Around midnight, Kristy DeRung saw the boat still drifting and heard a woman laughing. When Dale and Karen DeRung came back outside after 12:15 am, the same boat was slowly driving back and forth and circling, just as Tom had described his attempts to locate Jane. According to the DeRungs, only one man was on the boat, and he seemed to be looking for something. It is likely the DeRungs saw the Rhodes’ boat before and after Jane’s fall.

The distance between where Tom first led rescuers and the spot the DeRungs identified was approximately a half-mile. That suggests that Tom may have been off by a half-mile when he took rescuers out on the lake to search for Jane. He reflected on this possibility in his last recorded interview with State Farm’s investigator. In that interview, Tom said he regretted that he did not get good reference points on each side of the lake. He said that after talking to law enforcement officers, “I realized how stupid [I] was.” (B. 0231.)

Even if Jane fell into the lake where the DeRungs suggested, it is possible Tom was mistakenly wrong rather than intentionally lying. Witnesses described him as confused about the location. The location near the DeRungs’ house was within a half-mile perimeter of Tom’s original point, and Capt. Chandler suggested that a half-mile was a reasonable perimeter because that is what Hennepin County routinely used. Dr. Aiken noted that, in her experience, “boat drivers have difficulty re-locating the site of an incident at night on a lake.” (Supplement 2, at 8.)

Had Tom been trying to deceive rescuers, it makes little sense for him to suggest the search should move further north within just 20 minutes of leading the rescuers to the location where he thought the search should begin. Nor does it make sense that the next morning he would again suggest the search move further north. If he was trying to direct rescuers’ attention away from the

⁷⁷ Appendix to Rhodes’s Memorandum of Law in Support of Petition for Post-conviction Relief, March 21, 2014, at A-28-31.

area near the DeRungs' house, it seems unlikely he would twice suggest they move in that direction.

Even accepting the State's theory about why Jane could not have drowned where Tom identified, she could not have drowned where the shore witnesses suggested either.

At trial, Capt. Chandler testified that Jane could not have surfaced nine-tenths of a mile north of the location Tom originally identified 13 hours after drowning. Capt. Chandler testified that when a drowned body submerges, it goes straight to the bottom. (T. 1107, 1112.) Once it reaches the bottom, a body will not refloat until decomposition causes an increase in the body's buoyancy. (T. 1117.) Decomposition time depends on the temperature of the water, and the water, by Capt. Chandler's calculation, was 39.2 degrees at a depth of 40 feet. At a temperature of 39.2 degrees, a body would not resurface for at least three weeks. (T. 1120.)

Capt. Chandler determined that the water depth where the search began was 40 feet. Capt. Chandler testified that Jane would have sunk to the bottom very near the spot where she fell in. (T. 1112) Therefore, it would have taken a minimum of three to four weeks for her body to refloat. According to Capt. Chandler, only if Jane drowned in water 10 feet deep or less could she have refloat just 13 hours after she drowned. (T. 1120)

In the post-conviction proceedings, the defense offered evidence that Capt. Chandler gave inaccurate testimony about the temperature of the lake where Jane allegedly fell in. A report from the Department of Natural Resources showed that the temperature of Green Lake at a depth of 40 feet was 68.9 degrees, not 39.2 degrees. The court found this evidence immaterial because even at a temperature of 68.9 degrees, a body would not refloat for at least one week.⁷⁸

The main problem with Capt. Chandler's testimony was not that he got the temperature wrong, although it would certainly diminish his credibility as an expert. Regardless of whether the body sank where Tom originally identified or where the DeRungs identified, the body would have reacted the same way because the depth of the lake at both locations was 40 feet.⁷⁹ Capt. Chandler's opinion makes the State's theory, that Jane drowned where the witnesses saw a boat circling, impossible. This point did not come through clearly at trial even though Capt. Chandler testified

⁷⁸ *Rhodes v. State*, 875 N.W.2d at 785.

⁷⁹ Attachment 8, Deputy Roe's Map of Green Lake with depth markings. Note that Box #1, where Tom first led rescuers, is between the 30-40 feet in depth, while Box #4, where the DeRungs saw Tom's boat circling, is well within the 40-foot depth line.

that Jane's body had to have drowned in 10 feet of water or less to end up where her body was found. (T. 1120.) The defense failed to remind the jury that there had been no testimony that would suggest Jane's body drowned in an area where the water was 10 feet deep or less.

At trial, Capt. Chandler gave nuanced testimony about whether Jane's body could have floated nine-tenths of a mile. He did not testify that it was impossible for a body to float nine-tenths of a mile after drowning. Capt. Chandler testified that he did not believe a body could remain afloat without a life jacket, although he admitted he had seen a couple of bodies that did not sink in his estimated 300 rescues. (T. 1112.) He also testified that he did not believe a body could float nine-tenths of a mile and "*elude the attention of trained observers who are looking for it.*" (T. 1121.) The problem with Capt. Chandler's testimony is that there were no trained observers on the scene when the search for Jane began. The first responders who began the search used what they had on hand—Tom's boat and hand-held flashlights. Furthermore, according to investigation reports, the search for Jane's body remained near or upwind from the spot Tom had originally identified.⁸⁰ If Jane's body was floating, the searchers would not have found her by searching upwind from the place where she fell into the water.

In an interview with the CRU, Capt. Chandler said that it is possible Jane was a fresh floater—someone who never submerges. He said he had found several fresh floaters in his work. But he emphasized, "We found them," meaning that his team was able to see the body floating. Chandler further explained that in searches his team conducted, they routinely put down a half-mile perimeter around the last-seen location. The perimeter would move downwind as they searched. According to Chandler, his teams always put a helicopter in the air if a potential drowning victim was still missing because, he said, you cannot see well from the surface. "You get deflections, and you can see better from a helicopter." Chandler also said his teams always walk the shoreline, and if someone had walked the shoreline, Jane would have been found sooner.

The search protocols Capt. Chandler's team regularly followed were not used to locate Jane. The searchers did not establish a half-mile perimeter. They did not use a helicopter. They did not move downwind. They did not move even when Tom recommended it. They did not walk the shoreline, and they did not have adequate lighting. Given these facts, there is no evidence suggesting it would be impossible for Jane's body to float nine-tenths of a mile without being detected.

⁸⁰ Attachment 7. The search was confined to squares 1, 2, and 3 until 11:00 am on August 3rd.

Experts agree that a drowned body can float rather than sink. Dr. Wigren presented compelling findings showing that Jane’s sex, body type, and clothing made her more prone to float given the results of recent studies: “overall, females were significantly more buoyant than males,” “percentage of body fat plays a role in determining the ability to remain afloat,” “buoyancy is determined by ratio of fat to fat-free tissue,” “the higher the ratio [of fat to tissue], the more likely it is that an individual will be able to float,” “foam in athletic type shoes provided approximately 7 Newtons of buoyancy,” “even this minor addition to buoyancy enabled the female participants to ‘float freely’ on approximately 95% of occasions,” “this percentage fell to 25% when the trainers (athletic shoes) were removed.”⁸¹

Dr. Aiken agreed that some bodies float, noting that although “many bodies sink shortly after drowning, there are occasional exceptions, likely a result of body habitus, and other factors.” (Aiken Report, at 8.) She believed that Jane’s body had the type of physique that would float. In her interview with the CRU, Dr. Aiken mentioned a plane crash over a lake that resulted in several deaths. Some of those bodies floated while several others sank.

The CRU searched for more detailed studies on how to predict when and what bodies float rather than sink after drowning. Finding a dearth of research, the CRU asked water rescue expert Gene Ralston about the sink-float phenomenon. He said that anyone estimating the odds of Jane’s body floating were just guessing because “there is no body farm for drowning deaths.”⁸² In other words, scientists cannot conduct experiments to see how many people who drown would float versus sink. His own guess about the probability that Jane would have floated was 40% to 60%, given her gender, height, weight, and clothing.⁸³

Given that all of the experts agree Jane *could have* floated, a rational hypothesis exists that Jane’s body could have traveled up to nine-tenths of a mile to where her body was found.⁸⁴ Just as likely, she could have traveled four-tenths of a mile from where the DeRungs saw a boat circling to the shore where she was found—which was four-tenths of a mile directly downwind.

⁸¹ Appendix to Rhodes’s Memorandum of Law in Support of Petition for Post-conviction Relief, March 21, 2014, at A-28-29.

⁸² The Body Farm is the popular name given to University of Tennessee in Knoxville’s Forensic Anthropology Center. The Body Farm systematically studies the decomposition of bodies that are buried on the Center’s “Farm” to assist in developing better knowledge and procedures for death investigations.

⁸³ CRU Interview with Gene Ralston.

⁸⁴ The CRU continues to find the most persuasive evidence favors the location the DeRungs identified as the place where Jane fell into the lake. And the evidence about floatation would make this location even more probable while still not excluding a location further to the south, where Tom first led rescuers.

Evidence that a shore witness heard Jane Rhodes screaming “stop, no, it hurts” is weak, and the defense lacked valuable impeachment evidence.

At trial, Andrea Iverson testified that when she went onto the deck of her sister-in-law’s lake house, she heard moaning and then she heard a woman screaming, “stop, no, it hurts,” as the boat whipped around erratically (T. 752.) The prosecutor signaled the importance of Andrea’s testimony in arguments to the jury. In opening statement, the prosecutor told the jury that Andrea heard a female yelling, “No, stop it, it hurts.” (T. 578.) In closing, the prosecutor came back to what Andrea heard—“No, stop it, that hurts”—and used her testimony to argue, “[T]his was not an accident, this was not an oops; this was a premeditated and intentional murder.” (T. 1330.)

In post-conviction proceedings, the Minnesota Supreme Court found that Andrea Iverson’s testimony, along with the other shore witnesses’ testimony, corroborated Dr. McGee’s testimony.⁸⁵ And Andrea’s testimony, if believed, did, indeed, provide strong evidence to corroborate Dr. McGee’s opinion that Jane was forcefully thrown off the boat after a struggle.⁸⁶ However, the CRU’s investigation found several problems with Andrea’s testimony, some of which the jury never heard.

First, when Andrea initially recalled what she heard and saw, she described hearing a woman’s voice saying—*not screaming*—“no, stop it, it hurts” from the boat. Andrea gave her first interview to detectives about 20 hours after the incident she witnessed. The interview was recorded. In this first statement, Andrea started out somewhat confused by what she had heard. Andrea told the detectives that she was standing on her sister-in-law’s deck when she heard “weird noises” coming from the lake. (B. 0120.) They were “kind of a muffled murmur” or groaning. She looked out on the lake and saw a boat making “weird circles.” (B. 0120.) Then she heard a woman “*say* no and then I wouldn’t hear anything for awhile and then stop it and it hurts and different things.” (B. 0120.)

⁸⁵ *State v. Rhodes*, 657 N.W.2d 823, 841 (Minn. 2003). That the shore witness accounts were used to corroborate Dr. McGee’s opinion is problematic because Dr. McGee relied on shore witness accounts to arrive at his medical opinions. This type of circular reasoning was not exposed at trial and, therefore, cannot be found in the record. The CRU discovered this circular logic by reviewing the Medical Examiner’s file and the communications between the prosecutor and Dr. McGee during the post-conviction proceedings. Thus, the Minnesota Supreme Court was unaware that it engaged in circular reasoning.

⁸⁶ According to notes from the Medical Examiner’s file, Dr. McGee also relied on witness accounts “cries from the lake [with] erratic driving at night” to reach his determination on the medical findings. See Attachment 4.

The interview continued, and Andrea described what first drew her attention to the boat she saw. While Andrea gave the detective her description, the detective conducting the interview introduced the idea that Andrea heard the woman screaming “stop it, no.” At first, Andrea disagreed with the detective’s characterization. The interview transcript captured this exchange:

Q. What drew your attention?

A. The moaning.

Q. Okay.

A. The groaning. I-- I mean to tell you the truth at first I thought maybe they were having sex out there.

Q. Okay.

A. But I wasn’t really sure.

Q. That’s okay. How long did that moaning go on?

A. Um, at least 30 seconds if not more maybe? Just becuz I kept trying to figure out where it was coming from—like was it coming from a dock or was it coming from that boat or where was it actually coming from?

Q. Okay.

A. And then that’s when that had stopped and then it proceeded to be stop it, no, and then all that.

Q. Let me—let me interrupt ya right now. Ya hear the moaning going on, you think there's somethin’ maybe of a sexual nature that's going on.

A. Yeah.

Q. Then the next thing you hear is stop it or **is there a scream?**

A. No, **I don’t think it was a scream.** I think it was like – **I think it was a voice. The next thing I heard was a voice to stop it.** (B. 0122.)

The detective, not Andrea, introduced the idea that the woman she heard on the boat was screaming “stop it.” Andrea disagreed with him. But later in the interview Andrea adopted the detective’s description and abandoned the description she had given earlier.

Q. Okay

A. . . . But [the boat] wasn't doin' no – I don't – it wasn't doing that circular thing but then **once she started screaming**, it was, becuz then I was like well, what are they doing now, you know, kind of thing like that.

Q. **And when she was what we're gonna call screaming, what was she screaming** or what was she saying?

A. No, stop it, it hurts, that kind of thing. (B. 0123.)

And by the end of the interview, Andrea had fully adopted the detective's characterization of the woman's voice screaming.

Q. Okay. When you were looking at the boat and hearing these voices, would you say that they were like whispers that would just carry on a lake or . . .

A. No.

...

A. It wasn't – I guess the wind was coming towards us so we probably picked up the voices a little bit more than you would if, ya know, the wind was going the other way but **it was definitely screaming**. (B. 0124.)

Andrea's memory morphed during the interview in a predictable way. Researchers have identified a phenomenon known as misinformation effect, which happens when witnesses are exposed to misinformation, often in the form of a leading question, and the witness adopts the misinformation. For example, one study focused on witnesses who observed a car fail to stop at a stop sign and hit a pedestrian. The witnesses were asked "how fast was the car going when it passed the yield sign?" The witnesses often remembered the scene as having a yield sign rather than a stop sign. These types of studies have been recreated over the years, and many show that even a seemingly benign wording of a question may contaminate a witness's memory. For example, participants in a study were more likely to answer yes when asked "Did you see the broken headlight?" than when asked "Did you see a broken headlight?" Importantly, this type of memory contamination occurs without any attempt by the questioner to mislead or deceive.⁸⁷

The most essential part of Andrea's trial testimony was that she heard a woman **screaming** "stop it, it hurts," as if the woman was in distress. Yet this characterization originated with the

⁸⁷ For a helpful explanation of this effect and a list of resources, see <https://nobaproject.com/modules/eyewitness-testimony-and-memory-biases#content>.

investigator, not with Andrea. At trial, none of the other witnesses testified that they heard a woman screaming in distress.

If Andrea was confused about what she heard and her memory morphed because of the detective's leading questions, it is not surprising that several months after she witnessed the event, Andrea failed to mention this essential part of her statement—that the woman on the boat was screaming or saying “stop it, that hurts.” A prosecutor who prepared Andrea for her appearance before the grand jury noted this important omission in a memo the CRU found in the prosecutor's file described as “timeline of shoreline witness' observations.”⁸⁸ The document notes:

[At midnight,] Andrea Iverson, on the outdoor deck at 311 Lake Avenue, hears loud moans coming from the lake. Andrea's first impression is that the moans sound sexual. This draws Andrea's attention to a particular boat, which is driving fast and erratically. Andrea realizes that the people on the boat cannot be having sex and simultaneously driving the boat in this fashion. The moans last about thirty seconds. Frightened screams, which last about one minute, then come from the boat. **(In her statement to police, but not in her grand jury prep session, Andrea said that she heard a woman say “stop it, that hurts.”)**

The prosecutor did not provide the defense with this “timeline of shoreline witness' observations” even though it contains a summary of a witness's statement that differs—in a material way—from her earlier statement. Therefore, the defense was unable to effectively cross-examine the integrity of Andrea Iverson's memory about this very important fact during trial, a fact the prosecutor repeated several times during trial to support a finding of premeditated, intentional murder.

Andrea's testimony at trial—that she heard a woman screaming “no, stop it, it hurts”—does not align with her initial recollection of what she told the detective she heard. Given the fact that her memory may have been contaminated by a detective's questions and that she did not recall the woman saying “no, stop it” months after the event, the CRU was interested in the likelihood, given the conditions at the time, that Andrea *could have heard* a woman's voice saying “no, stop it” as the boat circled out on the lake.

Andrea described the boat as being “pretty far out there.” (GJ. 133.) It was so far out that none of the witnesses in the Iverson group could decipher what type of boat it was, how many passengers were on board, or whether the boat was pulling someone riding an innertube or someone barefooting. (B. 0120-25.) Furthermore, according to Andrea, the boat's engine was

⁸⁸ Attachment 9 (bold typeface added for emphasis).

continually running while it was being driven erratically. (B. 0124.) The engine was going fast, and constant, and the driver did not slack off. (B. 0126-27.)

Considering the test that investigators performed with the Rhodes' boat, it is hard to understand how Andrea could have heard what the woman on the boat was saying. Detectives tested whether a witness could hear what someone on the Rhodes' boat was saying if the boat was driving some distance away from the shore. They found that when the boat was 100 to 200 yards from shore—much closer than what the shore witnesses described—a person on shore could hear voices but could not hear what they were saying.⁸⁹

Finally, it is unlikely that Andrea was hearing Jane Rhodes on the boat she saw because it is unlikely that she and the rest of the Iverson group were watching the Rhodes' boat at midnight. John Iverson saw the same boat earlier that evening, between 10:30 and 11:30 pm. The boat John saw earlier was driving in the same fashion, which he described as a pattern of eights and nines. But the Rhodes did not leave the Northern Inn until 11:30 pm. Furthermore, as described in the prosecutor's "timeline of shore witnesses" memo and in Kristy DeRung's recorded statement, Kristy and her boyfriend saw a boat sitting and drifting directly off the shore from the DeRungs' house at midnight—the same time the Iverson group was watching a boat driving erratically—when Kristy heard a woman laughing. (B. 0278-80.) Neither Kristy nor her boyfriend heard screams or words of distress.

Tom Rhodes's statements about the incident have inconsistencies, but they don't provide sufficient support for a first- or second-degree murder conviction.

Tom Rhodes's statements about the incident evolved in ways that raise questions about his truthfulness and what happened immediately before and after Jane fell into the lake. In fact, the State argued forcefully that Tom's inconsistent statements support his conviction for first-degree premeditated murder. The Minnesota Supreme Court agreed. In its 2016 opinion denying Rhodes's fourth petition for post-conviction relief, the Court concluded that the non-medical evidence *independently* supported Tom Rhodes's conviction. "The nonmedical evidence included "physical

⁸⁹ When the CRU interviewed prosecutor in post-conviction, he explained that Andrea may have heard words from a person on boat in the water, even though investigators who were closer to the shore could not hear words coming from the Rhodes' boat when they tested it. He asserted that women can hear at decibel ranges men cannot.

and motive evidence, testimony as to Rhodes' conduct, and inconsistencies in Rhodes' statements."⁹⁰

When a person provides multiple statements about the same event, inconsistencies are expected. Through every retelling of a witnessed event, there is opportunity for memory contamination, and every bit of information the witness learns has the power to change his memory of the events. Generally, if the witness is honestly trying to retell the story, the most immediate telling is the most accurate. Stories told days to weeks later are more likely to contain inaccuracies.

Whether and when a witness's statement was recorded is highly relevant when judging its accuracy. The most reliable accounts are those that law enforcement records, verbatim, close in time to the witness's telling. When witnesses later provide details about what another person told them, they are considered "ear witnesses," and the witnesses' retelling of another person's story is likely to be inaccurate on important details.⁹¹ Like many of us learned from playing the "telephone" game, most people do not have a good memory for the details of stories about things they did not see or experience, and when people retell those stories to others, they rarely get all important details right.

The CRU carefully analyzed every statement ascribed to Tom Rhodes. The CRU found minor inconsistencies about what happened before Jane fell into the lake, but it found more troubling inconsistencies about what happened after the fall.

The prosecutor argued that Tom's statements contained inconsistencies regarding the direction and speed of the boat when Jane fell out, but the CRU could find no reliable evidence to support this conclusion. Tom consistently told law enforcement he was going north and looking to the right or east when Jane fell out. He also consistently told law enforcement that the boat was going about 40 mph, which would have been top speed, so that the boat would plane out. Perry Weiland was the only witness Tom spoke to the night of the accident who heard a different version. Weiland remembered Tom saying that the boat was going slowly when Jane fell. But Weiland was with Tom most of the morning after the incident. Weiland helped Tom with calls to his parents and Jane's parents. Weiland was with Tom when he told his sons about the incident when they woke up. Weiland did not record a statement with law enforcement until five days after the

⁹⁰ 875 N.W.2d at 790.

⁹¹ See generally Laura Campos & Maria L. Alonso-Quecuty, *Remembering a Criminal Conversation: Beyond Eyewitness Testimony*, 14(1) *Memory* 27-36 (2006).

incident. It would not only be understandable, but expected, that Weiland would get some of the details of the evening wrong.

Tom also remained mostly consistent in describing Jane's fall. His various statements described Jane as rising from her seat and bending forward to pick something up. He looked to his right, and when he looked back to his left, all he saw were Jane's shoes going off the boat. Tom's statements describe Jane falling off the back, or the side, or near the front of the boat. The prosecutor thought these inconsistencies about where Jane fell out of the boat were significant. The CRU had difficulty understanding the prosecutor's concern about these inconsistencies because the space between the seat where Tom and Jane were sitting and the seats at the front of the boat was only a few feet. In fact, when detectives tested the boat, they noted that when sitting where Tom said Jane had been sitting, Det. Hartog could bend forward at the waist and reach his arms far enough to touch the edge of the seats at the front of the boat. (B. 0049-50.) The front, middle, and back of the boat were all within one small stride of each other in the Rhodes' boat. (Attachment 6.) Given that the boat was traveling at a high rate of speed, a fall from the front would have sent Jane off near the rear of the boat.

This is not to say Tom's explanations were without inconsistencies. Most troubling was the evolving nature of what happened just before Jane fell, and what Tom did after she fell.

The Mankato Interview

Almost two weeks after Jane drowned, Dets. Cruze and Hartog interviewed Tom at the Mankato Police Department. Tom recalled leaving the Northern Inn after watching the Olympics. He and Jane went out on the lake and sat looking at the stars. They saw another boat without lights "tearing around," and it made them nervous. (B. 0203.) The waves were getting bigger. Tom took off to the north and had the boat at full throttle, meaning the boat was traveling around 40 mph. (B. 0204.) He looked right, toward the moon, he looked left and saw Jane getting up, like she was trying to pick up something she dropped. When he thought she was moving back to sit down, he looked right. And when he looked back toward her again, he saw her go over near the front deck. (B. 0205.) He did not hear Jane say anything. (B. 0206.)

When Jane went into the water, Tom remembered that first, he missed the throttle, and then he pulled it back and started to turn the boat around. (This was a fact Tom had not mentioned to anyone before the Mankato interview.) Then he accelerated, going straight back to where he

thought she fell. Neither he nor Jane were wearing life jackets, and Jane was not a good swimmer by any means. (B. 0208.) Tom did not have a flashlight on the boat, and the moon was not helping him to see Jane. (B. 0209.)

Tom jumped into the water to find her, but he left the boat engaged so it kept circling around. He got back in the boat and zigzagged. He may have gone further north and called her name. He could not remember. He said he got no response. (B. 0211-12, 0220.) Tom denied harming Jane, but he said he felt bad that they hadn't been wearing their life jackets. (B. 0223.)

The Glendenning Interview

On October 10, 1996, over two months after Jane drowned, David Glendenning, a claim representative with State Farm Life Insurance, interviewed Tom. (B. 0226.) Tom said he was driving the boat away from where he and Jane had been sitting because he was worried about another boat with no lights. (B. 0227.) He said people in the other boat sounded like they had been partying. He thought the boat was about 500 to 600 feet to the south of them. (B. 0235.) Tom said he was going full throttle heading north when he noticed Jane standing up to reach something. (B. 0238.) She took a step back like she was going to sit down, and Tom glanced to the right. When he looked back to the left, he just caught a glimpse of Jane's shoes going over the edge of the boat between the front deck and the seats at the back of the boat. (B. 230.) Tom explained that he missed the throttle when he first tried to grab it. Then he grabbed the throttled, slowed down, "turning left and accelerating real quick" back to where he thought she fell out. He had no flashlight, so he stood on the back seat and used the riser light to look for Jane. (B. 0230.)

Tom told Mr. Glendenning that he was yelling for Jane. He remembered yelling, "Jane, it's Tom . . . yell, yell or make a sound." (B. 0230.) Tom remembered zigzagging in the boat, then turning off the boat and yelling for Jane. At some point he thought he heard a gasp. (B. 0230.) Tom also said he believed Jane may have let out a "muffled scream" when she fell out of the boat. (B. 0240.) These details differed in a significant way from Tom's earlier statements.

Tom expressed regret that they weren't wearing life jackets. He said he guessed they got "too relaxed around the lake." (B. 0232.) He also regretted not "pinning down the area better" so that he could lead law enforcement to where Jane fell in. (B. 0231.) Tom thought he'd probably sell the boat because of the low sides and because of the accident. (B. 0235.)

There are innocent explanations for the change in Tom's explanations. Memories change with time. They can be reconstructed in telling the story and in receiving feedback from others. Tom's version morphed in understandable ways. It became more detailed in later accounts, and it changed with different audiences.

Tom's differing versions seem to show his regret for the actions he did not take rather than a cover-up for actions he planned and carried out. Tom's explanation about the presence of life jackets, for instance, changed. At first, he said he and Jane were sitting on them. He told someone else that they were nearby. Ultimately, he told a story of regret about the life jackets, perhaps owning up to the fact that Jane, who could not swim, should not have been out on a boat, with low rails, late at night, on choppy water, going at a high rate of speed, without wearing a life jacket.

Likewise, Tom may have begun to realize that when on the lake at night, with a passenger who does not swim, you need to have heightened awareness about your surroundings in case an accident occurs. And you would need at least a flashlight on board.

Finally, Tom's adoption of a new version—that he called out for Jane many times—seems to show regret rather than premeditation. Tom gave a consistent explanation to all law enforcement officers. He said he did not remember yelling Jane's name. Two months later, when talking with an insurance claims representative, he adopted a different ending. If one were going to lie to cover up a murder, telling your most defensible story to a civilian, months after the incident, would be irrational.

The CRU found very few inconsistencies in Tom Rhodes's statements and none that would support a conviction for first- or second-degree murder. The State did not prove its case against Tom Rhodes through his inconsistent stories. It proved its case through its two experts. Dr. McGee provided the testimony upon which the conviction rests—defensive injuries to Jane's arms, a blow to her neck by a hand in a "V" position, and at least two blows from a flat boat hull. Capt. Chandler provided corroboration—leading the jury to believe that Jane could not have drowned where Tom described. Capt. Chandler's testimony repackaged the evidence of Tom's anxiety and eagerness to find his wife into evidence of a premeditated ruse to cover-up his crime. Yet his original temperature measurements were inaccurate, and they were unchallenged by the defense. The State's expert testimony won the murder conviction. Everything else was window dressing.

VI. Conclusion

Thomas Rhodes's conviction for first- and second-degree murder has been undermined by facts that came to light since the conviction. Assessing the evidence as a whole, the murder convictions may have resulted in a miscarriage of justice.

Prosecutors have a special role in the legal system. They represent the government as advocates, prosecuting people who have been charged with crimes. Simultaneously, they have an ethical duty to seek justice, not merely convict, and the prosecutor's primary duty as a minister of justice is to seek the truth. The prosecutors' special role also requires them to intervene even after a conviction when evidence of a wrongful conviction arises.⁹² When prosecutors become aware that they have failed to disclose evidence favorable to the defense or that they may have unknowingly presented false evidence, they have a duty to disclose the evidence, to search for the truth, and to rectify any injustice that may have resulted.

As a result of the CRU investigation, there is evidence that the State unknowingly presented false or misleading evidence at trial and in subsequent post-conviction proceedings. The State also failed to disclose evidence relevant to the case and favorable to the defense. This evidence could have been used by the defense to support its theory that Jane Rhodes died from an accidental death. In the hands of competent counsel, the undisclosed evidence could have impeached crucial prosecution witnesses who were necessary to establish that Jane's death resulted from a premeditated, intentional act, and would have given greater plausibility to the defense's theory that the death was unintentional and accidental. These failures violated Rhodes's right to due process.

Due process concerns not only the fairness of a proceeding but the accuracy of the result. The unknowing use of false or misleading evidence compromises both the fairness and accuracy of proceeding. In the Rhodes case, the prosecutor relied solely on Dr. McGee's own assessment of his opinion regarding the cause and manner of Jane Rhodes's death to determine the reliability of his opinion. Yet, in the years since Tom Rhodes's conviction, courts have found a "public and troubling fact that longtime Ramsey County Medical Examiner Michael McGee has a well-documented history of providing false or inaccurate testimony in court."⁹³ The CRU found the same pattern in *Rhodes*.

⁹² ABA Model Rule 3.8(g).

⁹³ *Rodriguez*, at 51.

Nine defense experts and the CRU's independent expert agreed with each other and disagreed with Dr. McGee's classification of Jane's death as a homicide. The CRU's independent expert found:

- No medical evidence to support Dr. McGee's conclusion that Jane suffered a blow to the neck from a hand in the "V" position;
- No medical support for Dr. McGee's opinion that Jane suffered defensive wounds;
- No medical evidence to support Dr. McGee's opinion that Jane received *multiple* blows by a boat;
- Dr. McGee's testimony that Jane could have died from a blow to the head rather than from drowning was found to be not credible.

Importantly, although the CRU sought Dr. McGee's response, he refused to meet with the CRU to explain his opinions or consider the evidence the CRU had compiled. As a result, the State unknowingly presented false or misleading evidence at trial and in post-conviction proceedings. The false or unfounded evidence supported the State's theory of a premeditated, intentional homicide and misleadingly ruled out a potentially accidental cause of death.

The State also presented inaccurate evidence through Capt. Chandler, who testified that Jane could not have resurfaced within 13 hours from the spot where Tom led first responders. The State admitted that Capt. Chandler was wrong about the temperature of the lake, which served as the basis for his opinion, but the post-conviction courts found no prejudice because even with an accurate temperature the result would have been the same—Jane could not have resurfaced within 13 hours. However, this analysis ignores the most likely scenario. Jane's body most likely never sank to the bottom of the lake. Most likely, her body floated to the shore. And if her body did not float to shore, then the State's reliance on the shore witnesses was misleading because they placed the boat they saw in an area of the lake that was even deeper and colder than where Tom originally led rescuers. Capt. Chandler's inaccurate testimony was important for showing that under either the State's or the defense's theory, Jane's body must have floated to shore rather than sank.

When there is any reasonable likelihood that false or misleading evidence presented by the State affected the jury's verdict, the remedy is a new trial. *Napue v. Illinois*, 360 U.S. 264 (1959). In this entirely circumstantial case, where the State had to disprove every reasonable hypothesis of innocence, Dr. McGee and Capt. Chandler provided the most persuasive evidence—arguably the only evidence—that could disprove Tom Rhodes's account of Jane's accidental fall from the

boat and single blow upon his return to find her. Therefore, the State does not oppose the Petitioner's motion to vacate Tom Rhodes's conviction for first- and second-degree murder.

In addition, reversal is warranted because the State failed to disclose evidence favorable to the defense that could have affected the jury's verdict. The United States Constitution requires the State to disclose evidence favorable to the defendant, including evidence that is exculpatory or impeaching. *Brady v. Maryland*, 373 U.S. 83 (1963); *Smith v. Cain*, 565 U.S. 73 (2012). A new trial is required when the undisclosed evidence is material, i.e., when there is a reasonable probability that had the evidence been disclosed the outcome would have been different. *Cone v. Bell*, 556 U.S. 449 (2009). A reasonable probability does not mean more likely than not; it means that the likelihood is enough to undermine confidence in the outcome. *Kyles v. Whitley*, 514 U.S. 419 (1995). The appropriate *Brady* analysis is whether "disclosure of suppressed evidence to competent counsel would have made a different result reasonably possible." *Id.* at 441. And suppression of evidence favorable to the accused violates due process whether the evidence was suppressed willfully or inadvertently. *Brady*, 373 U.S. at 87.

In Minnesota, when the State violates discovery rules in criminal cases, courts apply a standard more favorable to the defendant than the United States Constitution affords.⁹⁴ Minnesota courts have evaluated discovery violations under a harmless error analysis, granting a new trial if the undisclosed evidence "could have affected the judgment of the jury." *State v. Hunt*, 615 N.W.2d 294, 298 (Minn. 2000).

In its review, the CRU found evidence that should have been disclosed to defense counsel before trial.⁹⁵ Rule 9.01, subd. 1(2), requires the State to disclose "any written summaries of oral statements" and "the substance of oral statements." The CRU found three separate instances where the State failed to provide the defense with a witness's statement: 1) the undisclosed statements Dr. McGee made to the prosecutor, as recorded in the January 8 memo; 2) the undisclosed substance of the statements Dr. McGee and Capt. Chandler made during two pre-trial meetings

⁹⁴ "The state's obligations in discovery derive from the Minnesota Rules of Criminal Procedure and also from the constitutional guarantees of due process." *State v. Hunt*, 615 N.W.2d 294, 298 (Minn. 2000). The Minnesota Supreme Court may also grant a new trial without a showing of prejudice when it is in the interest of justice. *State v. Kaiser*, 486 N.W.2d 384, 386 (1992).

⁹⁵ Although the CRU found evidence that should have been disclosed to the defense, it found no evidence that the prosecutor intentionally suppressed the evidence. In fact, in a January 6, 1998, letter from the prosecutor to defense counsel, the prosecutor apologized for over-producing copies of discovery documents, asking defense counsel to "bear in mind that Rule 9 is quite explicit that prosecutors are to disclose everything in the State's possession that bears on the case, and that the courts have made clear that the consequences of not doing so will be severe." (Emphasis in the original.)

with the prosecutor; and 3) the undisclosed summary of Andrea Iverson's statement to the prosecutor, made while preparing for her grand jury testimony, which differed in a material way from the recorded statement that had previously been disclosed to the defense.

The cumulative effect of these undisclosed statements could have affected the jury's judgment. The ultimate question in this case was whether Jane Rhodes accidentally fell from the boat and was struck by the boat when Tom returned to find her, or whether Tom violently threw Jane from the boat and intentionally used the boat to deliver at least two blows to her head. Because the evidence was entirely circumstantial, the State had to disprove, beyond a reasonable doubt, that Jane died from an accidental fall and single blow to her head.

To meet the State's burden of proof, the prosecutor's argument was simple, "If there's more than one strike, there's premeditation." However, according to the undisclosed January 8 memo, Dr. McGee could not rule out a single blow from the boat. The State's failure to disclose the memo prevented the defense from arguing that even Dr. McGee could not rule out the defense's accidental blow theory.

Likewise, the defense was prevented from understanding the evolution of the State's two experts' opinions because the prosecutor failed to provide the substance of opinions Dr. McGee and Capt. Chandler voiced in meetings with the prosecutor. These statements may have provided the defense with evidence that Dr. McGee shaped his opinions in the case from circumstantial facts rather than from his medical expertise or knowledge. Given this knowledge, the defense could have lodged objections to many of Dr. McGee's opinions.⁹⁶

Finally, the defense could have used Andrea Iverson's undisclosed statement to impeach the reliability of her memory. Andrea's testimony was critical because she was the only shore witness whose account corroborated Dr. McGee's testimony that Jane was struck by a hand in the "V" position—testimony that was described as the "most paramount of the entire trial."

The State's failure to disclose these statements deprived Tom Rhodes of his right to due process and undermines confidence in his conviction. Had defense counsel had access to these undisclosed witness statements, there's a reasonable probability that the verdict would have been different. Under Minnesota law, the State's failure to comply with discovery could have affected

⁹⁶ For instance, Dr. McGee's opinions invaded the province of the jury, relied upon hearsay, went beyond Dr. McGee's role as medical examiner, or violated the medical examiner's role as an independent, neutral expert, free from the influence of law enforcement and prosecutors.

the jury's judgment. And the remedy for these discovery violations is the vacation of the conviction. For these reasons, and in the interest of justice, the CRU recommends that Tom Rhodes's conviction for first- and second-degree murder be vacated.

On the other hand, trial court found sufficient evidence to support a conviction for second-degree manslaughter,⁹⁷ and so did the CRU. To sustain a conviction for second-degree manslaughter, the jury had to find: (1) that Jane Rhodes died, and (2) that Tom Rhodes caused the death of Jane Rhodes by creating an unreasonable risk and consciously taking a chance of causing death.

Unlike the evidence to support a murder conviction, the evidence to support a manslaughter conviction did not come from Dr. McGee, Capt. Chandler, Mark Schroeder, or Andrea Iverson. It came from Rhodes himself. Tom was driving a small and unstable boat, in the dark, at top speed. Tom knew Jane was not a good swimmer. Neither he nor Jane was wearing a life jacket. In fact, the life jackets were not easily accessible; they were stored under the front seat. Tom knew there was another boat on the lake that was driving erratically and without lights, which made him uncomfortable. He drove the Rhodes' boat away from the boat without lights, but also further away from the shore where he and Jane ultimately intended to return. He drove at top speed, using only the moonlight on the right side of the boat to navigate because the left side of the boat was cloaked in darkness. When Jane stood—on this unstable boat with low rails—Tom did not slow the boat or reach for her, he looked away. When Jane fell, he failed to slow the boat quickly because he missed the throttle. When he did grab the throttle, he turned the boat into the darkness and gunned it to get back to where Jane fell. If he did yell for Jane, no one heard him, and even he did not remember doing so until several weeks after the incident. Tom had no real awareness of where he was on the lake when Jane fell, which made it hard for rescuers to find her. As Tom admitted to the State Farm representative, he had become “too relaxed around the lake.”

The jury had sufficient evidence from which to conclude that this tragic boating accident resulted from an unreasonable risk that Tom consciously disregarded. Therefore, the CRU's recommendation is to vacate the murder convictions and enter a conviction and sentence for the manslaughter charge.

⁹⁷ Over the prosecutor's objection, the trial court granted the defense's motion to add second-degree manslaughter to the jury charge.